

IN THE MATTER OF ARBITRATION BETWEEN

Law Enforcement Labor Services, Inc.,
Local 123,
Union,

and

City of Richfield, Minnesota,
Employer and/or City.

OPINION AND AWARD

Officer Jeffrey Cook Grievance

BMS Case No. 12-PA-0088

ARBITRATOR:

Gerald E. Wallin, Esq.

DATE OF AWARD:

January 18, 2012

HEARING SITE:

Richfield, Minnesota

HEARING DATES:

November 16, 2011

RECORD CLOSED:

December 2, 2011

REPRESENTING THE UNION:

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REPRESENTING THE EMPLOYER:

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JURISDICTION

The hearing in this matter was held on November 16, 2011. The undersigned was selected to serve as arbitrator pursuant to the parties' collective bargaining agreement ("Agreement") and the procedures of the Minnesota Bureau of Mediation Services. The parties submitted a dispute to arbitration that involved issues of procedural arbitrability, as a threshold matter, and, secondarily, the propriety of the disciplinary action taken by the Employer. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. Because of the proximity of the upcoming Holiday Season, the parties waived the 30-day award issuance requirement found in their Agreement. The parties closed the record by submitting post-hearing briefs by email. They were duly received on or before December 2, 2011, and the matter was taken under advisement.

ISSUES

The parties stipulated to the following statement of the Issues:

1. Is the Written Reprimand issued to Officer Jeff Cook by the City of Richfield on or about May 1, 2011 arbitrable?
2. If so, did the City of Richfield violate the Collective Bargaining Agreement by issuing the Written Reprimand to Officer Cook without just cause?
3. If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 7 GRIEVANCE PROCEDURE

- 7.1 Definition of a Grievance. A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this Agreement, or as to disciplinary actions taken by the Employer.

* * *

7.4 Procedure. Grievances, as defined in Article 7.1, shall be resolved in conformance with the following procedure:

- Step 1. A non-probationary Employee claiming a violation concerning the interpretation or application of this Agreement shall, within twenty-one (21) calendar days after such alleged violation has occurred, present such grievance to the Employee's supervisor as designated by the Employer. * * * A grievance not resolved in Step 1 and appealed to Step 2 shall be placed in writing setting forth the nature of the grievance, the facts on which it is based, the specific provision or provisions of the Agreement allegedly violated, and the remedy requested and shall be appealed to Step 2 within twenty-one (21) calendar days after the Employer designated representative's final answer in Step 1. Any grievance not appealed in writing to Step 2 by the Union within twenty-one (21) calendar days shall be considered waived.
- Step 2. If appealed, the written grievance shall be presented * * * A grievance not resolved in Step 2 may be appealed to Step 3 within twenty-one (21) calendar days following the Employer designated representative's final Step 2 answer. Any grievance not appealed in writing to Step 3 by the Union within twenty-one (21) calendar days shall be considered waived.
- Step 3. If appealed, the written grievance shall be presented by the Union and discussed with the Employer designated Step 3 representative outside of the Public Safety Department. The Employer designated representative shall give the Union the Employer's answer in writing within twenty-one (21) calendar days after receipt of such Step 3 grievance. A grievance not resolved in Step 3 may be appealed to Step 3a or the procedure set forth in Sections 5 and 6 of this Article within twenty-one (21) calendar days following the Employer designated representative's final answer in Step 3. Any grievance not appealed in writing to the procedure set forth in Section 3a, or Section 5 and 6 of this Article by the Union within twenty-one (21) calendar days shall be considered waived.

Step 3a. If the grievance is not resolved in Step 3 of the grievance procedure, either the Union or the Employer may submit the matter to mediation within twenty-one (21) calendar days following the Employer's designated representative's final answer in Step 3. Submitting the grievance to mediation preserves timelines as set forth in Section 5 and 6 of this Article.

7.5 Waiver. If a grievance is not presented within the time limits set forth above, it shall be considered "waived." If a grievance is not appealed to the next step within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the Employer's last answer. If the Employer does not answer a grievance or an appeal thereof within the specified time limits, the Union may elect to treat the grievance as denied at that step and immediately appeal the grievance to the next step. The time limit in each step may be extended by mutual agreement of the Employer and the Union.

7.6 Choice of Remedy. If the grievance remains unresolved as a result of the written Employer response in Step 3 or failure to resolve the grievance in mediation in Step 3a, and if the grievance involves suspension, demotion, or discharge, the grievance may be appealed either to the procedure of Section 7 of this Article or to a procedure such as: Civil Service, Veterans' Preference, or Fair Employment. If appealed to any procedure other than the procedure of Section 7 of this Article, the grievance is not subject to the arbitration procedure as provided in Section 7 of this Article. The aggrieved Employee shall indicate in writing which procedure is to be utilized - - Section 7 of Article 7 or another appeal procedure - - and shall sign a statement to the effect that the choice of any other hearing precludes the aggrieved Employee from making a subsequent appeal through Section 7 of Article 7.

7.7 If both parties, having exhausted the grievance steps provided herein, cannot settle a grievance, either party may submit the issue in dispute to arbitration as provided in the Public Employment Labor Relations Act of 1971, as amended. The selection of an arbitrator shall be made in accordance with the "Rules Governing the Arbitration of Grievances" as established by the Bureau of Mediation Services.

7.8 Authority of Arbitrator.

A. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this

Agreement. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the Employer and the Union, and shall have no authority to make a decision on any other issue not so submitted.

- B. The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules, or regulations having the force and effect of law. The arbitrator's decision shall be submitted in writing within thirty (30) calendar days following the close of the hearing or the submission of briefs by the parties, whichever is later, unless the parties agree to an extension thereof. The decision shall be based solely upon the arbitrator's interpretations of the meaning or application of the express terms of the Agreement to the facts of the grievance presented.

* * *

ARTICLE 9 DISCIPLINE

* * *

- 9.2 The Employer will discipline non-probationary Employees for just cause only. Discipline will be in one or more of the following forms: (a) documented oral reprimand; (b) written reprimand; (c) suspension with or without pay; (d) demotion; or (e) discharge.

* * *

RELEVANT STATUTORY PROVISION OF PELRA¹

179A.20 CONTRACTS.

* * *

Subd. 2. **No contract provisions contrary to law.**

No provision of a contract shall be in conflict with:

- (1) the laws of Minnesota; or

* * *

Subd. 4. **Grievance procedure.** (a) All contracts must include a grievance procedure providing for compulsory binding arbitration of grievances including all written disciplinary actions. * * *

¹The Minnesota Public Employment Labor Relations Act, Minn. Stats. Chapter 179A.01-.25

* * *

179A.25 INDEPENDENT REVIEW.

It is the public policy of the state of Minnesota that every public employee should be provided with the right of independent review, by a disinterested person or agency, of any grievance arising out of the interpretation of or adherence to terms and conditions of employment.

* * *

BACKGROUND AND SUMMARY OF THE EVIDENCE

The instant grievance arose after Grievant, Officer Jeffrey Cook, was issued a written reprimand for his participation in the high-speed pursuit of a fleeing motorist on April 8, 2011. The reprimand asserted that the manner of Grievant's participation violated two separate provisions of the Employer's pursuit policy.

Both parties introduced extensive documentation and testimony in support of their respective positions in this matter. In addition, their post-hearing briefs were comprehensive and equally extensive. No useful purpose would be served by providing a detailed description of the entire record of evidence and the many contentions advanced in the post-hearing briefs. The record and briefs have all been carefully reviewed and considered. Instead, this summary attempts to confine itself to those considerations that are instrumental for the resolution of the Questions at Issue.

At the time of the incident, Grievant had approximately ten years of service as a patrol officer with the Employer. According to commendations and performance evaluations in the record as well as the testimony of members of his supervisory chain of command, Grievant was a good performing officer. His work history reflected above average to outstanding judgment and the ability to plan police action to ensure minimal danger. Grievant was also trained and certified as a K-9 officer. During the pursuit in question, Grievant had his K-9 partner with him in his squad car.

The City has a rectangularly shaped configuration with its long sides lying east-west. For the most part, its streets form a north-south and east-west grid pattern. The City lies directly west of the St. Paul-Minneapolis International Airport and south of the City of Minneapolis. Interstate Highway 494 essentially forms the southern boundary of the City and runs east-west along that boundary. The City's northern boundary is another major east-west thoroughfare known as the Crosstown Highway.

The airport has its own police department to enforce traffic laws in its vicinity. Just after 2:00 a.m. on the morning of the incident, an airport police officer (“APO”) stopped a driver for excessive speed on I-494. He also noted some erratic driving behavior such as the right-side tires crossing the fog line on that side as well as some abrupt lane changing when the APO would pull in behind. The motorist initially stopped for the APO on the left shoulder but then fled west bound on I-494. The APO pursued with the authorization of his supervisor.

The motorist left I-494 at the 12th Avenue - Portland Avenue exit, turned northbound on 12th Avenue, and entered the City. The APO mistakenly radioed his location to be northbound on Portland Avenue.² He asked his dispatcher to notify the Richfield police that he was conducting his pursuit within their jurisdiction. He also asked to be patched through onto a radio channel known as LTAC1 that is monitored by multiple police agencies. The APO reported the pursuit to be for “driving conduct.”

Grievant’s dispatcher relayed the pursuit notification for “driving conduct” and he monitored the radio traffic thereafter with his squad radio.

The fleeing motorist turned westbound onto 66th Street from 12th Avenue. He headed toward a roundabout traffic circle built at 66th Street and Portland Avenue. The APO remained in pursuit and was making periodic radio calls to update listeners with his location and direction of travel.

The record contains CD recordings of the radio transmissions as well as the video from Grievant’s squad camera. The radio transmissions do not contain any explicit request from the APO for assistance from the Richfield police. According to the beginning of the video recording, Grievant’s squad was stopped and pointed westbound on 66th Street just west of the roundabout at Portland Avenue. The pursuit would have been approaching him from behind his squad. Grievant slowly made a left-hand U-turn to approach the roundabout. The video shows the APO squad approaching with its roof lights flashing. After the APO made the right-hand turn through the roundabout to continue the pursuit northbound on Portland Avenue, Grievant made a wrong-way left turn through the roundabout and joined the pursuit. The video shows the time to be 2:12:53 a.m. Grievant’s speed was 14 m.p.h. as he made the turn.

Five seconds later, Grievant’s lights and siren were on and his speed was 42 m.p.h. It is

²Portland Avenue runs parallel to 12th Avenue but is approximately one-half mile farther west.

difficult to accurately judge distances from the night-time video, but it appears that the APO was several hundred yards ahead of Grievant's squad. The fleeing motorist may have already gone over the Crosstown Highway and into Minneapolis. The APO was soon to exit Richfield into Minneapolis as well.

Grievant accelerated to a maximum of 84 m.p.h. after joining the pursuit. While northbound on Portland Avenue, the APO radioed, "He's on Portland going north into Minneapolis." Grievant next radioed, "Richfield K-9 behind you." He made the transmission approximately 21 seconds after he joined the pursuit. Grievant's supervisor monitored the radio traffic and waited for contact from Grievant.

Although traffic was light at that time of the morning, the video shows no less than four other vehicles pulled over to the side as Grievant approached the Portland Avenue bridge over the Crosstown Highway. He crossed the bridge into Minneapolis at 2:13:20 a.m. at a speed of 72 m.p.h.

The pursuit wound around various streets in Minneapolis thereafter. After listening to the radio transmissions for less than one minute after Grievant radioed "Richfield K-9 behind you," Grievant's supervisor directed the Richfield dispatcher to notify Grievant to pull out of further participation. Grievant complied. Shortly thereafter, the APO lost the fleeing motorist and abandoned further efforts to catch the driver.

While the pursuit was in progress, the license plate on the fleeing vehicle was researched. After the pursuit had been abandoned, it was learned that the driver was the grandson of the registered owner. The grandson had outstanding arrest warrants for felony charges, one of which was for a weapons charge.

The Employer's Vehicle Pursuit Policy provides, in pertinent part, as follows:

I. PURPOSE

* * * Because vehicle pursuits may be dangerous, however, restrictions must be placed on their use. * * * This Policy provides restrictions on the use of vehicle pursuits and guidelines for officers in the exercise of their permitted discretion.

II. POLICY

* * * The involved officer must be able to articulate clearly the reason(s) for the pursuit. These reasons must comply with the standards and guidelines set forth in the Policy.

III. DEFINITIONS

* * *

SERIOUS FELONY: A felony that involves an actual or threatened attack which the officer has reasonable cause to believe could result or has resulted in death or serious bodily injury (e.g., 1st and 2nd degree assault, aggravated robbery, murder, etc.) [Refer to Minn. Statute 609.066] Additionally, burglaries, felony narcotics violations and motor vehicle thefts may, depending on circumstances, be considered serious felonies.

* * *

IV. PROCEDURE

Pursuit is justified only when the officer knows or has reasonable grounds to believe the suspect presents a clear and immediate threat to the safety of other motorists; has committed or is attempting to commit a serious felony; or when the necessity of immediate apprehension outweighs the level of danger created by the pursuit, as in the case of a serious traffic violation such as DWI.

* * *

TERMINATION OF PURSUIT

A pursuit **shall** be terminated under any of the following circumstances:

* * *

8) If the pursuing officer fails to establish and maintain communications with the Richfield on-duty supervisor.

* * *

INTERJURISDICTIONAL PURSUITS

* * *

Officers should not become involved in another agency's pursuit unless specifically authorized by the duty supervisor or the emergency nature of the situation dictates the need for assistance.

* * *

According to the written reprimand issued to Grievant, he should not have become involved in the pursuit based on the information he had. The reprimand read, in pertinent part, as follows:

The only information you had for the pursuit was the Airport police advising the reason for the pursuit was "driving conduct." Richfield police officers do not engage in pursuits for "driving conduct."

According to the Employer's testimony, "driving conduct" is a generic term used to describe any type of driving violation. It can range from speeding to running through a stop sign to driving too slowly to improper lane changing to not signaling to weaving all over the road. An officer

cannot leap to the assumption that DWI impairment is meant simply by use of the term. Grievant's own traffic stop statistics were used to illustrate this point. In 2011 up to the month of October, Grievant made 512 traffic stops for various forms of improper driving conduct. Only 11 were for DWI.

The written reprimand continued on to cite Grievant for a second violation of the pursuit policy as follows:

Secondly, department policy was violated when you did not make contact with the duty supervisor to authorize your involvement in the pursuit. Department policy #209 states: "Officers should not become involved in another agency's pursuit unless specifically authorized by the duty supervisor or the emergency nature of the situation dictates the need for assistance."

In addition to the details of the pursuit incident itself, the parties submitted evidence about several other facets of the dispute. There were documents and testimony describing the training Grievant received on the Employer's pursuit policy. In connection with a previous similar incident, Grievant and several other officers expressed their beliefs that they had not received adequate training on the policy. They were given a direct order prohibiting them from engaging in any pursuits until after remedial training could be conducted. That training was provided in November of 2010. The policy was revised effective January 1, 2011 to incorporate the latest information. The two provisions that Grievant allegedly violated were not among the new material. Grievant signed acknowledgments both before and after the revision date to acknowledge his full understanding of the policy. On January 11, 2011, Grievant was issued a memorandum recognizing his understanding of the policy. The memorandum went on to rescind the order prohibiting him from engaging in pursuits.

The Union's steward, a 13-year patrol officer, described a conversation he had with the chief of police in 2009. The conversation came after a different pursuit incident resulted in officer discipline. According to the steward's testimony, the chief said he understood why officers felt a need to back up lone officers from other agencies and why Richfield officers would want to get involved to provide assistance. The witness relayed the substance of the conversation to other

officers afterward, which included Grievant.

Grievant testified about his role in the pursuit. His testimony was in accordance with the long narrative he wrote as part of his report of the incident in question. The narrative was prepared a few hours after the incident. According to the narrative, Grievant heard the advisory that the APO was "... chasing the car due to driving conduct." Grievant interpreted that as the driver being possibly impaired. He took the possible impairment into account along with the fact that the APO was alone and the only car in pursuit. He considered that his K-9 partner could be used in case the motorist left the vehicle and attempted to escape on foot. There was minimal other traffic and road conditions were dry and good for the time of day. In his testimony, Grievant said he thought it was an emergency situation. He said his dispatcher used his radio call sign and "... gave me a call to assist."

Grievant's testimony went on to explain why he interpreted the terms "driving conduct" to mean DWI impairment. Based on his training and common use experience, the majority of the time officers only use "driving conduct" when they are talking about DWI.

On cross-examination, Grievant acknowledged that his dispatcher cannot give him orders; they must come from someone in his chain of command. He recognized that his long narrative did not claim that he perceived the situation to be an emergency. Nor did he make a claim of emergency to his immediate supervisor after the incident. He further agreed that the dispatcher did not give him a call for assistance from the APO in such words; that is what he understood the dispatcher's notification to him to be. He admitted he had not received any direct request for assistance from the APO. He acknowledged that he would have expected the dispatcher to specifically tell him there was a request for assistance if there had been such a request; it would have been part of the dispatcher's job to do so. He further admitted that the Employer's pursuit policy does not authorize participation in an interjurisdictional pursuit merely because the other officer is by himself.

The APO also testified at arbitration. He described his understanding that "driving conduct" meant DWI impairment as Grievant testified. He initially thought the suspect driver was impaired. He also thought the license plate information about the suspect driver was radioed to him while the chase was still going through Richfield.

The record also contains evidence in support of the Union's concerns about the doctrines of

progressive discipline and disparate discipline as well as the propriety of the Employer's investigation. The Grievant's personnel file contained a prior documented oral reprimand beyond the one-year period stated in the document and it was reviewed in connection with the assessment of the instant discipline. The record also contained exhibits concerning other pursuit participants who did not receive discipline. In addition, the Union's evidence noted that Grievant was not interviewed by supervisors before the discipline was assessed.

The Employer's Chief of Police/Director of Public Safety testified about the evolution of the pursuit policy. In 1986, a prior administration made the policy more restrictive because of the risk of harm to the public posed by such pursuits. He noted that the policy then was one of the most restrictive in the Twin Cities area and was often referenced by officers to be the "no chase policy." He also testified that a person is killed every day in the United States as a result of police pursuits and 42% of the time the person is an innocent third party. As a result, the Employer's policy has eliminated petty misdemeanors and misdemeanors, which excludes most traffic violations, as a justification for pursuits. The policy has become restricted to permitting pursuits only for serious felonies and some DWI situations.

The Chief of Police did not recall the conversation attributed to him by the Union's steward. Nonetheless, he did not dispute that he might have made the comments about understanding why officers would want to pursue suspects to apprehend them. It is human nature among police officers who are charged with enforcing the law. Officers naturally do not like to see violators get away. That is why the pursuit policy was written to cause officers to resist the temptation to pursue for minor matters. The alleged conversation also occurred before the latest round of training that Grievant received on the pursuit policy.

The Chief of Police disputed the meaning of "driving conduct" claimed by Grievant and the APO. If the APO truly suspected he had a DWI situation, the Chief could not understand why the APO would not have said so over the radio.

The Chief of Police also testified about the Employer's policy for use of disciplinary notices in personnel files. The Agreement does not contain any limit on the time of retention. Until certain progressive discipline challenges arose in prior arbitrations, such documents were normally retained in the file only for use in connection with the next annual performance appraisal that would come

due. According to the Chief's testimony, the Union's actions in the prior arbitrations led the Employer to retain all such documents indefinitely. He noted, however, that such reprimands effectively become stale after a two-year period.

POSITION OF THE UNION

The Union's position is twofold: First, the grievance is arbitrable, and, second, the Employer did not have just cause for issuing the written reprimand to Grievant. As a result, the Union asks that the discipline be reversed with the removal of the reprimand from Grievant's personnel file.

POSITION OF THE EMPLOYER

The Employer's position is that the grievance is not arbitrable given the text of Article 7, Section 6. On the merits, if the matter is found to be arbitrable, the Employer maintains that the discipline was issued for just cause.

Accordingly, the Employer asks that the grievance be denied.

OPINION AND FINDINGS

The procedural arbitrability issue submitted is a threshold type of question that requires determination before any consideration of the merits may be undertaken. If the dispute is not arbitrable, then the grievance must be dismissed without addressing the merits. It follows that the merits of the Employer's disciplinary action may be reached only if the matter is found to be arbitrable.

After careful review of the relevant considerations bearing on the arbitrability issue, three reasons are seen that drive the finding. The first reason emerges from the combined operation of three provisions of the Minnesota Public Employment Labor Relations Act. Minnesota Statutes Chapter 179A.25 declares that the right of independent review of grievances is the public policy of the State. In addition, Chapter 179A.20, Subd. 2 provides that no public collective bargaining agreement provision may conflict with Minnesota law. Finally, Chapter 179A.20, Subd. 4 explicitly states that all public collective bargaining agreements "... must include a grievance procedure providing for compulsory binding arbitration of grievances including all written disciplinary

actions.” Given the thrust of these provisions of Minnesota law, it would appear that the parties’ Agreement cannot contain any provisions that operate to preclude the arbitrability of the instant grievance in question that challenges a *written* reprimand.

For the second reason, Article 7.8 B of the parties’ Agreement quite clearly prohibits this arbitrator from making any arbitrability finding that is contrary to or inconsistent with Minnesota law. It would appear, therefore, that the parties’ Agreement effectively requires a finding that the grievance is arbitrable.

Finally, when read in context with all of Article 7, the undersigned does not find Section 7.6 to constitute an explicit limitation on the arbitrability of the instant grievance. Instead, as written, it appears to merely require a grievant to make an election of remedies for certain kinds of discipline where the grievant has other avenues of independent review available in addition to binding arbitration. The written reprimand in question does not appear to fall within the type of discipline where the affected employee must make the election of remedies. Because the instant written reprimand is not within the scope of Section 7.6, it would appear that recourse to arbitration would remain available per Section 7.7.

For the foregoing reasons, the grievance is found to be arbitrable.

Turning to the merits, the general issue presented is the question of whether the written reprimand is supported by just cause. A traditional just cause analysis examines the disciplinary action from two different but related perspectives. The analysis must scrutinize both the basis for the discipline as well as its magnitude.

The Employer’s pursuit policy leaves little question about its intended application. Not surprisingly, there was no contention made during arbitration or in the Union’s post-hearing brief to the effect that the policy was unclear, ambiguous, or difficult to understand. Without any amplification by the testimony of record, the policy language rather unequivocally directs that pursuits must not be initiated or joined into without a compelling set of factual circumstances that are objectively present to justify the action. This is clear from the first paragraph of the Procedure section of the policy. In addition, even where justification exists, the policy also mandates that participants satisfy specified communications protocols.

The analysis, therefore, must focus on whether the attendant circumstances and Grievant’s

actions fell within the stated parameters that would have permitted and governed his participation in the pursuit.

It is undisputed that the incident constituted an interjurisdictional pursuit within the meaning of the policy. The pursuit was initiated by the APO. As a result, the Employer's policy is unmistakably clear that Grievant's participation had to satisfy one of two conditions to be permissible. The policy language reads as follows:

Officers should not become involved in another agency's pursuit unless specifically authorized by the duty supervisor or the emergency nature of the situation dictates the need for assistance.

Although the radio transmission recordings show that Grievant had ample time to contact his duty supervisor, he did not do so at any time before or after joining the pursuit. Therefore, unless the "emergency" exception applied, Grievant's participation violated this policy provision.

The record provided several considerations bearing on the question of whether emergency circumstances existed. There were no radio transmissions from the APO that suggested emergency circumstances. The APO never used the word over the radio. The APO never requested assistance from the Richfield police. The APO never radioed that he was pursuing a possible DWI suspect.

Taken together, the various radio transmissions do not suggest that the suspect had any impairment of his ability to control his vehicle while traveling at high speed. Neither Grievant's testimony at arbitration nor the narrative he added to his written report noted that the suspect had any impairment difficulties. The suspect had already made two high speed turns without reported problems before he approached the roundabout at 66th and Portland where Grievant was waiting. The suspect had no reported difficulty negotiating the entry into or exit out of the traffic circle at high speed to head northbound on Portland. After exiting the roundabout, the suspect's direction of travel would take him out of Richfield in less than one minute.

The fact that the APO was alone in his squad car does not appear to be unusual. Single occupants of squad cars appears to be the norm. As a result, officers call for backup if they desire assistance. As the APO proceeded westbound toward the roundabout, Grievant's squad car was directly to his front. Yet again, the APO did not request assistance.

When Grievant wrote his report narrative after the incident, he did not claim there was an emergency.

Although it was later learned that the fleeing suspect had outstanding arrest warrants, one of which was for a weapons charge, the audio recordings show that this information was not available to the APO or Grievant until *after* the pursuit had been abandoned. Thus, the only information Grievant had about the reason for the pursuit was that the initial stop by the APO had been made for “driving conduct.”

The combined thrust of the foregoing considerations compel the finding that Grievant had no proper basis for inferring an emergency situation existed. His inference was entirely based on supposition. Accordingly, by joining the interjurisdictional pursuit as he did, he violated the Employer’s pursuit policy.

The merits question also requires an examination of Grievant’s claim to the effect that the term “driving conduct” justified his interpretation that the fleeing motorist was really a suspected DWI-impaired driver. According to the testimony of all of the Employer’s supervisory officers at arbitration, “driving conduct” is a generic descriptor for any and all forms of improper driving behavior. To the contrary, the testimony of Grievant says otherwise, especially given the time of day when the incident occurred. According to the APO’s testimony, he intended to signal a suspected DWI-impaired driver when he reported only “driving conduct” to describe the basis for initiating his pursuit.

The conflicting testimony over the customary meaning of “driving conduct” unavoidably poses a credibility issue that must be reconciled. Fortunately, there are several considerations that bear on the question. They are discussed in no particular order of significance.

As previously noted, none of the radio transmission recordings reflect that the fleeing suspect had any impairment of his ability to control his vehicle at high speed through at least three turns before Grievant joined in the pursuit. All three turns involved 90-degree changes of direction.

Grievant’s own traffic stop experience showed that nearly 98% of his encounters did not involve DWI.

Grievant’s report narrative does not show that he observed any impairment-related erratic driving by the suspect.

Two significant points stand out about the APO's involvement. Although he allegedly intended to signify that the suspect was a possible DWI, he did not explicitly say anything like that to his own dispatcher or duty supervisor over the radio at any time. Moreover, when he asked his department personnel to notify the Richfield Department that his pursuit was entering the Richfield jurisdiction, he did not ask that anything other than "driving conduct" be relayed. In addition, the State of Minnesota requires a form to be filed to report certain circumstances surrounding all vehicle pursuits by a peace officer. The form filed by the Airport Police Department is in the record.³ Section 7 of the form contains six boxes to be used for checking off the "Initial Reason for Pursuit: (check one)." The box corresponding with "DWI" is blank. The box corresponding with "Traffic" is marked with an X.

In light of the foregoing factors, the weight of the evidence does not establish that Grievant had a proper basis to claim that he interpreted "driving conduct" to mean possible DWI.

The propriety of the Employer's investigation before deciding upon discipline remains for consideration. Article 9 of the parties' Agreement contains a number of procedural provisions dealing with the investigation and assessment of discipline. However, a requirement that the affected employee be interviewed before assessing discipline is not found among them nor has such a requirement been cited elsewhere in the Agreement. While interviewing an affected employee to obtain his or her account before determining discipline is widely regarded as good practice, especially for avoiding surprise at arbitration, it is normally not treated as a required element of just cause unless the applicable collective bargaining agreement mandates it.⁴

The instant record contains actual recordings of everything relevant that was said over the radio and seen by the camera in Grievant's squad car. Grievant's duty supervisor was able to hear the radio transmissions in real time. In addition, the Employer had Grievant's police report with his long narrative that purported to explain his involvement.

³Employer's Exhibit No. 6

⁴ For a comprehensive discussion about this point as well as the other elements of just cause, the reader is invited to review the paper entitled, *Arbitral Discretion: The Tests of Just Cause* by John E. Dunsford, Past President of the National Academy of Arbitrators. The paper was delivered at the 42nd Annual Meeting of the Academy in 1989 and was published by BNA Books in the Proceedings of that annual meeting. All of the Proceedings through 2009 have been indexed and are available online at the Academy's website at www.naarb.org.

The evidentiary record does not identify any other relevant factors of significance that could have been learned through a pre-discipline interview. Under the circumstances, therefore, the finding is that the Employer was not remiss in conducting its investigation as it did.

It follows from the foregoing discussion that the Employer had a proper basis for its determination that Grievant's actions were in violation of the applicable pursuit policy. It is so found.

The analysis next must examine the propriety of the quantum of discipline. The Union has concerns about whether the Employer's consideration of Grievant's prior discipline more than one-year old violated the doctrine of progressive discipline. The Employer contends the assessment of a written reprimand was warranted without regard to the prior discipline. In addition, the Employer noted that the Agreement does not establish any time limitation on the consideration of prior discipline.

Grievant received a documented oral warning dated September 9, 2009. His driving conduct⁵ during participation in another interjurisdictional pursuit was determined to be unsafe. The document ended with these two paragraphs:

A copy of this letter will be placed in your evaluation file and remain there for a period of one year from the date of the incident.

Further violation of this department directive may result in progressive disciplinary action as described in the Richfield Police Department manual and employee handbook.

The first of the two paragraphs above corroborates the testimony of the Chief of Police at arbitration. It says the document would remain in Grievant's *evaluation* file. According to the Chief's testimony, once the next annual performance evaluation was completed, the document would not be needed for subsequent annual evaluations. Most notably, the document does not say that the reprimand would not be considered in connection with future similar discipline after the passage of one year.

⁵ The document twice uses the term "driving conduct" in connection with Grievant's participation in the pursuit at a speed in excess of 90 MPH on West 66th Street. The context of the usage does not suggest any connection to possible DWI.

According to the latter of the two paragraphs, the text affirmatively warns that the incident may be used for progressive discipline purposes in connection with future similar violations.

Without more, the Employer's consideration of the prior reprimand would not be offensive to the just cause standard. But there is more.

As the earlier discussion shows, Grievant's conduct during the pursuit in question actually violated the Employer's pursuit policy in two separate respects: First, the circumstances known to him at the time did not justify any participation by him; he should not have joined the interjurisdictional pursuit by the APO. Secondly, and separately, he did not comply with the requirement to establish and maintain communication with his duty supervisor.

Given the dual violations shown by the weight of the evidence, it was not unreasonable for the Employer to conclude that more than an oral reprimand was warranted.

The Union's concerns about disparate discipline remain for review. In support of its concern, the Union's evidence⁶ included an incident report where neither of two employees were disciplined. One of the involved employees was a Community Service Officer ("CSO") who is not authorized to participate in pursuits.

Review of the exhibit shows the incident occurred on May 5, 2011, approximately one month after Grievant's incident.

The May incident occurred just before noon. Although the report narrative refers to the incident as a pursuit, the surrounding facts described in the 3-page narrative show that it was so only in the technical sense. It never became a high speed pursuit. Rather, it appears to have been an attempt by an undercover officer in an unmarked vehicle assisted by the CSO to gain the attention of an impaired driver who was functionally oblivious to the situation he was causing. After observing the driver hit the curb on East 66th Street with his right side tires and then serve over the dotted line and back, the officer attempted to get the driver to stop as well as signal other traffic of the danger posed by the driver. These three paragraphs vividly illustrate the true nature of the technical pursuit *after* the officer had established communication with his dispatcher and also learned that the duty supervisors were out of position and were unable to timely deal with the situation:

⁶ Union Exhibit No. 17.

* * *

The vehicle was traveling eastbound on 66th Street approaching Bloomington Avenue. I pulled off of 66th Street, waited for a brief moment so that the vehicle would pass me, and then began following again so that I was able to relay to dispatch the current location. The vehicle approached the roundabout, failed to yield to any other traffic, missed the turn to continue in the eastbound lanes of 66th Street, and then continued eastbound on 66th Street in the westbound lanes. The center divider on this portion of the roadway is a raised divider which contains plants and trees and would make it extremely difficult for any oncoming traffic to avoid a vehicle going the wrong way.

The vehicle came to a stop facing eastbound in the westbound lanes at the stoplights on the west side of the HWY 77 bridge. I pulled up next to the vehicle and activated my emergency lights and siren in an attempt to get the driver to stay stopped. I began getting out of my vehicle to remove the driver when the suspect vehicle began driving again. CSO [name redacted] was behind me and assisting me in attempting to get the vehicle stopped. The vehicle continued eastbound on 66th Street in the westbound lanes and came to a stop on the east side of the HWY 77 bridge, still eastbound in the westbound lanes.

I aired the license plate as [data redacted] and radioed to dispatch that I was attempting to stop the vehicle, as there were no squads in the area. I again began to get out of my vehicle in an attempt to remove the driver, however, before I was able to get out, the vehicle began moving again. The vehicle continued onto Longfellow driving in the wrong lanes of traffic, swerving all over the road, and traveling at approximately 15-20 miles an hour. I pursued the vehicle on Longfellow with my lights and siren on. CSO [name redacted] continued to assist me by following behind me and I was able to see and hear that he had his emergency lights and siren activated.

* * *

As a general matter, disparate discipline may exist when substantially the same misconduct occurs by two or more employees under substantially the same circumstances by employees who are similarly situated, in terms of their work histories, and the employees are disciplined in a significantly different manner without a rational explanation for the different treatment.

The criteria necessary to demonstrate disparate discipline have not been established by the evidence in the instant record. The factual circumstances are not at all similar.

As a result of the foregoing considerations discussed and findings made, it is determined that the Employer had just cause to discipline Grievant as it did.

AWARD

1. The Written Reprimand issued to Officer Jeff Cook by the City of Richfield on or about May 1, 2001 is arbitrable.
2. The City of Richfield did not violate the Collective Bargaining Agreement by issuing the Written Reprimand to Officer Cook; the City had just cause to do so.
3. The grievance is denied.



Gerald E. Wallin, Esq.
Arbitrator
January 18, 2012