IN THE MATTER OF ARBITRATION BETWEEN

CITY OF HASTINGS
(Employer)

and

DECISION
(Discharge Grievance)
BMS Case No. 12-PA-0020

LAW ENFORCEMENT LABOR SERVICES, INC.
(Union)

ARBITRATOR: Mr. Frank E. Kapsch, Jr.

DATE AND PLACE OF HEARING: The hearing took place on December 14 and December 28, 2011 at the Hastings City Hall and at the Hastings Police Department located in Hastings MN.

RECEIPT OF POST-HEARING BRIEFS: Both Parties submitted timely briefs as of January 13th, 2012.

APPEARANCES

FOR THE EMPLOYER:
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JURISDICTION

The Parties stipulated that this Arbitrator has been properly selected and appointed in accordance with the provisions of Section 7.4, Step 4 of the applicable labor agreement and thereby possesses the authorities, responsibilities and duties as set forth therein to hear and resolve this grievance dispute.

THE ISSUE

The Parties stipulated that the Issue is; did the Employer, on July 16, 2011, discharge Police Officer Donald J. Farrington for just cause? If not, what shall be the remedy?

THE EMPLOYER

Founded in 1857, the City of Hastings, Minnesota is located at the confluence of the St. Croix and Mississippi Rivers. The City is also the county seat for Dakota County. The City's current population is approximately 23,000. Among its various governmental functions, the City operates a full-time Police Department dedicated to protecting and serving the City's residents. The Police Department consists of a Police Chief and a workforce of some 30 sworn Officers and Administrative Support employees. The Department's Police Officers are represented, for purposes of collective bargaining, by Law Enforcement Labor Services, Inc. (the Union and/or LELS).

THE UNION

Law Enforcement Labor Services, Inc. is Minnesota's largest labor organization dedicated solely to the representation of law enforcement employees and related personnel throughout the State of Minnesota. The Union is headquartered in St. Paul MN and has numerous collective bargaining relationships and agreements with various cities, counties and other political subdivisions within the State of Minnesota; including the City of Hastings and its Police Department.

COLLECTIVE BARGAINING HISTORY

The City of Hastings and Law Enforcement Labor Services, Inc. have had an ongoing collective bargaining relationship, reflected by various successive labor agreements with respect to the City's Police Officers for a number of years. The current applicable labor agreement was effective January 1, 2010 and was scheduled to expire on December 31, 2010. The Parties agree that this agreement is applicable to this matter.

BACKGROUND

The following is a factual summary based on relevant and undisputed record testimony and evidence submitted by the Parties in the course of the hearing:

As noted in the Statement of the Issue, this matter concerns the discharge of Donald J. Farrington from his employment as a Police Officer for the City of Hastings.

At all times material herein, the City's Police Department has consisted of the following personnel: a Chief of Police, two Lieutenants, about six Sergeants, about three Investigators, a School Liaison/Resource Officer, a Canine Officer about thirteen Patrol Officers and about three Administrative Support employees.

The Grievant, Donald Farrington, was hired by the City as a licensed, sworn Police Officer on about July 6, 2006. During his subsequent tenure with the Department Farrington served as a Patrol Officer. In his capacity as a Patrol Officer Farrington worked assigned shifts and schedules much of time as a single uniformed officer in a marked squad car.

According to the record, during his most of his tenure with the Department, Farrington's work performance was regarded as at least satisfactory and he had no notable or significant disciplinary issues.

Unfortunately, that situation changed markedly on or about April 10, 2010. On that date, at about 4:10 AM, Farrington was off-duty and driving his personal vehicle in St. Paul MN when he apparently lost control of his vehicle and crashed into a power pole damaging both his vehicle and the pole. Rather than immediately notifying anyone of the accident, Farrington decided to walk home. At approximately 6:17 AM he called the Ramsey County Emergency Communications Center (911) and informed them that he had just been car-jacked at gunpoint by a black male, who fled in his vehicle. Farrington said he wished to make a formal report of the incident.

Very quickly, following the call-in report, a St. Paul Police Officer appeared at Farrington's home to take a formal statement from him regarding the details of the alleged car-jacking.[1] During the course of the formal interview, Farrington eventually admitted to the St. Paul Officer that there really hadn't been a car-jacking and there was no black male perp. He confessed that he had crashed his car, probably as a result of excessive alcohol consumption, and had panicked. He had apparently panicked because of concern over how the accident might affect his employment status as a Hastings Police Officer.

Farrington was subsequently charged with two (2) Misdemeanors; 1) Failure of driver to stop for an accident involving damage to property and 2) Falsely reporting a crime.[2]

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[1] Unbeknownst to Farrington, witnesses had already reported his accident and had informed authorities that the driver was a white male and had fled on foot, following the crash.

[2] Although the field investigation indicated that alcohol may have been a contributing factor in Farrington's accident, a post-accident blood-alcohol test failed to establish that his BAC, at the time of the accident, was at least .08. Accordingly, he was not charged with Driving Under the Influence (DUI). It should be noted, however, that he subsequently voluntarily enrolled in and successfully completed an alcohol rehab program and has been alcohol-free ever since.

On September 13, 2010, Farrington, as part of a plea, pleaded guilty in Ramsey County District Court to the charge of fleeing the scene of an accident. The charge of filing a false crime report was dropped as part of the plea arrangement. His plea resulted in a sentence of 1) ten days in jail (suspended for one year), 2) one year of probation and 3) a $500 fine, $300 of which was suspended for one year. The suspended portions of the sentence would be dropped upon successful completion of probation and no other notable offenses within a year.

Upon learning of Farrington's April 10, 2010 accident and the resulting criminal charges, the City of Hastings initiated its own Internal Affairs investigation of the situation. On September 23, 2010 Police Chief Paul Schnell and City Administrator David Osberg presented a formal letter to Farrington outlining the factual details and findings of the Internal Affairs investigation. Those findings were that Mr. Farrington had, in the course of that investigation;

1. *Admitted involvement in leaving the scene of an accident, contrary to Minnesota statute.*
2. *Admitted making a false report of a crime.*
3. *Admitted fabrication of circumstances surrounding a motor vehicle crash.*
4. *Admitted involvement in after-hour alcohol consumption at a locally licensed liquor establishment.*

The letter then outlined the specifics of the discipline action resulting from the situation:

1. *Acknowledgement of the City's original intention to impose an unpaid suspension of 30 days and agreement to the following:*
2. *Unpaid suspension of 15 days (120 work hours) to be served consecutively.*
3. *Acknowledgement and acceptance of conditions of **"last chance**"* (emphasis applied) *for continued employment, as described below.*
4. *Cooperation with the establishment of and participation in a facilitated "restorative process," as described below.*
5. *Follow through on all chemical health aftercare recommendations, including the requirement to provide proof of on-going participation on a monthly basis for the first year after receipt of these conditions, and quarterly for one year thereafter.*

The provisions of the "last chance" for continued employment were as stated below:

> "*As the conduct in which you engaged represents serious violations of City policy and in recognition of the City's responsibility to ensure public trust in its police service, you agree to follow the prescribed provisions of "last chance" for continued employment. The term "last chance" means that sustained complaints related to violations of the provisions described here, constitute grounds for your separation from continued employment with the City of Hastings Police Department. The "last chance" component of*

the disciplinary intervention shall remain in effect for 36 months from the date of issuance, unless otherwise noted.

A sustained complaint regarding any of the following "last chance" provisions shall serve as grounds for involuntary separation form employment:

1. *Failure to comply with and provide documentation of continued follow through with chemical health recommendations as directed for the first 24 months following issuance of discipline.*
2. *Failure to comply with any and all requirements of the court relative to your prosecution for the above described underlying offenses.*
3. *Criminal prosecution and a corresponding finding of guilt for any criminal offense (excluding minor traffic offenses).*
4. *Engagement in any conduct determined to represent bias-based policing at anytime during your employment with the City of Hastings Police Department.*
5. *Engagement in willful violation of Minnesota statutes or City Ordnances and/or licensing regulations in or around alcohol-related business establishments."*

Finally, the letter outlined the specifics of the facilitated ""restorative process" that Farrington agreed to undergo. Farrington signed for receipt of the letter on September 30, 2010.

In about November 2010 Farrington successfully participated in and completed the "restorative process" and, from the City's point of view, Mr. Farrington was behaving well in connection with his work performance.

In about November, 2010 the City began issuing *Brady-Giglio* letters[3] to defendants and/or counsel in cases in which Officer Farrington had previously been personally involved.

The next chapter of the situation begins to unfold in about December 2010. It is a long time and routine practice for Patrol Officers, especially those on the late night/early morning watch, to regularly perform routine "bar checks". These "bar checks" typically occur during the last few hours of the bars' business day and are an effort to casually walk through, "show the flag" and indicate to both the establishment and potentially unruly patrons that the police are not far away, if any problems arise.

[3] These letters result from U. S. Supreme Court Decisions in *Brady v. Maryland*, 383 U.S. 83 (1963) and *Giglio v. U.S.*, 405 U.S. 150 (1972) which require prosecutors to disclose to defendants any exculpatory evidence that they possess which would impair the credibility of their witnesses. In this context, the City was required to disclose to past and future defendants that Officer Farrington had made false statements in connection with his vehicle accident in April, 2010, thereby impairing his personal credibility. This *Brady-Giglio* notice requirement for Officer Farrington has no expiration date.

During his years on patrol, one of the establishments that Farrington frequented on “bar check” and calls for service was Dugarel’s Bar. As a result of those visits and encounters, he was acquainted with one of the employees, a young lady by the name of Leslee L. Ward. Ward is approximately 24 years old and is the single mother of two children, XXXX (age about 3-5months) and YYYY (age about 4yrs). Each child has a different father.

On or about December 24, 2010 Hastings officers (not Farrington) responded to a call from Ward at her home in Hastings. Upon arrival, Ward informed the officers that Anthony “Tony” Siebenaler, her boyfriend and the father of her recently-born son, XXXX, had tried to strangle her during the course of an argument/fight. Siebenaler was arrested on a Domestic Abuse charge and was subsequently placed on what is known as a DANCO court order. The acronym stands for “Domestic Abuse No Contact Order”. Upon issuance of the DANCO, Mr. Siebenaler was prohibited from having any personal or other contact with Ms. Ward, including visits, phone calls or electronic messages.

Tony Siebenaler was no stranger to the members of the Hastings Police Department. Over the years he had a number of relatively minor encounters with members of the Department.

Farrington admitted that he did hear of Siebenaler’s arrest on December 24, did review the arrest report and did informally discuss the situation with Ward during their conversations at Dugarel’s. Over the course of subsequent conversations concerning Siebenaler and the DANCO, Farrington said Ward expressed skepticism as to whether the police would protect her and her children from possible violence by Siebenaler. Farrington assured her that the Department would do everything necessary to protect her. These informal conversations between Farrington and Ward took place face-to-face during the course of Farrington’s duty visits to Dugarel’s from about late December into January, 2011.

In about mid to late January, Farrington, while driving on routine patrol, encountered Ward in her vehicle and they exchanged brief “hellos” and civilities. At one point, Farrington handed Ward a business card with his personal cell phone number on it and urged her to call upon him anytime.

Shortly thereafter, Farrington and Ward began texting one another. According to the record evidence, their texting was initially sporadic, intermittent and relatively innocuous. [4]

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[4] Ms. Ward presented to the Department a handwritten verbatim transcript of the text messages she received from Officer Farrington on her cell phone during the period 3/2/11 through 4/24/11. From 3/2/11 until about 3/21/11 she was only able to retrieve Farrington’s incoming messages, as her contemporaneous messages to him were allegedly deleted by her phone system. On and after 4/21/11 to 4/24/11 her transcription shows both her texts and Farrington’s. The Department credibly testified that it tried, without success, to obtain an actual printout of the messages on Ward’s phone from either her phone or from her carrier, but were advised by the carrier that

By early March, 2011 the frequency of the text messages from Farrington to Ward are now almost daily and occur during several time periods within a typical day. The messages are also more personal and intimate in nature. An example;

> 3/2/11, 3:18 AM – OK, I must be like every other guy, lol…I don't think so.
> 3:30 AM – Sleep tight. (winky face emoticon).
> 12:16 PM – OK, I think if it works out for Sat, we could have some fun. (winky face emoticon)

On 3/3/11 Tony Siebenaler calls in to 911 at about 5:15 PM and says he wants to talk to an officer because his ex-girlfriend (Ward) is harassing him by showing up at his current girlfriend's house and at his father's house, where he's currently living. He tells the 911 Operator that he's concerned that this situation is going to get him in trouble because he's currently on a DANCO with respect to her and that he'd like to talk to an officer to try to clear the situation up.

The record indicates that earlier that same afternoon, Siebenaler had been at his girlfriend's house when Ward appeared there with her two sons, XXXX and YYYY. Siebenaler is XXXX's father. According to Siebenaler, Ward is angry and begins yelling at him, accusing him of being worthless and being a bad dad to XXXX. Siebenaler, not wanting to do anything that would violate the DANCO, flees his girlfriend's house and goes to his father's house, his current domicile. Ward, again accompanied by her two children, subsequently shows up at Siebenaler's father's house and the two again engaged in an argument. At one point, Ward announces that she needs to take XXXX and get him cleaned up and also needs to pick up some milk at Wal-Mart. She departs with XXXX and, according to Siebenaler, leaves YYYY, her other son, with him at his father's house.

When Ward doesn't return to pick up YYYY within what he considered a reasonable period of time, Siebenaler calls Ward on her cell phone and asks her when she's going to come by and pick up YYYY? They again get into an argument, but she did eventually come by and picked up YYYY. It was after she left that Siebenaler decided to make the 911 call in an effort to avoid any problems with the DANCO.

Officer Farrington accepted the 911 service call re: Siebenaler and immediately went to the Siebenaler's father's house and interviewed and took a report from him there. Siebenaler essentially recounted the events that had occurred with Ward both at his girlfriend's house and subsequently at his father's house earlier that afternoon. He did tell Farrington that he had called Ward on her cell phone to find out when she was going to return and pick up YYYY?

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wasn't technically possible. The Department was able to check the transcribed messages against those remaining on Ward's phone and found her transcriptions to be accurate. The Union didn't challenge that assertion.

After interviewing Siebenaler, Farrington proceeded to the Wal-Mart store where he located Ward. He confirmed with her that Siebenaler had previously called her on her cell phone. Based on that fact, Farrington subsequently went back to Siebenaler's house and placed him under arrest for violating the DANCO by calling Ward on her cell phone.

At about 6:30 PM, at the Dakota County Jail, Farrington interviewed and took a formal statement from Siebenaler regarding the day's events involving Ward.

Later at about 8:47 PM Farrington went to Ward's house and interviewed and took a formal statement from her with respect to her encounters with Siebenaler earlier that day. In her statement, Ward admitted that she had tried to call Siebenaler at least eight (8) times that day and was angry because he didn't answer or return her calls. She then went to his girlfriend's house for the purpose of locating him. She also admitted that she had previously called Siebenaler, in spite of the DANCO; because she needed him to help her take care of the kids and he was willing to do that, but the statement makes no reference to whether she left YYYY in Siebenaler's custody that day.

On 3/4/11 at about 8:30 PM the Department received a report from the mother of one of Siebenaler's other ex-girlfriends to the effect that she believed he had a gun and was going to commit suicide. Officers, including Farrington, were dispatched to locate Siebenaler and also to investigate and interview witnesses. The officers subsequently learned that Siebenaler was indeed alive, but were unable to locate him until about 4 AM the following morning driving his car in Hastings. He was stopped and taken into custody by Hastings Police Officer Larry Evans. Officer Farrington subsequently arrived on the scene and took custody of Siebenaler and transported him to Regions Hospital in St. Paul for psychiatric observation. Ms. Ward apparently had no personal involvement in this situation.

On 3/5/11 Farrington learns that Ward is going to join some friends at a bar in nearby Prescott MN and texts as follows:

10:40 PM – Where u at.
10:42 PM – OK, how late u going to b in Prescott.
10:57 PM – I'll meet you there in Prescott later if that works.
11:36 PM – I'm headed to Prescott now. It will take me 30 min.
12:25 AM – I'm in Prescott.
12:41 AM – U get lost?
12:51 AM – I'm sitting in scabs.
1:03 AM – R u having fun somewhere else. I'll come to where u r.
1:10 AM – OK, is it OK to come over.
1:13 AM – Yes or no.

Farrington apparently did end up at the same bar as Ward and her friends, but there was little or no direct contact between them before the gathering broke up and everyone left.

At 3:01 AM Farrington texted Ward- Did I make you feel uncomfortable tonight?

3:08 AM – Just thought u were. Didn't get to chat w/u much. Did anyone say anything to you about my being there.

3:18 AM – Well it would bug me not to know what was said.

3/26/11, 12:21 PM – It was nice to see you outside of work. I will say that u looked not only nice but sexy.

On 3/7/11 Farrington sends Ward a series of texts inviting her for a ride on his Harley motorcycle and he notes that he doesn't like to ride at night because of the danger of running into a deer, so he assures her they will only ride during daylight. At 10:41 AM he says to her – *I can see that sexy little body in the daylight then.*

On 3/8/11, 4:35 PM Farrington texts Ward; *Ya I meant won't. I think you would look great in a bikini w/that petite little body of yours.*

On 3/10/11, 8:05 PM, Farrington texts Ward and asks if he can see her later that night to say Hi? She apparently said "no" and he responded with a text at 8:10 PM, OK, (sad face emoticon) Have fun.

Later that same evening, at about 11:00 PM Farrington is on duty in his squad car and is apparently watching Ward's house. He notices a strange vehicle in her driveway and does a computer check on the license plate. The check comes back that the vehicle owner is a Michelle Latham. At 11:11 PM he texts Ward and tells her to say Hi to her friend Michelle.[5]

The following morning, 3/11/11 there are a series of texts from Farrington to Ward that appear to indicate that Ward was upset about Farrington watching her house and running a license plate check on her friend. Farrington responds that he guarantees that if Ward had the same tools (license plate check?), she would be able to do the same thing.

Later that evening, Farrington and Ward were routinely testing each other. According to both Farrington and Ward, she noted to him that while she is currently bogged down taking care of the kids, Siebenaler is drinking and having a good time at one of the local bars. She tells Farrington that she thinks

[5] Farrington's explanation for the license plate check was that he happened to be in Ward's neighborhood that evening and when he saw the strange vehicle in her driveway, decided to run the plate to see if the vehicle and its owner had any relationship to Tony Siebenaler and the DANCO. Ms. Latham, a friend of Ward, had stopped by to visit Ward and her children that evening.

Siebenaler is drinking in violation of either the DANCO or his court imposed conditions for his release on the earlier Domestic Abuse Strangulation charge. Farrington indicates he's not sure but will check it out. He subsequently calls on of the Department's Administrative Support employees at her home and asks her to check it out. She subsequently confirms that Siebenaler is not supposed to be out drinking per his release conditions on the pending Domestic Abuse charge.

At approximately 10:52 PM on 3/11/11, Officer Farrington appears at the bar where he finds Siebenaler indeed drinking and places him under arrest for violation of court release conditions.

At 12:01 AM on 3/12/11, Farrington texts Ward that it is "taken care of". Ward expresses concern to Farrington that Siebenaler probably knows that she was the one responsible for his arrest. Farrington tells her not to panic, that everything will be fine.

Later in the evening on 3/12/11 Farrington texts Ward and he is talking about sleeping over at her house.

> 10:25 PM – As long as business is taken care of in your bed, I'm fine sleeping anywhere.
> 10:27 PM – I'm good w/that.
> 10:28 PM – U may not want to kick me out.
> 10:31 PM – You may have to wait and see.
> 10:34 PM – That's fine. Takes me about 45 minutes if your OK w/that.
> 10:39 PM – No, but I will go as long as you want me to..I won't finish until you want me to.
> 10:41 PM – Really, are you questioning my stamina.
> 10:42 PM – Well I don't get off until you are tired.
> 10:43 PM – Can you handle me.. lol.
> 10:44 PM – I will get you off as many times as you can.

Early in the morning of 3/14/11, Ward was apparently having some difficulty in getting to sleep. In response, Farrington texted at 4:38 AM – *It did, that's OK. I have some Trazidone if you want some*.[6] There is no credible record evidence to indicate that Farrington ever actually gave Ward any Trazodone.

> At 4:56 PM – Farrington texts, That Trazodone don't do anything for me. No sleep aid does.
> At 4:58 PM – So let me ask you, does sex relax you. It does for me.
> Over the next several minutes the text subject apparently turns to birth control and Farrington advises Ward that he's been "fixed" as of 8 years ago and assumes that she doesn't like condoms.

[6] Trazodone is a prescription medication used in high dosages (150-600mg) to treat depression and in low dosages (<50mg) as a sleep aid. According to online reports, Trazodone is the 17th most abused prescription drug in the U.S. Addiction is the major problem.

Later that same day, Farrington is texting Ward and trying to work out a schedule to meet her. At 11:08 AM he texts, *So if sex scares you, does oral sex scare you.*

As noted above, the texting between Farrington and Ward continues, according to the transcription, until 4/24/11. However, after 3/14/11, the messages are less frequent and contain relatively minimal sexual content or reference. Ward appears to let Farrington know that she really isn't into him and, for his part, he seems to finally get the message.

On May 24, 2011, Leslee Ward appeared at the Hastings Police Department and filed a formal Personnel Complaint – Citizen Complaint. In the Complaint she specifically stated:

> "*I am afraid to change my address because Officer Don Farrington has ran my girl friend's plates while she was at my house. Also, I feel there is a conflict of interest because he has arrested my children's father, my brother and his girlfriend. I believe it's because I led him on and would not pursue a relationship with him. I believe another officer should deal w/ the issues.*"

On May 28, 2011, Officer Farrington was issued a Memo by Police Chief Paul Schnell informing him of the formal Complaint by Leslee Ward and further informing him that the Complaint would be the subject of an Internal Affairs Investigation to be conducted by Sergeant Craig Puch.

On May 28, 2011, Lieutenant James Rgnonti sent Officer Farrington a Memo with a complete copy of Ms. Ward's Complaint document and a list of the formal allegations that would be the subject of the Internal Affairs Investigation. The allegations were;

1. *Inappropriate texting, which was done while on duty.*
2. *DVS or CJRS computer access for non-law enforcement purposes.*
3. *Submission of an inaccurate police report.*

Sergeant Puch formally interviewed Ms. Ward on May 26, 2011. When asked why she had decided to file the Complaint against Officer Farrington, she said that she had recently moved her residence and was afraid to change her address because she doesn't want Officer Farrington to know where she lives. She also said that Officer Farrington had recently arrested her brother Patrick's girlfriend, Jessica Peterson, on an outstanding felony warrant and that Farrington was aware of the relationship between Ms. Peterson and Ms. Ward. She told Puch that when her brother, Patrick, learned of her relationship with Officer Farrington he had her transcribe the phone texts that she had with Farrington and he turned them over to his attorney.

Puch interviewed Michelle Latham, Ms. Ward's friend, on May 27, 2011.

He re-interviewed Ms. Ward again on May 30, 2011.

On June 6, 2011, Sergeant Puch and Lieutenant Rgnonti met with Officer Farrington and his LELS Union Representative, Kim Sobieck, and conducted a formal interview and took his statement.

Sergeant Puch continued his investigation into about mid-June, 2011 with various interviews and re-interviews of pertinent witnesses to fully explore and obtain a full factual account of the situation, for presentation to Chief Schnell for a determination on the matter.

On June 24th, 2011 Sergeant Puch presented his completed written Report of the Internal Affairs Investigation into Ms. Ward's Complaint of May 24th, 2011, to Schnell.

On July 6, 2011 City of Hastings Administrator David Osberg advised Officer Donald Farrington by letter that effective July 16, 2011 his employment with the City as a Police Officer would be terminated. The letter stated that, "*Termination is warranted due to the serious nature of your misconduct, as well as your past disciplinary infractions. The basis for your termination includes, but is not limited to the following:"*

The letter then outlined six (6) specific reasons upon which the termination decision was based. The following is summary of those reasons:

1. <u>Inappropriate Access to and Use of Police Information</u>. The investigation established that Farrington had accessed the Vehicle Owner database for a vehicle parked at Ms. Ward's home on the evening of 3/10/11 and learned that the vehicle belonged to a Michelle Latham, an apparent friend of Ms. Ward. Farrington subsequently texted Ward and let her know that he had run Ms. Latham's vehicle plate through the law enforcement database. When Ms. Ward questioned whether Farrington should be doing that, he casually responded that she'd probably do it also, if she had access to the system.

   Police Department Policy 7.01.09, subdivision 1C states that *"[p]eace officers shall not use the authority of their position as peace officers, or information available to them due to their status as peace officers, for any purpose of personal gain, including but limited to, initiating or furthering personal an/or intimate interactions of any kind with persons with whom the peace officer has had contact while on duty."*

   The investigation further established that Farrington violated Department Policy 7.01.10 when he disclosed to Ward the results of his license plate check/search in that those results were "criminal investigatory data" which

is generally confidential or non-public data under the Minnesota Government Data Practices Act (MGDPA).

2. Inappropriate Contact with Ms. Ward While on Duty and While Acting as a Peace Officer. The investigation established and Farrington admitted that he had engaged in "sexting" messages to Ms. Ward on a number of occasions during the period January through April, 2011. These "sexting" messages contained both explicit and/or implied sexual content and innuendo. Farrington admitted that at least some of the "sexting" messages to Ward were sent while he was on duty.

   The Hasting IT Policy, Appendix 19 states that, *"[n]o employee may use any of their own equipment such as laptops, PDAs [or] cell phones in any manner while working as a City of Hastings employee that would violate the sections of this Information Technology Policy or any other policy of the City of Hastings."* Conducting personal business, i.e. sending sexually charged text messages to Ms. Ward during work hours, can only be categorized as "personal business" and doing so violates Chapter 7, Section d of the City's Personnel Policy which prohibits conducting personal business during work hours. Similarly, Department Policy 7.01.12, subdivision 4, states, *"[e]mployees, while on duty, will limit activity unrelated to department business, except that which is authorized by a superior officer."* Farrington obviously never sought Department permission to sext/text Ms. Ward while on duty.

   Farrington was also involved in the arrest of Ms. Ward's former boyfriend during the period that he was also engaged in or seeking a sexual relationship with Ms. Ward. As previously noted in Department Policy 7.01.09, subdivision 1C, police officers are prohibited from using "*the authority of their position as peace officers"* for personal reasons. During the course of the arrest/enforcement action relating to Ms. Ward's former boyfriend, Farrington skewed certain investigative facts to protect Ms. Ward from possible legal action, thereby violating 7.01.09, subdivision 1C.

   Furthermore, Department Policy 7.01.09, subdivision 1A clearly states that *"[p]eace officers shall, unless required by law or policy, refrain from becoming involved in official matters or influencing actions of other peace officer in official matter, impacting the officer's immediate family, relatives or persons with whom the officer has or has had a significant personal relationship.*" Accordingly, because of his personal relationship with Ms. Ward, Farrington should have recused himself or otherwise should have refrained from any official matters involving Ms. Ward.

   Farrington's skewed or one-sided report, that he compiled in connection with the arrest of Ward's former boyfriend on 3/3/11, violated Department Policy 7.01.04, subdivision 1C which states, *"[p]eace officers shall*

truthfully report, testify, and present evidence, including exculpatory evidence in all matters of an official nature. Similarly, Department Policy 7.01.09 states that, *"[p]eace officers shall not compromise their integrity, or that of their department of profession, by taking or attempting to influence actions when a conflict of interest exists."*

3. Offering to Violate a Minnesota Law. Farrington, in a text message to Ms. Ward on 3/14/11, offered to supply her with Trazodone, a prescription drug. As he was well aware or reasonably should have been aware, it is unlawful to provide a prescription medication or drug to anyone, other than the person for whom it was prescribed.

4. Failure to Report Suspected Maltreatment of Ms. Ward's Children. Farrington admitted that he was aware during the course of his relationship with her, that she personally smoked marijuana on a daily basis. He was also aware that she very likely smoked marijuana in the presence of her two sons, XXXX (age about 3 months) and YYYY (age about 3-4 years). He was also aware that Ms. Ward was breast feeding XXXX during this time period. Farrington was also aware that he was a "mandatory reporter" under the Minnesota Maltreatment of Minors statute and that Ms. Ward's conduct constituted maltreatment of her children and he should have reported the situation to Child Protection authorities. When asked why he failed to report the situation to Child Protection, Farrington said that he understood from Ward, that she had a case worker with Child Services, but he never personally checked with the case worker to verify that s/he was, in fact aware of Ms. Ward's marijuana use.

   Farrington's failure to properly report Ward's situation with marijuana and her children violated the Department's Law Enforcement Code of Ethics and Department policy, notwithstanding the possible threat to the children.

5. Unethical and Unprofessional Conduct. Farrington's conduct as set forth in Items 1 through 4, as above, violated Department and City of Hastings Employee Policies related to the integrity, professional behavior and effectiveness of the Police Department, including;

   Department Policy 7.01.06 which states that, *"[p]eace officers shall not, whether on duty or off duty, exhibit conduct which discredits themselves or their Department or otherwise impairs their ability or that of other officers or the department to provide law enforcement services to the community*."

   Likewise, Hastings Employee Policy, Chapter 7 provides that, *"[e]mployees should exhibit behavior that is ethical, professional, responsive and of high standards*."

6. Termination is the Only Appropriate Level of Discipline. Farrington's behavior, as outlined herein, represents a flagrant disregard for Department Policies, the Law Enforcement Code of Ethics and the City of Hasting's generally applicable employment policies. While such conduct is sufficient in and of itself to justify termination, his recent past disciplinary record clearly demonstrates that such behavior is not isolated and when coupled with the current situation, shows an ongoing and continuing pattern of misconduct and bad judgment.

   Accordingly, the City of Hastings is entitled to better from its Police Officers. Given his continued disregard and violation of relevant City and Department Policies and the laws of the State of Minnesota, termination of Officer Farrington is the only appropriate discipline for his most recent misconduct.

THE GRIEVANCE

By letter dated July 7, 2011 to David Osberg, the City Administrator, the Union filed a timely grievance in protest of Officer Farrington's discharge. The grievance specifically alleged that, "*The Employer's action violates, including, but not limited to, Article 10 of the Collective Bargaining Agreement*. *Remedy Sought: Officer Don Farrington be made whole in all respects, including, but not limited to reinstatement and removal of the discipline and any associated documentation from all files and back pay."*

Relevant Contract language:

Article 10, Discipline

10.1. The Employer will discipline employees for just cause only. Discipline will be in one or more of the following terms:

a) Oral reprimand;
b) Written reprimand;
c) Suspension;
d) Demotion; or
e) Discharge.

10.2. Suspensions, demotions and discharge will be in written form.

10.3. Written reprimands, notices of suspension and notices of discharge which are to become part of an employee's personnel file shall be read and acknowledged by signature of the employee. Employees and the Union will receive a copy of such reprimands and/or notices.

10.4. Employees may examine his/her own personnel file at reasonable times under the direct supervision of the Employer.

10.5. Discharges will be preceded by a five (5) day suspension without pay.

10.6. Employees will not be questioned concerning an investigation of disciplinary action unless the employee has been given an

opportunity to have a Union representative present at such questioning.

10.7. Grievances relating to this Article shall be initiated by the Union at Step 3 of the grievance procedure under Article VII.

On July 11, 2011, Mr. Osberg, the City Administrator, responded by letter to the Union acknowledging receipt of the grievance, but denying the grievance in accordance with Step 3 of the grievance procedure.

Following receipt of Mr. Osberg's letter of July 11, 2011, the Union, on July 13, 2011, notified MN Bureau of Mediation Services (BMS) by letter that Officer Farrington would be proceeding to arbitration on his grievance and requested that BMS provide the Parties with a list of perspective arbitrators.

Ergo, here we are.

SUMMARY OF THE PARTIES' MAJOR ARGUMENTS

THE EMPLOYER:
At the outset, the Employer notes that at no time during the arbitration hearing did the Union or Mr. Farrington question or challenge the propriety of the Employer's investigation of this matter. The investigation was clearly conducted in accordance with the City's procedural requirements, the Peace Officer's Discipline Procedures Act [7] and the applicable labor agreement.

Farrington's colleague and fellow Officer, David Bauer testified in the hearing that Leslee Ward was a known repeat victim of domestic abuse cases handled by the Hastings Police Department and that she was the victim in a serious felony domestic abuse strangulation case on December 24, 2011. Officer Farrington, while not directly involved in that matter was aware of the case. Officer Bauer noted that as part of the Department's domestic abuse training, officers are taught that domestic abuse victims may view officers either as their protectors or as an enemy or threat. He noted that domestic abuse victims, in general, have dysfunctional interpersonal relationships and are "broken and scared". He testified that officers are trained to maintain a professional distance from domestic abuse victims and noted that it would be unprofessional to have a "relationship" with a domestic abuse victim who was involved in case with the Department. Farrington subsequently testified that he, like Bauer, had received the training regarding handling of domestic abuse cases and had served o a committee formed by Police Chief Schnell on how to better handle and respond to domestic abuse calls, reports and situations.

Farrington alleged, during his hearing testimony, that he had texted Ms. Ward in order to build her trust in the Police Department because she had expressed frustration to him over the police handling of her domestic abuse reports

[7] See Minn. Stat. § 626.89.

regarding her ex-boyfriend, Anthony Siebenaler. However, as demonstrated in the hearing, a detailed examination of the texting messages from Farrington to M. Ward show a very different picture. Contrary to Farrington's assertion, his text messages to Ward are clearly an attempt to facilitate a personal, sexual relationship with her.

With respect to Farrington's allegation that Ms. Ward "provoked" him into the texting situation; this excuse blatantly ignores his obligation and responsibility, as a police officer handling domestic abuse cases and victims, to refrain and recuse himself from any personal or intimate relationships and to maintain professional boundaries with such persons.

During both the investigation and his hearing testimony, Farrington admitted that he had used his personal cell phone to text/sext Ms. Ward while he was on duty as an officer. An examination of the cell phone messages indicates that during March and April, 2011, he sent 391 text messages to Ms. Ward. Of that number 121 of the messages were sent while he was on duty as an officer. Farrington attempted to argue that some of the apparent "on-duty" texts/sexts were sent while he was on break, but subsequently conceded that officers, even while on break, are still "on-duty" and Farrington admitted that his sexting Ward while on duty violated Department Policy.

With respect to Farrington's arrest of Mr. Siebenaler on March 3, for alleged violation of the DANCO, it is clear from the investigation and the hearing testimony that Farrington purposely skewed his interview/statement from Ms. Ward to conceal the fact that she had purposely hunted down Siebenaler at his girlfriend's and his father's house to confront and harass/argue/fight with him, in spite of the DANCO. Farrington further tried to obscure the fact that Ms. Ward had left her son, YYYY, with Siebenaler on that date while she ran errands. Siebenaler's single phone call to her was merely to find out why she hadn't come back to pick up her son. Ms. Ward testified during the Internal Affairs investigation that Farrington had advised her that because of her numerous phone calls to Siebenaler and if she said she left YYYY with Siebenaler on March 3, that could cause her trouble. None of that information appears in Farrington's investigative reports.

Similarly, Farrington's arrest of Anthony Siebenaler, while he was drinking at a local bar on 3/11/11, clearly demonstrates his lack of impartiality and professional boundaries as a police officer in dealing with a domestic abuse situation.

With respect to Farrington's running a DMV license plate check on the vehicle parked at Ms. Ward's home on the evening of 3/10/11, he contended that He was merely checking to determine if the vehicle was related to Mr. Siebenaler and a possible violation of the DANCO. However, his subsequent actions and statements made to Ward by text, make it clear that his real purpose was to personally determine who else might be spending the evening with Ms. Ward –

perhaps a rival for her affections? Obviously, his disclosure of the plate check results to Ward made both her and her friend the vehicle owner, Michelle Latham, very uncomfortable because it was clear that they were under immediate police surveillance. Again, Farrington was well aware of the rules, regulations and policies governing access to the DMV database and the confidentiality of information obtained from there, but chose to ignore them in the interest of furthering his relationship with Ms. Ward.

In offering to supply Ms. Ward with the prescription medication Trazodone in a text message on 3/14/11, Farrington admitted, in the hearing, that he was aware that supplying a prescribed drug to anyone other than the individual for whom it was prescribed violated Minnesota law. Although Farrington denies that he subsequently furnished the drug to Ward, but the fact that, as a police officer, he offered the drug in violation of law, violates the various ethics requirements and City and Departmental policies as cited by Mr. Osberg in the July 6, 2011 termination letter.

Farrington acknowledged that he was aware, via his personal relationship with Ms. Ward, that she used/smoked marijuana and got "high" on virtually a daily basis; while also breast-feeding her infant son and caring for her other son. He also conceded that, as a police officer, he was a "mandatory reporter" under the Minnesota Maltreatment of Minors law (*Minn. Stat. §626.556*). That law defines "*neglect*" to include "*chronic and severe use of alcohol or a controlled substance by a parent or person responsible for the care of the child that adversely affects the child's basic needs and safety.*" [8] Farrington's only explanation for failing to report Ward's marijuana to Child Protection was that he understood from Ward she was working with a social services case worker and assumed that the case worker was aware of the marijuana situation. He also admitted that he never checked with the case worker to verify that awareness. Hastings Police Department, upon learning of this situation, did subsequently contact the appropriate Child Protection people and advised them of Ward's marijuana use.

The City certainly had Just Cause to terminate Farrington, as a police officer, after clearly establishing via a complete investigation that he definitely violated the Policies and Ethical requirements of his Employer, the City of Hastings. In doing so, Farrington violated the trust that is integral to the functioning of a police force and negatively impacted his ability to satisfactorily perform his job in the future.

As is the case with many labor agreements, the applicable agreement herein requires that the Employer have "*Just Cause*" to justify discipline, including discharge of an employee, but no where in the agreement is that term defined. In Minnesota, "*just cause*" for the termination of a public employee "*must relate to the manner in which the employee performs his duties*." *Ekstedt v. City of New Hope*, 193 N.W.2d 821, 828 (Minn. 1972)

[8] See Minn. Stat. §626.556, subd. 2(f)(8).

In the absence of any specific, universally accepted definition of the term "just cause", it is noted that this Arbitrator, has in the past used the following guidelines in analyzing and evaluating whether the specific circumstances of a discharge may meet the requirements of "just cause": See *St. Paul Public Schools v. AFSCME Local 844*, BMS Case No. 10-PA-1585 (Kapsch, Nov. 12, 2010)

1. *Did the employer give the employee forewarning or foreknowledge of the possible disciplinary consequences of the employee's conduct?*
2. *Was the employer's rule or managerial order reasonably related to a) the orderly, efficient and safe operation of the employer's business and b) the performance that the employer might properly expect of the employee?*
3. *Did the employer, before administering discipline to an employee, make an effort to determine whether the employee did in fact violate or disobey a rule or order of management?*
4. *Was the employer's investigation conducted fairly and objectively?*
5. *At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?*
6. *Has the employer applied the rules, orders and penalties evenhandedly and without discrimination to all employees?*
7. *Was the degree of discipline administered by the employer in a particular case related to a) the seriousness of the employee's proven offense and b) the record of the employee in his service with the company?*

The City is confident that its actions in connection with the termination of Officer Donald Farrington on July 16, 2011 fully meet the above guidelines for "Just Cause" in this matter.

Accordingly, based upon the record testimony and evidence in this matter, the City of Hastings respectfully requests a finding that it had just cause to terminate the Grievant and that the Union's grievance is denied.

<u>THE UNION</u>:
The Union sees the core issue in this case as being whether Officer Farrington and Ms. Ward had a "significant personal relationship". The City's case hinges upon its belief that Officer Farrington's interest in Leslee Ward improperly influenced him in the performance of his duties as a Police Officer. If it is established that Officer Farrington did not have and was not seeking a significant personal relationship with Ms. Ward, much of the improperly motivated conduct alleged against him falls by the wayside as, at worst, the questionable exercise of his police authority.

As indicated in the record, Department Policy 7.01.09, subd. 1A restricts peace officers from becoming involved in official matters "*impacting the officer's immediate family, relatives or persons with whom the officer has or has had a significant personal relationship* (emphasis applied)."

Farrington did not have and was not pursuing a significant personal relationship with Ms. Ward. It is the Union's contention that Farrington and Ward never developed a significant personal relationship. The record evidence is that is that they never dated, never had a physical relationship and never had any significant direct contact outside of the performance of Officer Farrington's police duties. Farrington's familiarity with Ward largely developed during his bar checks at Dugarel's Bar, where Ward was employed. Those encounters date back approximately four years or more. It is acknowledged that at one point during the texting period in early 2011, Ward invited Farrington to join her after work at a bar in nearby Prescott WI. Both agree that while they did meet, there was only a brief and casual conversation between them. On another occasion, while he was on patrol, he encountered Ward at a RedBox movie rental kiosk in Hastings and they briefly exchanged pleasantries. Any alleged relationship between Farrington and Ward was thus almost entirely based upon their exchange of text messages for about a one month period in March of 2011.

It is the Union's position that a "relationship" which is virtually entirely based upon electronic communication, i.e. cell phone texting, cannot be viewed as a "significant personal relationship". The "personal" component of a relationship must necessarily involve significant face-to-face or in-person contact.

Other components of a significant personal relationship would seem to be the duration and the passage of time, relative to encounters. It is unlikely that one or two brief encounters between two individuals would be considered by most people to qualify as "significant", even if the encounters were somewhat intimate. Likewise for someone who they may have considered friends back in grade school, but whom they haven't had any subsequent contact with for the past 20 years.

Accordingly, the Union does not believe the facts in the instant case are sufficient to establish a "significant personal relationship" between Farrington and Ward where the evidence shows that they never dated, never had a sexual relationship, had only brief social contact outside of their work and where the primary communications between them were electronic.

Farrington's running the plates of Michelle Latham was not employment misconduct which supports a discharge. The Union also contends that Farrington's running the plates on Michelle Latham's vehicle on the evening of 3/10/11 was not employee misconduct which supports a discharge. As Officer Farrington testified, he was well aware that Ward was protected by a DANCO on Siebenaler and that he would occasionally patrol past Ward's house looking for

evidence that Siebenaler might be there or in the area. When he encountered a strange vehicle parked at the house, he would run the plates. On a couple of occasions the plate checks returned to someone that Farrington knew or recognized as a relative to Ward and he took no further action. No one disputes that those instances were for a proper law enforcement purpose.

On 3/10/11, while on routine patrol near Ward's house, Farrington saw an unfamiliar vehicle parked at Ward's house. He ran the plate and it came back for Michelle Latham. Unfamiliar with that name, Farrington texted a question to Ward to the effect, "who is Michelle Latham?" Ward responded that Latham was a friend who was helping her assemble a crib. A brief exchange followed wherein the crib assembling was mentioned, *"u two play in the crib yet. Lol*?" and Farrington concluded, "*Tell your friend Michelle hi…lol*". It was the following day when Ward initiated another text conversation with Farrington and inquired into how he had been able to identify Ms. Latham and another brief exchange followed in that regard.

Two months later, in late May, 2011 Ward included the Latham plate check incident as the primary motivation for her filing the Complaint against Farrington; now claiming that she was afraid to change her address on her driver's license after she had moved. That contention, in her May, 2011 Complaint, is simply not credible; because the record shows that the day after the Latham plate check, Ward was continuing to text Farrington and, in fact, reported to Farrington that Siebenaler was drinking in a local bar in violation of his court release conditions. That report resulted in Siebenaler's arrest. The record also shows that the two continued texting each other routinely on a variety of subjects over the course of the subsequent weeks.

With respect to the Latham plate check, the City claims that Farrington's text inquiry to Ward as to the identity of Latham violates its Policy 7.01.10. Contrary to that assertion, the Union contends that once the plates returned to Latham, the most efficient way of establishing the identity of Latham or any connection to Siebenaler was to ask Ward. In that context, Ward was also well aware that Officer Farrington knew of her continuing contacts with Siebenaler and the purpose of the text was to insure that those contacts were no longer occurring. While Farrington's approach to the situation may not have been the best advised; under the circumstances, disclosing the results of the check of Latham's plates to Ward was not such a serious breach of confidentiality to warrant significant discipline.

<u>The text messaging between Farrington and Ward did not constitute inappropriate conduct</u>. The texting between Farrington and Ward only involved his personal cell phone and about 70% of his messages to Ward were sent when he was off duty. Of those texts that he sent while nominally on duty, it appears that a majority of those occurred during his break times. Also, the Union does not agree with the City that may of the highlighted messages in the purported text

log of messages actually demonstrate “sexting” or any serious courting behavior. The Union respectfully requests that the arbitrator carefully review those messages for himself.

The arbitrator also should be aware that texting is a rising communication phenomenon. The City claims that Officer Farrington sent some 391 texts to Ward over the course of a couple of months. A recent study concluded that the average adult typically sends and receives about 10 texts per day, but 5% of adult texters send as many as 200 text messages per day or 6000 texts per month.

Also, by their very nature, texts are abbreviated messages. A review of the text log reflects that many are not complete sentences and many are only a few words long. Accordingly, it sometimes takes a number of such brief messages to form or discern much of substance. The arbitrator also needs to recognize society’s increasingly casual attitude toward sex and sexual dialogue. Conversations concerning sexual subjects, which at one time might not have been shared even between married couples, are now commonplace even between casual acquaintances. The point being that neither the number nor volume of text messages or occasional explicit sexual content are currently sufficient to establish a serious or significant personal relationship.

The City complains that Farrington’s relationship with Ward presented a conflict of interest whereby he should have excluded himself from involvement with situations involving Siebenaler. However, the City has not explained exactly when it believes the alleged relationship between Farrington and Ward reached a point of significance. Farrington’s first arrest of Siebenaler occurred on 3/3/11 and the record shows only a handful of texts between Farrington and Ward prior to that arrest. Even Ward conceded that until March, 2011 there wasn’t much texting going on between the two. Farrington testified that he did not seek out the call from Siebenaler on 3/3/11 and his decision to make the arrest was not influenced by any relationship with Ward.

The next arrest of Siebenaler occurred on 3/11/11. That arrest was initiated by Ms. Ward, but actually carried out by Officer David Bauer, with Farrington taking actual custody of Siebenaler.

The foregoing clearly indicate that 1) the number, frequency and subject matter of the texts do not establish that significant personal relationship existed between Farrington and Ward; 2) The informal relationship between Farrington and Ward did not compromise Officer Farrington in the performance of his police duties and 3) the City does not question the legal validity of Siebenaler’s arrests. Accordingly, Officer Farrington’s involvement in those matters was not a conflict of interest, but the exercise of routine police work that fails to rise to the level of requiring discipline.

Farrington's spur of the moment offer of Trazodone to Ward does not constitute employment misconduct. The record indicates that both Farrington and Ward were at their respective homes at about 4:30 AM on 3/14/11 trying to get some sleep. Apparently Ward texted Farrington and said something about having difficulty getting to sleep. Farrington did text, "*It did, that's OK. I have some Trazidone if you want some".* The record is clear that Farrington did not, in fact, give that drug to Ward. His so-called "offer' appears to have been an off-the-cuff comment made in the course of a text conversation between two sleep-deprived individuals.

Even if it were concluded that this was a serious offer, the Union notes that under the pertinent Minnesota Statutes, a simple offer to provide Trazodone is not a criminal offense, but actually providing the drug to another person, without an applicable prescription, would of course be a crime. [9] The arbitrator should note that Trazodone is defined in the statute as a Legend drug and is not listed as a "scheduled controlled substance" and the definition of a restricted sale of a legend drug does not include an offer to sell. Accordingly, under all relevant circumstances, Farrington's "offer" of Trazodone to Ward would not be a violation of Minnesota law. Therefore, Farrington's actions in this instance cannot be considered a violation of Department Policy 7.91.03.

Officer Farrington was not remiss in failing to report Ward's suspected use of marijuana to Child Protection. Farrington admitted that while he was aware that Ward was a regular user of marijuana – apparently based on her admissions - he had not seen her actually smoking or using the substance. He was not specifically aware if she used marijuana in the presence of her children. In his limited contacts with Ward and her children, he observed no indications that they were neglected or maltreated. Both children appeared to be well-fed, properly dressed and clean on those limited occasions when he observed them. Like wise, he found the home to be clean and orderly.

The City alleges that the fact that Ward was smoking marijuana while breastfeeding her infant son automatically established a violation of the *Maltreatment of Minors Act*, Minn. Stat. §626.556. The statutory language does not support that conclusion. §626.556, subd. 2(f)(6) provides part of the definition of "neglect" as follows: "*prenatal exposure to a controlled substance*". That definition recognizes that any use of a controlled substance during pregnancy constitutes "neglect". However, subd. 2(f)(8) also adds the following definition of "neglect": "*chronic and severe use of alcohol or a controlled substance by a parent or person responsible for the care of a child that adversely affects the child's basic needs and safety*."

Thus "neglect" based upon regular marijuana use in other than prenatal situations, as defined by the statute, requires the additional element of an adverse effect on the child's basic needs and safety and Farrington testified that

[9] See Minn. Stat. §151.37, subd. 1.

he saw nothing that suggested that Ward was not providing for her children's basic needs and safety. Contrary to the City's claim, there is nothing in the statute which discusses or concludes that a breastfeeding mother who smokes marijuana is guilty of maltreatment and thus a mandatory reporter has no obligation to report such a concern.

Finally, Farrington explained that he did not believe he was obligated to report Ward's marijuana use because he understood that she had a caseworker assigned through Social Services. While the City obviously faults him for not following up with the alleged caseworker, since he had no evidence that Ward's children were being neglected or maltreated, he had no obligation to report. Accordingly, his conduct in this situation does not justify significant discipline.

<u>The discipline taken against Officer Farrington due to the vehicle incident in April 2010 is not relevant to the current action</u>. Over the objections of the Union, the City, in the arbitration hearing, entered the details of disciplinary action taken against Farrington in about September, 2010, in connection with a vehicle accident situation in which he was involved on or about April 10, 2010. That disciplinary action included a "last chance" agreement.

It remains the Union's position that the disciplinary action arising from the April, 2010 incident is not relevant to this current matter. The Union notes that with respect to the five (5) specific requirements of the last chance agreement, Farrington has not violated any of them and has continued to fulfill those requirements. None of the issues raised by Ms. Ward relate in any manner to those provisions of that agreement.

The only potential violation of the terms of the last chance agreement cited by the City is the restriction against "bias-based policing". The City suggested that Farrington's arrests of Siebenaler might be instances of "bias-based policing". There is no logical basis for such a suggestion. As noted above, the various arrests of Anthony Siebenaler have all been legally valid. Moreover, the intent of the provision in the last chance agreement with respect to "bias-based policing" was to address the fact that in the April, 2010 incident he had falsely accused a male black man of hijacking his car. Siebenaler is a white male. Accordingly, the previous last chance agreement is wholly irrelevant to the matters raised by Ward's May, 2011 Complaint.

In view of the foregoing, it is the Union's position that the City has failed to establish Just Cause for the discharge of Officer Donald Farrington and respectfully requests that the Arbitrator sustain this grievance, reinstate Officer Farrington to his former position as a Patrol Officer and make him whole.

ANALYSIS, DISCUSSION AND FINDINGS

As an Arbitrator, I am keenly aware that discharge cases are among the most important situations that I am called upon to determine. Discharge decisions have significant psychological, economic and legal effects on all parties involved.

This labor agreement conditions Discipline/Discharge upon "Just Cause" and like most labor agreements, this one contains no other statements, standards or definitions as to the precise meaning of that term.

Despite of the absence of a definition of "just cause" within the labor agreement itself, one would expect that - given the myriad of discharge cases that labor arbitrators have had to deal with over the course of many decades - the labor arbitrators themselves would have certainly reached a clear consensus as to the meaning of those terms. Wrong! The situation was aptly explained by one seasoned, veteran labor arbitrator who observed that neither he nor his esteemed colleagues have ever been able to reach agreement on an universally accepted definition of the term "just cause", but he noted that he and every other labor arbitrator could readily recognize the presence or absence of "just cause" in any particular case.

Of course, I am very familiar with Arbitrator Carroll Daugherty's "*The Seven Tests of Just Cause"* as outlined in the Employer's Arguments above.[10]

I, personally, find Daugherty's "Test" to be a useful tool in organizing and analyzing the facts and evidence that come to the fore in discipline cases. However, like many arbitrators, I find that it is rigid and overly mechanical in its application as a true test of "just cause"; in that it fails to recognize and allow for the weighing of the myriad of factors and nuances that are involved in a typical discipline situation.

An alternative view of the "just cause" situation was set forth by Roger I. Abrams and Dennis R. Nolan in "*Toward a Theory of 'Just Cause' in Employee Discipline Cases*", 85 Duke Law Journal 594 (1985). Like Daugherty's "Tests", I find Abrams and Nolan's theoretical construct to be another useful tool to organize and analyze the myriad of facts presented in a typical disciplinary case where the term "Just Cause" is not defined in the contract.

Turning now to this matter and after reviewing and considering the record testimony and evidence, several preliminary considerations and findings are appropriate;

1. Officer Farrington, at all times material herein, was fully aware of the Employer's rules, regulations, requirements and policies governing his work performance as a Police Officer for the City of Hastings and was

[10] *Enterprise Wire Co*., 46 LA 359 (Carroll R. Daugherty, 1966)

concurrently aware that violations thereof would certainly result in disciplinary consequences and I so find.

2. The City of Hastings has properly adopted and implemented various policies, rules, requirements and regulations governing the conduct and work performance of its Police Officers to insure that they meet or exceed those standards which members of the Law Enforcement profession have voluntarily imposed upon themselves. By definition, Law Enforcement employees are granted significant authorities and powers to aid them in properly and efficiently carrying out their duties to "protect and serve". However, those authorities and powers also come with notable responsibilities, restrictions and checks to insure that there are used properly and are not abused. In this instance, I find that the City's policies, rules, requirements and regulations governing the conduct and behavior of its Police Officers are reasonable and clearly related to the City's mission of protecting and serving its citizens.
3. Based on the record evidence I find that the City did conduct a full and proper Internal Affairs investigation, accordance with their internal policies and protocols, with respect to the allegations made by Ms. Ward in her Complaint of May 24, 2011 involving Officer Farrington's conduct and work performance.
4. Based on the record evidence, the City's Internal Affairs investigation was conducted in a fair, objective and non-discriminatory manner and Officer Farrington, with appropriate Union representation, was afforded a full and unrestricted opportunity to address the specified allegations that were made against him. Accordingly, I so find.
5. The City made the decision to discharge Officer Farrington only after the Internal Affairs investigation was completed and only after the responsible officials had adequate time to fully review and consider all the evidence and facts established by the investigation. Accordingly, I so find.
6. The record is devoid of any contention or allegation that the City has applied or enforced its policies, rules, requirements and regulations in this instance in either a discriminatory or disparate manner with respect to Officer Farrington. Accordingly, I so find.
7. The question here is whether the degree of discipline imposed by the City upon Officer Farrington in this instance, i.e. discharge, is reasonably related to a) the seriousness of the employee's proven offenses and b) the record of the employee's service with the City. As indicated in the Union's Arguments above, the Union contends that it is on this "Test" that the City's decision to terminate Farrington fails to meet the "just cause" standard.

So, let's examine and consider each of the Union's arguments, with respect to item #7, in detail.

- <u>Officer Farrington did not have a "significant personal relationship" with Ms. Ward and, therefore, did not violate Department Policy 7.01.09, subd. 1A.</u>

Upon analysis and consideration of the Union argument and the record as a whole, I find this contention to be without merit. I base that finding on several considerations;

a) I would readily agree with the Union that up until about January, 2011, Farrington's relationship with Ms. Ward was casual and distant and relegated to what appears to have been brief chit-chat's during the bar checks at Dugarel's.
b) However, Farrington made a decision in about January, 2011 to enhance the nature of his relationship with Ward as part of a plan to assuage her concerns and skepticism about the willingness of the Police Department to support and assist her in her dealings with her ex-, Anthony Siebenaler. In furtherance of that plan, he readily provided her with his personal cell phone number and an invitation to call him.
c) Having reviewed the texting trail log from about February into April, I am convinced that by about March, Farrington's intentions with respect to Ward had developed into a desire to "get into her pants" or "do her". For her part, Ward obviously "played with him", but carefully and adroitly dodged his attempts to actually maneuver himself into her bed. No doubt, she initially felt very comfortable having a police officer actively vying for her charms, as she tried to cope with a difficult ex-boyfriend, but eventually became somewhat fearful with respect to his use of his power and authority.
d) At the point where sexual intimacy with Ward became his goal with respect to their relationship, Officer Farrington became involved in a significant personal relationship with her.
e) As a 40 year-old police officer, Farrington should have backed out of the communication system with Ward at the point when he realized that he truly wanted to engage in sex with Ward. That should have been the "boundary" moment. Alternatively, he had the option of advising his superiors that he was engaged in trying to establish a sexual relationship with Ms. Ward and ask them if they saw any ethical or conflict of interest problem in that situation? He obviously chose neither of those options and inevitably the situation spun out of his control.

- <u>Farrington's running the plates of Michelle Latham was not misconduct sufficient to warrant discharge</u>.

  I readily agree with the Union's position that the situation involving Michelle Latham's vehicle plate check, <u>standing alone</u>, would definitely not justify a discharge decision. But, from the City's

perspective, this incident was only one of about five (5) specific allegations that were considered in connection with the discharge decision.

- The text messaging between Farrington and Ward did not constitute inappropriate conduct.

  Based upon the record evidence, I find this contention to be without merit. The record clearly establishes that the Department has specific rules regarding the conduct of "personal business" by employees while on duty. Farrington contends that most of the on-duty texts to Ward were done while he was on "break", but given his impaired credibility, that could mean at least 30% of the approximately 391 messages occurred while "on-duty" and that is sufficient to constitute a violation of Department Policy 7.01.12, subd. 4, as alleged by the City.

- Farrington's spur of the moment offer of Trazodone to Ward does not constitute employment misconduct.

  While I readily agree with the Union's reading of Minn. Stat. §151.37, subd 3 to the effect that "offering" a legend drug, such as Trazodone, does not rise to a crime; his offer of the drug to Ward constitutes a proposal to commit a crime, i.e. furnishing a prescription drug to someone without a prescription. I am compelled to agree with the City that this is not acceptable behavior by a police officer, who has taken an oath to uphold the law. However, I also acknowledge that this incident, standing alone, is definitely insufficient to justify a discharge.

- Officer Farrington was not remiss in failing to report Ward's suspected us of marijuana to Child Protection.

  Minn. Stat. §626.556, subd. 3 make it clear that law enforcement officers are mandatory reporters with respect to the Maltreatment of Minors Act. According to the statute, reporting becomes "mandatory" for such an individual if and when that individual "*…knows or has reason to believe that a child is being…neglected or abused".*

  My understanding of the City's position on this situation is that they are not contending that Farrington had sufficient and clear-cut evidence to require a mandatory report. Rather, given his knowledge that Ward used marijuana and got "high" on a habitual and daily basis – while caring for two children, one of which was an infant – he failed to exercise reasonable and prudent judgment by failing to at least check or consult with Child Protection on the situation. That may have triggered an in-depth examination of her drug use as it related to her child care responsibilities. As the record indicates, upon learning of the Ward's marijuana use and

habit, the Department did make a report to Child Protection, but we don't know the result.
Again, I agree that this incident or situation, standing alone, would certainly not justify a discharge decision.

- The discipline action taken against Office Farrington due to the vehicle accident in April 2010 is not relevant to this action.
  I find this Union contention to be totally without merit for the following reasons:
  1. Virtually all of the currently recognized "just cause" theories suggest that, if not required, it is certainly strongly recommended that the employer review and give due consideration to an employee's overall work record, before considering disciplinary action and/or penalties. Both Daugherty and Abrams and Nolan recognize that consideration as part of "due process".
  2. The disciplinary record resulting from Farrington's April, 2010 off-duty vehicle accident incident is relevant for consideration, if for no other reason than its proximity in time to the instant situation. The disciplinary action imposed as a result of the April 2010 situation took effect on September 23, 2010 or about 5 months or so prior to the current situation.
  3. What is particularly notable and relevant about the September, 2010 disciplinary action was the fact that Farrington, in lieu of discharge, was given a "last chance" agreement (See details above in Background). The provisions of that last chance agreement were to remain in effect for a period of 36 months or until September, 2013.
  4. The City, while not contending that Farrington violated any of the five (5) specific provisions of the last chance agreement, did point out to him, in his termination letter of July 6, 2011, that the circumstances of his April, 2010 incident and the aftermath were, indeed, reviewed and considered in determining the appropriate action to be taken in this matter.

In reviewing and considering the record, as a whole, together with my findings, as above, I see a situation where, when viewed as single, isolated allegations, none of the offenses attributed to Farrington in 2011 would justify or merit discharge. In fact, I'm not certain that even collectively, they would be serious enough, in total, to meet the "just cause" standard.

The "trump card", however, is Farrington's record in the 2010 vehicle accident situation. His subsequently admitted to; 1) fleeing the scene of an accident, 2) filing a false report with authorities regarding the circumstances of the accident and 3) drinking at an after-hours liquor facility. Looking at these issues, we see an individual who, when confronted by the consequences of his bad decision-

making, immediately responds by running away and lying. Notwithstanding that he subsequently came to his senses and decided to try to remedy his mistakes; the record still stands that he initially made bad decisions and clearly exercised bad judgment under pressure.

To the credit of the City, they examined the total circumstances of the 2010 situation and decided that Farrington exhibited sufficient remorse and acceptance of responsibility for his errant actions to merit a "last chance". It was apparently their hope that if Farrington diligently and conscientiously continued on his path to rehabilitation over the required 36 months, and otherwise maintained satisfactory work performance, he would be firmly on a path of success for the rest of his law enforcement career.

I surmise that when the City reviewed the 2011 Internal Affairs investigation findings and looked back at the 2010 situation they came to the apparent conclusion that Farrington's past history of bad judgment and bad decision-making was not an isolated event, but an ongoing problem. Making correct and proper "judgments" is a critical ability in a law enforcement officer's job and bad judgments and decisions by an officer can be both financially costly and, in some circumstances, deadly. The City apparently decided, albeit reluctantly, that discharge was the only proper decision. Bad decisions incur bad consequences.

As an arbitrator, I have to restrain emotional impulses to routinely jump into disciplinary situations and substitute my judgment for that of the employer. Such caution is necessary because I know that I don't have a full and clear picture of the totality of the circumstances, solely on the basis of a couple of days of hearing. On the other hand, where, for example, 1) the record evidence is clear that the employer failed to afford the employee full due process, 2) the evidence is clearly insufficient to establish guilt or 3) where penalties levied by the employer are not reasonable or commensurate with the nature or severity of the alleged offense(s); I will and must take action to remedy the situation.

Arbitrator Whitley McCoy stated the dilemma quite eloquently in *Stockholm Pipe Fittings Co.*, 1 L.A. 160, 162 (McCoy, 1945):

> *"Where an employee has violated a rule or engaged in conduct meriting disciplinary action, it is primarily the function of management to decide upon the proper penalty. If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it….The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved – in other words, where there has been abuse of discretion*."

In this instance, I find no evidence or other rational basis to justify second-guessing or interfering with the Employer's discharge decision.

CONCLUSION

In view of my analysis, discussion and findings above, I conclude that the Employer has met its burden of proof and established by a preponderance of evidence that it had "just cause" to discharge employee Donald J. Farrington on July 16, 2011 and that the discharge was in full conformance with the provisions of the applicable labor agreement.

DECISION

Having concluded that the Employer did not violate the applicable labor agreement, as alleged by the Union in its Grievance of July 7, 2011, that grievance is hereby denied and dismissed. Concurrently, the Employer's discharge decision with respect to Donald J. Farrington is hereby sustained.

Dated at Minneapolis, Minnesota, this 13th day of February, 2012.

Frank E. Kapsch, Jr.
Arbitrator

Note: I shall retain jurisdiction in this matter for a period of fourteen (14) calendar days from the issuance of this Decision to address any questions or problems related thereto.