

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a
Dispute Between:

CITY OF BROOKLYN CENTER,
MINNESOTA

and

LAW ENFORCEMENT LABOR SERVICES,
INC., ST. PAUL, MINNESOTA

BMS Case No.: 12-PA-0732

Grievant: BZ
Subject: 3-Day Suspension

Heard: May 23 and 24, 2012
Award Issued: 8/24/2012

Sherwood Malamud, Arbitrator

APPEARANCES:

Abrams & Schmidt LLC, Attorneys at Law, by Marylee Abrams, 3820
Cleveland Avenue North, Suite 100, Arden Hills, MN 55112,
appearing on behalf of the Employer.

Isaac Kaufman, General Counsel, Law Enforcement Labor Services, Inc.,
327 York Avenue, St. Paul, MN 55130, appearing on behalf of the
Union.

ARBITRATION AWARD

Jurisdiction of Arbitrator

The City of Brooklyn Center, Minnesota, hereinafter the Employer or the City, and Law Enforcement Labor Services, Inc., hereinafter the Union, are parties to a Collective Bargaining Agreement that provides for the arbitration of grievances. On February 24, 2012, the parties notified the Arbitrator of his selection from a panel submitted to them by the Minnesota Bureau of Mediation Services to determine this grievance concerning the imposition of a three-day suspension by the Employer on Grievant, BZ. Hearing in the matter was held on May 23 and 24, 2012, at the Brooklyn Center City Hall. At the hearing, the parties presented documentary evidence and testimony. The hearing was not transcribed. The Arbitrator received the parties' written briefs on June 25, 2012.

Included in the Union's submission was a request to open the record to receive a vehicle list of CDR software version 3.5 published by Bosch. The Union indicated in its enclosure letter with its brief that it was unaware of the existence of this list on the Bosch website. The Employer objected to the receipt of this evidence. The Arbitrator rejected the submission on the following basis:

In order to properly consider this "list", I would need testimony to provide context as to its relevance and an explanation through testimony as to the significance of the "list" to the record evidence and testimony in this case. Without that information, it would not serve a useful purpose in my review of the record. Accordingly, I will not consider the "list" in my review of the record.

Subsequently, the Union responded to the ruling indicating that in its brief it addressed the issue of how the "list" is relevant to the evidence presented in this matter. To the extent the Arbitrator makes any further comment on this issue, he does so in the body of the Award. On the basis of the testimony, documentary evidence, and arguments of the parties, the Arbitrator issues the following Award.

On July 3, 2012, the Union and the City jointly requested that the Arbitrator place his consideration of the case on hold for a period of one week. Subsequently, on July 18, 2012, the parties presented the Arbitrator with a joint stipulation. In addition, they attached to the forwarding email a recording of a conversation between Union Steward Ratajczyk and Commander Gruenig and a transcript of this tape recorded phone conversation. With the stipulation, the parties asked the Arbitrator to continue the preparation of this Award. The July 18, email arrived at a time the Arbitrator was on vacation. He re-started his consideration of this grievance on July 29, 2012.

ISSUES

Although the parties were unable to stipulate to the exact formulation of the two issues to be determined by the Arbitrator, nonetheless, the parties agreed to allow the Arbitrator to formulate the precise statement of the issues.

First, there is the procedural issue. Was the grievance timely filed?

Second, the substantive issue may be formulated as follows:

Did the Employer have just cause to issue a three-day suspension to Police Officer BZ? If not, what is the appropriate remedy?

THE 2011 MEMORANDUM OF AGREEMENT

ARTICLE 11 – Discipline

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

- a. oral reprimand;
- b. written reprimand;
- c. suspension;
- d. demotion; or
- e. discharge.

...

11.9 Grievances relating to this Article shall be initiated by the Union in Step 3 of the grievance procedure under Article 12.

ARTICLE 12 – Employee Rights – Grievance Procedure

12.1 *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.

...

12.4 *Procedure* – Grievances, as defined by Section 12.1, shall be resolved in conformance with the following procedure:

Step 1. An 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. The Employer-designated representative will discuss and give an answer to such Step 1 grievance within ten (10) calendar days after receipt. 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 provision

or provisions of the Agreement allegedly violated, the remedy requested, and shall be appealed to Step 2 within ten (10) 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 ten (10) 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. The Employer-designated representative shall give the Union the Employer's answer in writing within ten (10) calendar days after receipt of such Step 3 grievance. A grievance not resolved in Step 3 may be appealed to Step 4 within ten (10) calendar days following the Employer-designated representative's final answer to Step 3. Any grievance not appealed in writing to Step 4 by the Union within ten (10) calendar days shall be considered waived.

...

Step 4. A grievance unresolved in Step 3 or Step 3a and appealed to Step 4 by the Union shall be submitted to arbitration subject to the provisions of the Public Employment Labor Relations Act 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.

12.5 *Arbitrator's Authority*

- 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) days following close of the hearing or the submission of briefs by the parties, whichever be later, unless the parties agree to an extension. The decision shall be binding on both the Employer and the Union and shall be based solely on the arbitrator's interpretation or application of the express terms of this Agreement and to the facts of the grievance presented.

ARBITRABILITY

Was the grievance timely filed?

In order to address the substantive issue over discipline, the Arbitrator must first determine whether the grievance was timely filed. If it was not filed timely, then the grievance will be dismissed. The timeliness determination begins with the language of Articles 11 and 12 of the Memorandum of Agreement.

It is Article 11.9 that introduces confusion to the determination of the timeliness issue. It provides that, "Grievances relating to this Article shall be initiated by the Union in Step 3 of the grievance procedure under Article 12." It is at Step 3 of the procedure that Article 11.9 directs that a grievance over discipline be initiated. The timeline established in Step 3 of the grievance procedure is 10 days. The language of the Agreement is as follows:

Step 3. If appealed, the written grievance shall be presented by the Union and discussed with the Employer-designated Step 3 representative. The Employer-designated representative shall give the Union the Employer's answer in writing within ten (10) calendar days after receipt of such Step 3 grievance.
(Emphasis added)

The language of Step 3 deals with grievances that were filed at Step 1 and are advancing through the Grievance Procedure.

However, the intent of Article 11.9 is to have a grievance **initiated** at Step 3. Does the timeline specified in Step 3 or the one set out in Step 1 apply? Step 1 spells out the timeline for initiating a grievance, as follows:

Step 1. An 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.

Which timeline applies? Is it the Step 3 timeline of 10 calendar days or is it the Step 1 timeline of 21 calendar days? Under the Agreement, there is no Step 1 in the processing of a grievance over discipline. The process begins at Step 3 of the grievance procedure.

It is this very subject, which timeline applies the 10-day of Step 3 or the 21 day at Step 1 that Union Steward John Ratajczyk and Commander Gruenig discussed in their August 19 phone conversation. (Both the transcript and the recording were provided to the Arbitrator by stipulation of the parties post close of the record and the submission of briefs)

On August 9, the Employer issued the three-day disciplinary suspension at issue in this arbitration. More precisely, it provided BZ with the notice that he would be suspended for three days. August 19 was the tenth calendar day subsequent to the issuance of the discipline. The Union Steward called Commander Gruenig to ascertain whether a grievance over the discipline was due on that day on August 19 or at a later date at the end of August. In the course of their conversation, both the Commander and the Union Steward agreed that the 21 day time period for filing a grievance applied to the appeal of a disciplinary action. Since the last day of the 21 day period fell during the Labor Day weekend, the Commander extended the time for filing a grievance to a date after Labor Day, September 5. Chief of Police Benner subsequently extended that to September 12.

It is clear from the conversation between the two, through the transcript and the recording of that conversation, that the City clearly stated that time limits should be observed. Union Steward Ratajczyk requested several times that the time limit be extended without a specific date by which a grievance should be filed. The City had no interest in that nor did it indicate any interest in waiving a time limit for the filing of the grievance over the suspension. Furthermore, it is clear from the conversation that the time limit applicable was the 21 day rather than the 10 day period in which a grievance over the imposition of discipline was to be filed.

By September 8, the Union Steward had obtained the agreement of the City to spread the three-day suspension over three pay periods. In an email to BZ, Ratajczyk informed BZ that:

Tony is willing to work out the time you have to do over three pay periods. Can you work with Rick or Tony to schedule the days? Then once it is done we will file. LELS will need release of information to get the police reports and the reconstruction report.

The nub of the difference between the parties is what is the event that precipitates the filing of the grievance. Is it the issuance of the notice back on August 9? Or, does the timeline for filing the grievance begin when the last day of the disciplinary suspension is served? The email from Union Steward Ratajczyk on September 8 reveals that the Steward believed that the time for filing a grievance would begin in November after BZ had served his last day of suspension.

Both the Employer and Union cite the Step 1 language at Article 12.4 in support of their position. Again, the language reads as follows:

An 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.

There is no Step 2 in the procedure established by the Agreement for the appeal of a disciplinary action. The appeal of a disciplinary action begins at Step 3. The Employer answer to the grievance must be provided within 10 calendar days. At Step 3 the Agreement goes on to state:

A grievance not resolved in Step 3 may be appealed to Step 4 within ten (10) calendar days following the Employer-designated representative's final answer to Step 3.

Step 4 is the arbitration step of the grievance procedure. The parties establish a one step process to consider an appeal of a disciplinary action. If the parties are unable to resolve the grievance appeal of a disciplinary action, the next step places the dispute before a neutral party, an arbitrator.

It is at Article 12.6 headed *Waiver* that the parties establish the result of the failure of the Union and Employer to observe the time limits specified in Article 12.

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.

Under the language of 12.6, the Union's failure to comply with the time limit means that it has waived its right to appeal the grievance. In order to avoid this waiver, Ratajczyk contacted Commander Gruenig to ascertain which time limit applied and to alert the Commander that it was likely that a grievance would be filed within the time limits.

The Arbitrator reviews the evidentiary record to determine what is the “occurrence” that precipitates the filing of a grievance.

If, according to the Union position, the action that precipitates a grievance is the last day that BZ serves the suspension, why then did Union Steward Ratajczyk call Commander Gruenig on the tenth day after the issuance of the notice of suspension? Whether it was a 10 day or a 21 day time limit, it would not have expired on August 19. Yet, it is clear from the conversation between the two of them that the Union Steward believed that under a 10 day limit the Union faced waiver of the right to file a grievance if the grievance were not filed on August 19. This evidence supports a finding that the precipitating event for filing a grievance is the issuance of the disciplinary notice, rather than the serving of the suspension.

The purpose of the grievance procedure is to allow an exchange between Employer and Union to attempt to resolve the grievance. In the case of a disciplinary action, since it appears, even in this case of the issuance of a three-day suspension which was issued by the Chief of Police, that it would serve no purpose to have an internal departmental or city step to review the decision of the Chief of Police to impose discipline. Further, the language of the Agreement clearly establishes that the purpose of a grievance is to provide the parties with the opportunity to resolve the dispute underlying the imposition of discipline. The chance of resolving a dispute over discipline is best before the disciplinary action is implemented. In other words, if the parties discuss the intent of the Employer to impose a three-day suspension prior to its imposition but after the issuance of the disciplinary notice, then the employee has not served the suspension and the Employer does not face a situation in which, if it accedes to the Union’s position that discipline is inappropriate, it will incur back pay. Any discussions held prior to the serving of a suspension occur at a point in time at which neither side has lost or changed its position with regard to the issues in dispute. Subsequent to the serving of a suspension, the employee has served the suspension and the Employer has not had the benefit of the employee’s work time during the period in which the suspension was served. These events are not reversed by a subsequent settlement.

The Union's interpretation of the language may stand contrary to the purpose of a disciplinary procedure, but the language of the Agreement may be read to support that interpretation. The Employer's assertion that it is the notice of suspension that serves as the "occurrence" of the alleged violation is supported, as well, by the language of Step 1. The Arbitrator turns to the conduct of the parties under this language, to resolve this contractual ambiguity.

In Exhibit 16, the Employer compiled a list of grievances filed by the Union over a period beginning in 2003 through 2011. The exhibit lists 10 disciplinary grievances filed by the Union during this period. It includes an oral reprimand, suspensions of varying lengths and a termination. In all 10 instances cited on this exhibit, the Union filed its Step 3 appeal within 21 days of the issuance of the notice of discipline. In all but the appeal filed in the case of an oral reprimand issued on October 20, 2004, the Union filed the appeal of discipline within a week of its issuance.

This evidence provides strong support for the Employer's position that the "occurrence" that starts the 21 day time clock in which a grievance is to be filed is the issuance of the disciplinary notice. If there were no other evidence concerning the procedural issue as to whether the grievance was timely filed, the Arbitrator would conclude that this grievance was not timely filed. The November 22 filing is well past 21 days of the issuance of the disciplinary notice of a 3-day suspension issued on August 9, 2011.

However, there is additional evidence concerning the arbitrability of this disciplinary grievance. After the November 22, 2011 filing of the grievance, the parties attempted to identify a date when they could meet and perhaps resolve the underlying dispute. It soon became clear that the schedules of Chief Benner and Union Business Representative Hinrichs would not accommodate a meeting within 10 days of the November 22 filing of the grievance that would permit the City to respond in a timely fashion. For that reason, Hinrichs wrote to Chief Benner and waived the 10 day time limit in which the City had to

respond to the grievance. For Chief Benner and the City, all that remained to do in light of the Union's waiver was to establish a date for their meeting.

Instead, Chief Benner responded on December 1, 2011 to the Union's waiver of the 10 day timeline for the City's response to the grievance with the following email (Exhibit 3-g):

The City also waives the timeline for this Step 3 grievance to allow for time to schedule a meeting to discuss a resolution. It is my hope we would be able to meet sometime during the week of December 12.

Please advise if this email does not meet your expectations for a waiver of timeline, thank you.

Ultimately, the parties, Union Representative Hinrichs and Chief Benner identified December 21 as the date for the meeting to address the grievance. Chief Benner prepared a response to the November 22 filing of the grievance for the signature of the City Manager, Curt Boganey bearing the date of November 29, 2011, Exhibit 3-f. In the letter, the Chief denies the substance of the grievance with the statement that the suspension was issued with cause. The letter goes on to state, "Also, this grievance was not submitted within the contractual timelines." However, this letter was never given to the Union on November 29 or on any other date. The letter denying the grievance and asserting the timeliness defense issued on January 6, 2012 over the signature of Chief Benner. In this letter, the Chief denied the grievance both on timeliness and substantive grounds.

The Union argues that in his December 1 email Chief Benner waived the assertion of the timeline for filing a grievance. The Union argues in its brief that the only timeline the City could waive is the 21-day timeline for the filing of a grievance. There is no other timeline for the City to waive. If the intent of the City was merely to meet and fully discuss the grievance, once the 10 day period for the City's response was waived by the Union, the only thing left to do was to establish a date for the meeting. It was unnecessary for the City to waive the timeline to set-up the grievance meeting. The only explanation that provides

meaning to the City's waiver of the timeline for this disciplinary appeal at Step 3, is a finding that the City waived the timeline for the initiation of the grievance at Step 3. The Arbitrator concludes that on December 1, 2011 the City waived the operation of the 21-day Step 3 timeline for the initiation of a grievance over the 3-day suspension.

The Arbitrator credits the testimony of Chief Benner that during the December 21 meeting he indicated that, in his view, the grievance was untimely. However, the expression of that view on December 21 does not change the fact that on December 1, the Chief waived the timeline for the initiation of this grievance.

The Arbitrator undertakes this torturous analysis of the procedural arbitrability of this grievance for several reasons. First, the discovery of the conversation between Commander Gruenig and Union Steward Ratajczyk clearly established that the City had every intention of enforcing grievance timelines. Second, Commander Gruenig and Union Steward Ratajczyk anticipated that a grievance, if one were filed, would be filed by September 5, or no later than September 12. There is no explanation in the record as to why the grievance was not filed by September 12.

Furthermore, the above analysis points to the ambiguity in the Agreement's language concerning the 10 or 21-day timeline for filing a disciplinary grievance. Both the City and Union during those discussions on August 19, 2011 questioned which timeline applied. Finally, but for those discussions, the focus of this portion of the grievance would be on whether the Chief waived the timeline for the initiation of the grievance.

On the basis of this finding, that Chief Benner waived the timeline for filing this grievance, the Arbitrator continues with the analysis of the substance of the grievance to determine whether the Employer had just cause to impose a three-day suspension, in this case.

STATEMENT OF FACTS

The accident in which BZ was severely injured occurred on November 16, 2010. Within the 18-month period of the date of the crash, BZ had been in five prior incidents that resulted in damage to his patrol car. He received progressive discipline for those incidents. The incident that immediately preceded the crash occurred on October 6, 2010. BZ damaged a squad car, and he received an 8-hour (1-day) suspension. The Employer ordered him to attend an on-line driving course. He completed the on-line driving course on November 9, just one week prior to the crash that is the subject of this discipline. BZ did not grieve any of the discipline issued for the five prior incidents involving his operation of a squad car.

On the basis of the totality of the evidence presented, the Arbitrator's review of the statements of witnesses submitted into evidence by the parties, his review of the photographs of the scene of the accident and the damage done to his squad car, and particularly the location of the automobile operated by the citizen who made a left turn into the driver's side front door of the squad car, form the basis of the following factual findings made by the Arbitrator concerning the November 16, 2010 accident.

The Arbitrator refers to the citizen who operated the vehicle that crashed into the driver's side front door of the squad car as Mr. "K." Mr. K was proceeding south on Brooklyn Boulevard and attempting to turn left onto 51st Street. Brooklyn Boulevard is a four-lane street. At the time of the accident on the night of November 16 at 10 p.m., no cars were parked on the street. Mr. K proceeded to make the left turn and in doing so traversed the left-hand lane, the lane closest to the median of the street. He proceeded into the right, the curb lane and into BZ's squad car as it was proceeding North on the inner right-hand lane, the curb lane of Brooklyn Boulevard.

The Minnesota State Patrol investigated the accident. It began on the night of the accident. The State Patrol issued its report six months later, on May 29, 2011. The investigator concluded that BZ's speed contributed to the accident. The investigator downloaded the information provided by the software

information on the deployed air bag in BZ's squad car, Bosch software version 3.5. The software indicated that BZ was proceeding in excess of 80 miles per hour for 3.5 seconds prior to the crash. Furthermore, the software indicated that at the time of the crash, BZ had reduced his speed, presumably through application of the brakes, to approximately 40 miles per hour.

The photograph of the accident scene indicates that the van that Mr. K drove was perpendicular to the right lane of the Northbound side of Brooklyn Boulevard. The front of the van was badly crunched. The front tires rested on the lane marker that divides the inner from the outer lane on the Northbound side of Brooklyn Boulevard.

In order to remove BZ from his squad car, the emergency vehicles that responded to the accident had difficulty removing BZ from his squad car. One officer entered the squad car from the opposite side to work to free BZ from the squad car for transport to the hospital. BZ was in a coma. He has no recollection of the accident whatsoever.

Mr. K refused to participate in a field sobriety test. His breathalyzer measured his blood alcohol level at .108. The maximum allowable in Minnesota is .08. Mr. K was arrested at the scene for operating a vehicle while under the influence of alcohol, what is known in vernacular terms as a dooey—DUI.

These are the salient facts of the accident. The Arbitrator discusses below the inferences he drew from those facts with regard to the disciplinary action taken by the Employer. First, the Arbitrator addresses several due process claims raised by the Union. The Union maintains that the Employer unnecessarily delayed the imposition of discipline depriving BZ of due process.

The Employer did not receive the report of the investigation conducted by the State Patrol and its reading of the data provided by the Bosch software until May 29, 2011. The Employer did not attempt to ascertain what occurred from BZ's individual account of the accident at the time of the accident,

because BZ was in a coma immediately after the accident. Subsequent to the accident, BZ had no recollection of how the accident occurred.

The Union argues that the Employer could have obtained a statement from BZ as to his “normal” routine when working traffic control on Brooklyn Boulevard. However, there is not a scintilla of evidence to suggest that what BZ did or did not do on the night of November 16 comported with his regular routine.

From the evidence presented, the Arbitrator is unable to reconstruct how BZ got to the point of the accident. The Bosch software reports his speed 3.5 seconds prior to the accident at 82 mph. His speed was approximately 40 mph at the time of impact. Yet, the witnesses report BZ’s car was accelerating at the time of impact.

One quarter of a mile South of the point of impact, is the boundary between Minneapolis and Brooklyn Center. BZ’s chase may have begun in Minneapolis. How else would he be able to accelerate his vehicle to 82 mph. It requires some distance to achieve that speed even for a Ford Crown Victoria squad car equipped with a V-8 engine.

During the hearing, at the request of the parties and in their presence, the Arbitrator participated in an inspection of the site of the accident. The Arbitrator cannot account for how the accident occurred in light of the speed of BZ’s car and based on the accounts of the witnesses to the accident. However, the Arbitrator need not recreate the accident and how it occurred for the purpose of determining whether BZ was properly disciplined.

The Arbitrator concludes that the Union’s charge that BZ was denied due process due to the delay in the issuance of discipline is wholly without merit. BZ’s physical state at the time of the accident and his subsequent inability to recall the accident or any circumstances surrounding the accident left the Employer no choice but to ascertain, as best it could, what occurred based on the statements of witnesses obtained by law enforcement at the time of the

accident at the scene of the accident. The Employer waited for the report from the Minnesota State Patrol of its investigation and the results of the information provided by the software downloaded from the deployed air bag in BZ's squad car.

The Employer acted appropriately when it did not obtain or attempt to obtain a statement from BZ, while he was in a coma or subsequently, when he regained consciousness, when he was on light duty or after he returned to his regular patrol duties and responsibilities. He had no recollection of the circumstances of the accident. BZ suffered no prejudice as a result of the Employer's appropriate decision to refrain from obtaining a statement from him under the unique circumstances of this case. This charge is also without merit.

Furthermore, the imposition of discipline was delayed further when the Chief of Police waited for the City's Accident Review Committee to complete its review of the accident and determine whether the accident was "preventable" or not under City policy as set forth in General Order 906:612 and Attachment A, thereto. The Committee determined that the accident was "preventable" and that BZ warranted discipline, but at a level less than progressive discipline would dictate. The Committee recommended lesser discipline for several reasons. Mr. K operated his vehicle under the influence of alcohol. The Accident Review Committee did not unanimously conclude that the accident was "preventable."

The Union argues that the application of the just cause principle to a fact pattern involving an accident between a squad car operated by a police officer and a citizen should be determined on the basis of fault rather than preventability. In this regard, the Union submitted with its brief the award of Arbitrator Gallagher in Ramsey County Sheriff's Department and Teamsters Local 320, 100 LA 208 (1992). In this award, Arbitrator Gallagher was called upon to contend with a determination by a review board and address a policy that required that an officer operate a squad car in a manner to prevent an accident. The policy at issue in Arbitrator Gallagher's case provided for the imposition of discipline if the board found the accident "preventable" even

though the officer was not at fault. In pertinent part, Arbitrator Gallagher reasoned as follows:

Resolution of this grievance requires a determination of the standard for disciplining an employee who has a motor vehicle accident while engaged in police activity. Apparently, the Employer's new accident review Board has adopted a standard that places blame by deciding whether an accident is 'preventable.' I do not apply that standard, however, because it is ambiguous, and its ambiguity makes it difficult to understand for those working under it.

Instead, I apply a standard similar to the one used in the civil courts to determine tort liability. Liability follows from negligence; i.e., the failure to use the care that a reasonable person would use under the same circumstances. For police employees, that standard should be adjusted to accommodate their special circumstance—that, while driving, they are obliged to engage in police work Accordingly, I apply the following standard for the discipline in this case. *Discipline may be imposed upon a police employee who has a motor vehicle accident while engaged in police activity if the employee fails to use the care that a reasonable person would use in the circumstances.* (As quoted in the Union's brief at p. 19.)

The determination of Arbitrator Gallagher represents his opinion and is not binding upon this Arbitrator. This Arbitrator finds that the Brooklyn Center Police Department may establish a policy to be observed by its police officers that requires that its officers operate automobiles in the pursuit of police activity in a prudent manner. Furthermore, they should do so, particularly when they are operating such vehicles at high speeds to take account of their surroundings and avoid accidents that may be considered preventable.

The City of Brooklyn Center Police Department does not have a specific policy with regard to maximum speeds for chases other than the admonition in Attachment A that officers should drive reasonably and prudently. State statute requires that an officer operate an emergency vehicle "with due regard for the safety of persons using the street" Minnesota Statutes 169.17. The

Arbitrator concludes that the City does not violate the principle of just cause, when it imposes a higher level of care through its decision to discipline officers when they are engaged in police activity if they should become involved in accidents that the Accident Review Committee determines to be preventable.

At this point, it should be noted that the determination of the Accident Review Committee that the accident was preventable is not directly before the Arbitrator. First of all, there is no provision in the parties' Agreement for arbitrable review of the decisions of the Accident Review Committee. Furthermore, the decision of the Accident Review Committee was provided to BZ together with the notice of suspension on August 9, 2010. Under departmental policy, BZ had 21 days in which to appeal the findings of the Accident Review Committee to the Chief. He did not do so. Therefore, both substantively and procedurally the conclusion that the accident in which BZ was involved was "preventable" is not subject to review by the Arbitrator.

However, the question before the Arbitrator is whether BZ's involvement in this preventable accident is the appropriate subject of discipline.

The Accident Review Committee sets out its reasoning in its report, as follows:

Officer BZ

On 11/16/2010 Officer BZ was driving his marked squad northbound Brooklyn Blvd when a vehicle making a left hand turn from the southbound lane struck his squad. The impact of the crash caused the squad to be pushed off the roadway a substantial distance. The driver of the oncoming car was intoxicated and was arrested for DUI. The crash was reconstructed by the State Patrol. Their findings state that Officer BZ's squad was travelling at 82 mph in a 40 mph zone. At the time of impact the squad did not have on its emergency lights and or siren. That as well as the actions of the impaired driver contributed to the accident. For exact findings please see attached report. Officer BZ was not able to give a statement because he was unable to remember the circumstances leading to crash. This was due to the traumatic nature of his injuries.

Preventable, this is Officer BZ's third accident in 12 months. He had previously received a one day suspension due to the number of preventable accidents he was involved in. The Committee requests a downward departure from the progressive discipline model. (less discipline than per policy). For the following reasons:

- The other driver's illegal alcohol consumption by definition was a leading factor to this crash.
- The other driver failed to yield to the right of way.
- The inability of Officer BZ to assist in this investigation causes the Committee to make reasonable assumptions.
- By policy officers are encouraged to engage their emergency lights in such a manner as to prevent the fleeing of an offender's vehicle. This usually means that an officer engages their emergency lights when in close proximity to the offender.
- Lastly, this Committee ruling was by consensus not a **unanimous** finding.

Just Cause

The Committee in Exhibit 6-d does not set forth the reasons why it found the accident preventable. In one sense, the accident was clearly preventable. If Mr. K had not continued to make his left turn across the Northbound lane that abuts the center line of Brooklyn Boulevard across that entire lane and into the right lane, the lane that abuts the curb on that street, there would have been no accident.

There is no dispute that the November 16, 2010 accident was BZ's third in 12 months.

Mr. K made statements at the scene of the accident that he saw BZ's car. He thought that he could complete the turn without incident. How many drivers would continue with a left turn when they observe a car coming towards them at a high rate of speed? Clearly, Mr. K's judgment was impaired. He drove into **the side** of Officer BZ's squad car.

The Accident Review Committee notes that BZ was traveling at 82 miles per hour in a 40 mile per hour zone. However, there is no policy prohibiting an officer from speeding up to that speed to apprehend a person committing a traffic violation. Furthermore, as the Accident Review Committee notes in its report, the absence of emergency lights and/or a siren does not violate departmental policy.

Officer BZ testified that he only puts on his siren and emergency lights, when he has apprehended or is approaching the offending vehicle. The Review Committee notes that Mr. K failed to yield the right of way. The Arbitrator can find no violation of departmental policy in the manner in which Officer BZ conducted himself on the evening of November 16. The Employer accepts the understanding that BZ was in pursuit of a person committing a traffic offense as the reason for BZ's acceleration to a speed of 82 mph.

The Employer determined that BZ failed to operate his vehicle in a prudent manner, when he was unable to stop his vehicle before Mr. K's van hit him. The State Patrol finding in this regard assumes that had BZ been able to stop his vehicle within 71 feet rather than 119 feet, Mr. K would have proceeded to complete his left turn without incident. The State Patrol report indicates that BZ's inability to stop his vehicle was a factor in the occurrence of the accident.

In any accident, no matter how it is caused, the mere presence of a vehicle involved in the accident is a factor in the occurrence of that accident. However, whether the standard employed is one of fault or preventability, the mere presence of a vehicle should not serve as the basis for the imposition of discipline under a just cause standard. Just being there, in and of itself, is not a sufficient reason for the imposition of discipline.

The State Patrol report that BZ, if he had proceeded at a speed that allowed him to bring his vehicle to a complete stop at 71 feet rather than 119 feet after the application of brakes would have placed him well before the intersection. The State Patrol concludes that the accident would not have occurred. This assumes that the operator of the van, Mr. K's vehicle, would

have proceeded to complete his turn through both Northbound lanes of Brooklyn Boulevard while BZ was stopped. However, Mr. K was under the influence of alcohol. His judgment was impaired. He may have remained stopped preparing to make his left turn at the moment that Officer BZ's squad car was stopped, had BZ been able to bring his car to a complete stop 71 feet after the application of brakes. **Or**, Mr. K may have proceeded to complete his left turn, when Officer BZ started his vehicle again and found himself at the intersection of 51st Street and Brooklyn Boulevard.

The evidence presented indicates that Mr. K observed Officer BZ's automobile, although Mr. K would not have known that it was a patrol vehicle, but he observed it prior to completing his left turn. He thought that he could complete his turn before Officer BZ reached the intersection. Mr. K observed a speeding vehicle in the far right lane that was either accelerating or decelerating rapidly as a result of the application of brakes or accelerator, and he determined that he could complete his turn before the patrol car reached the 51st Street and Brooklyn Boulevard intersection. Only a vehicle operated by someone under the influence of alcohol would have come to that conclusion. Whether the other vehicle had stopped and started up again or just continued would not have made a difference given the judgment exercised and demonstrated by Mr. K, when he elected to complete his turn. It is on this basis the Arbitrator concludes that BZ's vehicle and his participation in the accident was the result of his being there, nothing more. Whether he was going 82 miles an hour or 2 miles an hour certainly contributed to the severity of the accident not its occurrence.

The Arbitrator provides an analogy to assist the reader of this award to understand the circumstance that existed at the time of this accident. It may be compared to a situation in which a car is stopped on a rural road and a deer runs into the side of the vehicle. The operator of the vehicle was guilty of being at the point at which the deer, for reasons known only to the deer, elected to run into the side of the vehicle.

Under a different scenario, if a driver observes deer along the side of a road, but the driver continues to proceed at normal speed. A deer stops in the middle of the roadway; it is paralyzed by the car's lights. Due to the speed of the car, the driver cannot stop in time. The car hits the deer. The accident between the deer and the automobile may be termed preventable. The accident where the deer runs into the side of the automobile, whether the automobile is stopped or moving, is an accident that occurred because the vehicle was at the wrong place at the wrong time.

On the basis of this analysis, the Arbitrator concludes that this sixth accident in 18 months is not one that is chargeable and subject to disciplinary action. BZ was guilty of being at the wrong place at the wrong time. The speed at which he was proceeding and the absence of emergency lights and siren did not violate any departmental policy.

Remedy

In the above analysis, the Arbitrator concludes that the November 16, 2010 accident was not the proper subject of discipline. Therefore, the three-day suspension should be set aside and all reference to the discipline for this accident should be removed from BZ's personnel records. As part of the disciplinary action, the Employer required BZ to participate in monitored driving by an evaluator from the Minnesota Highway Safety Center in March 2012. The Arbitrator treats that as additional training, rather than part of departmental disciplinary action. The report of that evaluator, Exhibit 17, shall remain in BZ's personnel file. It is not discipline. It is training. Therefore it is not subject to review by the Arbitrator as part of the grievance process.

Based upon the above analysis, the Arbitrator issues the following:

AWARD

1. The Employer waived the assertion of the contractual time limits to the filing of this grievance. As a result of that waiver, this grievance is arbitrable.

2. The Employer did not have just cause to discipline BZ with a three-day suspension. The Employer shall set aside the discipline, reimburse BZ for the three days of pay docked as a result of the imposition of the suspension and remove all reference to the three-day suspension from BZ's personnel records.



August 24, 2012

Sherwood Malamud
Arbitrator