

**IN THE MATTER OF ARBITRATION BETWEEN**

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|   | ) | <b>BMS Case No. 12-PA-1103</b>          |
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| <b>CITY OF BLAINE, BLAINE, MINNESOTA</b>    | ) | <b>Issue: Suspension</b>                |
|   | ) |   |
| <b>(“City” or “Employer”)</b>               | ) | <b>Site: Blaine, Minnesota</b>          |
|   | ) |   |
| <b>&amp;</b>                                | ) | <b>Hearing Date: September 14, 2012</b> |
|   | ) |   |
| <b>LAW ENFORCEMENT LABOR SERVICES, INC.</b> | ) | <b>Briefing Date: October 19, 2012</b>  |
|   | ) |   |
| <b>(“Union” or “LELS”)</b>                  | ) | <b>Award Date: March 15, 2013</b>       |
|   | ) |   |
|   | ) | <b>Arbitrator: Mario F. Bognanno</b>    |
|   | ) |   |

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**JURISDICTION**

The parties to the above-captioned matter are City of Blaine, “City” or “Employer,” and Law Enforcement Labor Services, Inc., “Union” or “LELS,” who represents the Police Officers and Detectives employed by the Blaine Police Department (“BPD”). The parties are signatories to a Collective Bargaining Agreement (“CBA”) with an effective term of January 1, 2011 through December 31, 2013. (Joint Exhibit 1) Article 10, §10.1 of the CBA provides that the discipline of any represented employee must be for “good cause only.” (Joint Exhibit 1)

On February 1, 2012, the Grievant was suspended from duty for four (4) days without pay and, during this period of suspension, the Grievant’s authorization to engage in licensed police work and to carry his BPD-provided firearm were also suspended. Further, he was prohibited from performing any irregular police work (e.g., working on “overtime assignments,” performing police work at the Blaine High School (“BHS”) and so forth) without expressed supervisory authorization.<sup>1</sup> (Joint Exhibit 2)

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<sup>1</sup> The precise duration of Grievant’s period of suspension was from 0700 on Thursday, February 2, 2012 through 1500 on Tuesday, February 7, 2012. (Joint Exhibit 2)

The record shows that at the time of the instant matter, the Grievant was in his third year as the School Resources Officer (“SRO”) at BHS and, before that, he served as the field training officer for several new BPD police officers. Moreover, he occasionally worked as a provisional detective, receiving high marks for this work: as Chief Chris Olson testified, he did a “fantastic job;” he has a “great work ethic.” The Grievant was a “good cop,” with several recent letters of commendation on file and three (3) positive BPD employee evaluations dating back to 2008. (Employer Exhibit 1, Tab 9, p. 2; Union Exhibits D, E, F, G, H & I) At the arbitration hearing, the Grievant testified, without contradiction, that the instant discipline was his first as a licensed police officer; his first, during his six (6) years with the BPD and previous nine (9) years with the Sherburne County Sheriff’s Department.

However, notwithstanding the Grievant’s prior employment record, the City maintained that it had good cause to suspend the Grievant and to forego lesser pre-discharge forms of progressive discipline such as an oral or written reprimand. Beginning on September 21, 2011, the Employer identified a series of unfolding events that resulted in the Grievant’s purchase of a stolen trailer – a trailer he suspected was stolen – discrediting himself and the BPD. Given the necessary and high standing of “trust” and “integrity” in the law enforcement community and the Grievant’s admission of some BPD policies, about which he had prior knowledge and understanding, the Employer suspended the Grievant. (Joint Exhibit 2; Company Exhibit 1, Tab 25)

On February 13, 2012, the Union filed a Step 1 grievance, challenging the Grievant’s discipline, alleging that his suspension was not for just cause. (Joint Exhibit 3) On February 21, 2012, the Employer denied the Step 1 grievance. (Joint Exhibit 4) The grievance was then

advanced to steps two (2) and three (3) of the grievance procedure but a settlement was not achieved. (Joint Exhibits 5, 6 & 7) Thus, the matter was appealed to arbitration for final and binding determination. (Joint Exhibits 8, 9 & 10)

The undersigned Arbitrator heard the grievance on September 14, 2012, in Blaine, MN. Appearing through their designated representatives, the parties received a full and fair hearing. Witnesses were sworn and cross-examined. Exhibits were accepted into the record. Consistent with a "Protective Order" that was issued and cognizant of protections afforded private personnel data pursuant to the Minnesota Government Data Practices Act, Minn. Stat. 13.01, *et seq.*, the Grievant is identified herein as "Grievant." The parties waived the provision in Article 7, § 7.5.2 of the CBA that requires a decision within 30-days of the record's close. (Joint Exhibit 1) The parties filed post-hearing briefs on October 19, 2012. Thereafter, the present matter was taken under advisement.

**APPEARANCES**

**For the Employer:**

|                 |                                |
|-----------------|--------------------------------|
| Susan K. Hansen | Attorney at Law                |
| Chris Olson     | Chief, BPD                     |
| Dan Pelkey      | Lieutenant, BPD                |
| Brandon Fettig  | Community Service Officer, BPD |
| Terry Dusssault | Director, Human Resources      |

**For the Union:**

|               |                             |
|---------------|-----------------------------|
| Isaac Kaufman | General Counsel, LELS, Inc. |
| Nick Wetschka | Business Agent, LELS, Inc.  |
| Grievant      | Patrol Officer              |

**I RELEVANT CONTRACT PROVISIONS AND BPD POLICIES**

**COLLECTIVE BARGAINING AGREEMENT**

**ARTICLE 10 – DISCIPLINE**

The EMPLOYER will discipline employees for just cause only. ...

(Joint Exhibit 1)

**BLAINE POLICE DEPARTMENT POLICIES**

**POLICE REPORT WRITING**

It is the policy of the Blaine Police Department to prepare professional, accurate and complete reports on all calls for service and self-initiated activity its members respond to or investigate; and to maintain and disseminate those reports ...

**368.01 DEFINITIONS:**

A. Reports - A report includes, but is not limited to:

...

8. Any and all paperwork related to ... transportation holds ...

9. Tow Sheets; and,

10. All other paperwork

**368.02 COMPLETION OF REPORTS**

A. Reports will be completed prior to an officer going off-duty for the remainder of the scheduled workday. ...

**VEHICLE IMPOUNDMENT**

**312.01 CONDITIONS FOR VEHICULAR IMPOUNDMENT**

A. Motor vehicles shall be impounded under the following conditions:

...

4. Recovered stolen vehicles where the owner is not present or cannot a. retrieve the vehicle within a reasonable time period (reasonable for b. officer to stand by and wait).

...

6. The vehicle is determined to be unsafe to drive on public streets or a. highways, so its continued operation poses a danger to public safety.

...

**312.02 IMPOUND PROCEDURES**

...

B. A tow sheet and an Incident Contact Report (ICR) will be prepared on all cases in which a vehicle or vehicles are impounded.

...

**312.03 INVENTORY PROCEDURES FOR IMPOUNDED VEHICLES**

A. An inventory of all vehicles impounded will be conducted. This inventory includes the trunk, ..., all locked or unlocked containers within the vehicle. Those items observed during the course of the inventory will be noted on the tow sheet. This inventory will also include the physical condition of the vehicle.

...

**CODE OF CONDUCT**

**300. 03 PRINCIPLES GOVERNING CONDUCT OF SWORN OFFICERS**

A. Officers of the Blaine Police Department shall conduct themselves, whether on or off duty, in accordance with ... Policies, Procedures, Rules and General Orders of the ..., Blaine Police Department.

B. Officer of the Blaine Police Department shall refrain from any conduct in an official capacity that detracts from the public’s faith in the integrity of ... its Police Department.

...

D. Officers of the Blaine Police Department shall not, whether on or off-duty, exhibit any conduct which discredits themselves, the law enforcement profession, the City of Blaine and the Department. Officers shall not exhibit any conduct that impairs their ability or that of other Officers or the Department to provide law enforcement services to the community.

...

F. Officers of the Blaine Police Department shall not compromise their integrity nor that of the Department or law enforcement profession by accepting, giving or soliciting any gratuity which could be reasonably interpreted as capable of influencing their official acts or judgment, or by using their status as a Police Officer for personal, commercial, or political gain.

G. Officers of the Blaine Police Department shall not compromise their integrity, nor that of the Department or law enforcement profession, by taking actions or attempting to influence actions when a conflict of interest exists between their job duties and their off-duty life.

**OBJECTIVES**

...

**101.3(D) RECOVERY AND RETURN OF PROPERTY**

... To minimize the losses due to crime, the department makes every reasonable effort to recover lost or stolen property, to identify its owners, and to ensure its prompt return.

...

**PERSONAL CONDUCT**

...

**102.3 CONDUCT UNBECOMING AN OFFICER**

A police officer is the most conspicuous representative of government, and to the majority of the people they are a symbol of stability and authority upon whom they can rely. An officer’s conduct is closely scrutinized, and when their actions are found to be excessive, unwarranted, or unjustified, they are criticized far more severely than comparable conduct of persons in other walks of life. Since the conduct of an officer or civilian employee, on or off-duty, may reflect directly upon the department, an officer must at all times conduct themselves in a manner which does not bring discredit to themselves, the department, the City or the law enforcement profession.

...

**102.6 INTEGRITY**

The public demands that the integrity of its law enforcement personnel be above reproach, and the dishonesty of a single department member may impair public confidence and cast suspicion upon the entire department. ... Department employees must scrupulously avoid any conduct which might

compromise the integrity of themselves, their fellow officers, or the department, and has the obligation to report the dishonesty of others.

**102.6(A) GRATUITIES**

Gifts, rewards or gratuities or other benefits, shall not be knowingly accepted by a member of the department when such benefit is granted either fully or partially as a result of their employment by the department.

No member of the department shall offer or give gifts, gratuities, or special privileges to any person or agency in expectation of special benefit to themselves or the department.

**102.6 (B) SOLICITATIONS**

No employee of this department shall solicit any form of benefit for themselves, the department, the City, or any other organization, from any person, group, or firm when the benefit is to be secured as a result of their employment by the department. ...

(Employer Exhibit 1, Tab 26)

**II. ISSUE STATEMENT**

Pursuant to Article 7, §7.5.1 of the CBA the parties submitted issue statement proposals.

(Joint Exhibit 1) Based thereon, the undersigned poses the following issue statement:

Did the Employer violate the just cause standard in Article 10, §10.1 by suspending the Grievant for four (4) days without pay? If so, what is an appropriate remedy?

**III. FACTS AND BACKGROUND**

At approximately 8.38 p.m. on Wednesday, September 21, 2011, the Grievant, while off duty, was contacted by John Phelps, the relatively new Principal of BHS. The Grievant had previously invited Mr. Phelps to contact him after hours, if need be, should a problem arise that required immediate attention. According to the statement Mr. Phelps gave Lt. Dan Pelkey, who conducted the BPD's Administrative Investigation ("AI") of this matter, and, as the Grievant also testified at the arbitration hearing, Mr. Phelps reported an abandoned trailer that was partially occluding Bengal Drive, a private roadway, located adjacent to the school. Because of public road construction at the time, general traffic, including school-related traffic, was being routed up/down Bengal Drive and, thus, Mr. Phelps feared the occlusion would pose a Thursday-

morning safety hazard. The unlocked trailer contained “religious materials,” according to Mr. Phelps’ AI statement, and both men thought that it was possibly stolen. (Employer Exhibit 1, Tab 2, pp. 7-9, Tab 9, p. 5 and Tab 18, p. 1-3; Union Exhibit B)

At 8:42 p.m., the Grievant called Anoka County Dispatch (“ACD”) and asked to have an on-duty Community Service Officer (“CSO”) contact him. At 9:03 p.m., CSO Brandon Fettig contacted the Grievant who explained the situation, indicating that the trailer had either “broken down or was stolen.”(Employer Exhibit 1, Tab 9, p. 5) CSO Fettig subsequently went to the Bengal Drive location, discovering that the trailer was indeed a traffic hazard, interrupting two-way traffic flow. From all appearances, CSO Fettig thought that the trailer might have been stolen so he ran its license plate with the Department of Vehicle Services (“DVS”) and National Crime Information Center (“NCIC”) databases. From these searches, he learned that the trailer was not reported stolen and that the address of the trailer’s owner, the Living Presence Lutheran Church (“LPLC”), was incorrect. Thus, CSO Fettig searched Anoka County Records (“ACR”) and Googled the LPLC’s name in an effort to locate current owner information, but to no avail.

At 9:15 p.m., CSO Fettig testified, that he called the Grievant to report his Bengal Drive findings and the Grievant instructed him to call Auto-Medics Towing to request a “private tow,” not a “police impound,” because the incident was not a police matter: the trailer was not reported stolen and it was on private property. (Employer Exhibit 1, Tab 2, pp. 2-3 and Tab 11, pp. 5-7; Union Exhibit B) This testimony is repetitive of comments appearing in CSO Fettig AI statement. CSO Fettig testified that after the trailer was towed to Auto-Medics’ lot, he

completed an Incident Contact Report (“ICR”), a copy of which he left in the Grievant’s BPD box.

The ICR stated:

[Grievant] directed me to order a private Auto Medics for BHS to tow the trailer. Private Auto Medics ordered. Clear. Please have school administrator contact Auto Medics about the tow! Thanks.

(Union Exhibit C) CSO Fettig also testified that he neither prepared nor attached a Vehicle Impound Sheet (“VIS”) or simply, “tow sheet,” because the tow was not a police impound and, if so, it would have been reflected on the ICR.<sup>2</sup>

Regarding evidence having to do with the above reference to a “private tow” *versus* a “police impound,” Mr. Phelps’ AI statement, in so many words, indicated that the Grievant mentioned to him that if the trailer was towed and its owner was not located, the school would be charged the towing fee. (Employer Exhibit 1, Tab 18, p. 4) In fact, the Grievant’s AI statement variously showed where he told CSO Fettig that if he found that the trailer was “... a hazard, tow it” and “if it’s on private property, the school would like it towed.” (Employer Exhibit 1, Tab 9, pp. 4-5)

At the arbitration hearing, however, the Grievant testified that he did not direct CSO Fettig to order a private tow, rather he told him “If it needed to be towed, the high school would handle it.” The Grievant testimony’s was insistent about this point, he stated that he “... would have done an impound.” Yet, he acknowledged that on Thursday, September 22, 2011, he read the contradictory text appearing in CSO Fettig’s ICR, which CSO Fettig had left in his BPD mailbox. (Union Exhibit C) Continuing, the Grievant testified that because (1) supervision had not signed off on the ICR, (2) part of the ICR’s text was in longhand, and (3) an Auto Medics’

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<sup>2</sup> At tow sheet is an inventory of all items in the vehicle.

business card was attached to the ICR, he concluded that the ICR was not final and that CSO Fettig actually did a police impound and, accordingly, he would be attaching a tow sheet to the final ICR. However, CSO Fettig's draft ICR did not indicate in the space provided on the ICR form that a tow sheet would be forthcoming. (Union Exhibit C) Further, the Grievant's AI statement indicates that even though he suspected that the trailer was stolen, he did not instruct CSO Fettig to do a police impound because he himself was not at the scene of the abandoned trailer and was more interested in seeing to the hazard's removal. (Employer Exhibit 2, Tab 9, p. 6)

It is clear from record, that if the trailer had been impounded, then the impounding officer would have completed a tow sheet. In retrospect, if the tow had been a police impound, then all of the related ICR/tow sheet information would have been entered into ACR and identification of the trailer's owner would have been hastened.

Once the Grievant reached his office at BHS on the morning of Thursday, September 22, 2011, he attempted to find the trailer's owner using its license plate as his point of departure. As CSO Fettig had experienced, the Grievant also discovered that the address of the trailer's registered owner, LPLC, was incorrect and, thus, he too failed to locate its owner. Further, in his effort to locate the trailer's owner, on that morning and over the following several days, he continued to search relevant databases for reports of a stolen trailer. Still further, the Grievant's AI statement indicates that he called Auto Medics, and spoke with Arthur Smith, asking whether he needed any information about BHS in regard to the tow. Also, Mr. Smith told the Grievant about the trailer's physical condition and that the trailer contained religious materials. In addition, the Grievant called ACD, directing that the trailer be entered as a police

impound;<sup>3</sup> however, he did not edit CSO Fettig's ICR report to note this entry; he neither conducted an inventory of the trailer's content nor filed a tow sheet, as required by Policy 312.02.B, and he did not report to supervision that he filed an impound order. (Officer A's testimony; Employer Exhibit 1, Tab 9, pp. 6-8 and p. 9; Employer Exhibit 1, Tab 26)

On Friday, September 23, 2011, Kelly Karas, Records Technician, received a teletype from ACD about the police impound order the Grievant had called in. At that time, coincidentally, she was processing CSO Fettig's actual private tow ICR, without an attached tow sheet, thus, she concluded that ACD's teletype message was a mistake. The Grievant testified that, at the time, he did not know that his police impound directive was removed. (Employer Exhibit 1, Tab 12, pp. 1-2, Tab 29, p.7)

On Monday, September 26, 2011, Wymond Wong, President, LPLC Council reported that the trailer in question was stolen. He estimated the trailer's value at \$1,500; he also estimated the value of the individual items that were stored in the trailer. On that same day, BPD Officer Steve Nanney filed a stolen property ICR. (Employer Exhibit 1, Tabs 20 and 30) However, the ICR was not entered into the DVS or NCIC databases because Mr. Wong did not have the necessary license plate or related registration information because same was in a filing cabinet stored inside the stolen trailer.

On Friday, September 30, 2011, while on duty, the Grievant testified that he went to the Auto Medics lot in search of information about the trailer's owner. An Auto Medics employee entered the trailer, retrieving some documents, including an envelope addressed to Pastor

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<sup>3</sup> The Grievant's continuing search for the trailer's owner and his decision to record the trailer as a police impound were initiatives designed to benefit BHS. If the owner was identified and/or if the trailer was designated a police impound, then BHS would not have to pay Auto Medic's tow fee. (Employer Exhibit 1, Tab 9, p. 9)

Matthew Flom, LPLC, located at a Blaine, MN P.O. Box number. With this information in hand, the Grievant again ran computer searches for a Pastor Flom, with the same result: no matches. The Grievant acknowledged that he did not have Pastor Flom's name and address entered into ACR, which had the effect of precluding an Investigator from subsequently contacting him, as the trailer's prospective owner. BPD policy 312.06.A requires the BPD to give timely notification to registered owners that their vehicle has been impounded. (Employer Exhibit 1, Tab 9, pp. 10-11)

According to the Grievant's AI statement, while he was at the Auto Medics lot, he observed the trailer's general condition: its safety chain and jack stand were damaged. (Employer Exhibit 1, Tab 9, p. 12) Moreover, he asked Mr. Smith what would happen to the trailer in the event that it was not claimed. In turn, Mr. Smith explained that after making a *bona fide* effort to find the trailer's owner and, after a legally stipulated number of "hold" days had elapsed, he could sell the abandoned trailer.<sup>4</sup> The Grievant's AI statement also indicates that he told Mr. Smith to give him a call because he was interested in buying it. (Employer Exhibit 1, Tab 9, p. 11) Finally, the Grievant's AI statement indicates that forty-five (45) or so days later (i.e., on or about November 13, 2011), Mr. Smith called the Grievant, while he was working at BHS, to ask whether he was still interested in buying the unclaimed trailer. To which the Grievant responded, "Yep." The Grievant's AI statement also suggests that during this conversation, Mr. Smith proposed a purchase price of \$1,000. Grievant thought that this price

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<sup>4</sup> Mr. Smith's AI statement indicates that *via* certified mail, signed receipt needed, he attempted to contact the LPLC, but his letter was returned. Subsequently, during the September 20, 2011 search of the trailer, several business cards were found on which the LPLC's phone number and (incorrect) address were printed. Mr. Smith stated that he called said phone number several times over the next month or so with the same result, it was a disconnected number. (Employer Exhibit 1, Tab 15, p. 2)

was about right, given the trailer's dents and scratches, and the fact that it needed repairs, plus the cost of transferring it to his home. The Grievant stated that a new trailer would cost \$1,800 to \$2,000. Thus, on or about November 14, 2011, the Grievant went to the Auto Medics lot and bought the trailer. (Employer Exhibit 1, Tab 9, pp. 13-15; Tab 28)

According to Mr. Smith's AI statement, it was the Grievant who called on or about November 13, 2011, to ask whether the trailer had been claimed and, if not, he indicated that he was prepared to pay \$1,000 for it. In reply to AI questions from Lt. Pelkey, Mr. Smith indicated that the trailer would retail at about \$1,200 to \$1,500, but with its needed repairs the \$1,000 was "... all I would have wanted from anybody..." When asked if the instant trailer was "... beat enough to be a \$1,000 trailer?" Mr. Smith replied, "Yes." (Employer Exhibit 1, Tab 15, p. 2 and pp. 5-7)

Just prior to the Grievant's purchase of the trailer, Mr. Smith emptied its religious contents, donating same to the Son Light Church of the Nazarene, which was located adjacent to the tow lot. That church's receiving employees, Forrest Gregory, had prior knowledge of the theft of the LPLC's trailer and religious materials. Mr. Gregory told Lt. Pelkey that he attended the Good Shepherd Church, which is where the LPLC was parking its trailer. The record shows that the LPLC was a small congregation, with about twenty-five (25) to thirty (30) members and that it did not have a fixed residential address. It stored its bibles, hymnals and other religious materials in the trailer, which was being parked at the Good Shepherd Church, where LPLC services were being held. (Employer Exhibit 1, Tab 13, pp. 1-4) Mr. Gregory explained that he spoke with a person at Good Shepherd Church, reporting that the LPLC's stolen trailer was at Auto Medics. That person contacted the LPLC's pastor. (Employer Exhibit 1, Tab 13)

On December 9, 2011, Jesse Peterson, Pastor, LPLC, contacted the BPD, reporting that its trailer had been stolen and was located at the Auto Medics lot. The Pastor wanted to know how he could go about recovering the LPLC's property. Detective Karen Hamann took his call. Subsequently, she called Mr. Smith who told her that he no longer had the trailer: he sold it to the Grievant. She also called the Anoka County Attorney's office who advised that (1) the trailer was the stolen property of the LPLC and it needed to be returned to the church, and (2) any issue involving resolution of trailer's sales transaction that might arise between the Grievant and Auto Medics was a civil matter. On December 11, 2011, Detective Hamann spoke with Mr. Smith and the Grievant. Mr. Smith reported that the trailer sold for \$1,000; the Grievant reviewed events leading up to its purchase. The Grievant also told her that he would return the trailer to the BPD on December 12, 2011, which he did. Pastor Peterson recovered the trailer; later, Auto Medics returned the \$1,000 to the Grievant. (Employer Exhibit 1, Tabs 10 and 22)

Pastor Peterson's December 9, 2011 call to the BPD led to the internal administrative investigation that Lt. Pelkey conducted. Lt. Pelkey's extensive set of interviews and related documentation, led him to believe that the Grievant was guilty of violating several BPD policies. (Employer Exhibit 1) Chief Olson concurred and issued the suspension the Grievant is now challenging. (Joint Exhibits 2 and 3)

#### **IV. POSITION OF THE PARTIES**

##### **A. Employer's Arguments**

The City's argument began with the claim that the Grievant's suspension was for "just cause," as this phrase was defined by the Minnesota Supreme Court in 2002. *Hiligoss v. Cargill*, 646 N.W. 2d 142 (Minn. 2002) *Per* the Court's definition, the Employer's disciplinary action was

shown to be for “real” cause, as distinguished from “arbitrary whim or caprice.” Following an exhaustive and documented BPD internal affairs investigation, including Grievant admissions, the Grievant was found, the Employer maintained, to have violated numerous BPD policies, including the following: 368.01 (8), (9) & (10), “Police Report Writing;” 312.01.A (4) & (6), 312.02.B and 312.03.A, “Vehicle Impoundment;” and 102.6(B), “Solicitations.” Further, the Grievant’s violations of these policies resulted in consequential violations of policies governing “Conduct Unbecoming an Officer” and “Integrity,” policies 102.3 and 102.6, respectively. Still further, the Grievant’s conduct hindered the identification of the trailer’s owner and the trailer’s prompt return: a violation of policy 101.3(D), “Recovery and Return of Property.” (Employer Exhibit 1, Tab 2, p. 10-14)

In light of these “good conduct” and procedural policies, the high behavioral standards to which law enforcement is held and the authority entrusted to police officers, Chief Olsen averred that the Grievant should not have purchased the trailer: property that he believed may have been stolen. Such action, Chief Olsen maintained, called into question the high value the BPD places on integrity, and it threatened to undermine public trust, particularly that of the LPLC. The City points out that the Grievant knew and understood the BPD’s policies and that he acknowledged his obligation to comply with same. (Employer Exhibit 1, Tab 25) Further, the City argues that Lt. Pelkey’s internal investigation was fair and complete. Indeed, at the arbitration hearing, the Grievant neither challenged the completeness of Lt. Pelkey’s investigation nor claimed that it was biased.

In addition, the City argues that, for several reasons, its disciplinary suspension was appropriate. First, from September 21, 2011 on, the Grievant believed that the trailer may have

been stolen and, as he testified, from September 22, 2011 on, he conducted ongoing searches for its owner. Yet, the Grievant neither reported his suspicions nor his ongoing investigatory work to his superiors, to the Investigations division or ACR staff.

Second, suspecting theft, the Grievant failed to follow the standard procedures by not amending CSO Fettig's ICR, changing it from a private tow to a police impound and adding the requisite tow sheet, and/or by not providing the requisite tow sheet to supplement his September 22, 2011 call into ACR, reporting that the tow was a police impound.

Third, the City maintains that the Grievant was guilty of purchasing a trailer that he suspected all along was stolen property; there are no reasons for mitigation. In addition, Ms. Karas did not commit a "bureaucratic error," as the Union claimed. Ms. Karas deleted the Grievant's police impound report because he failed to prepare the required tow sheet supplement and, thus, she rightly concluded that since CSO Fettig's ICR was proper and complete, it was the more accurate statement of incident's status. The Union also claimed that if Mr. Wong had provided Officer Nanney with the stolen trailer's license plate and registration number on September 26, 2011 and if Officer Nanney had entered this stolen property information into ACR, then the Grievant would have been able to locate the owner of the trailer: a complication that contributed to the Grievant's situation. However, the Employer points out, Mr. Wong did not have said information – it was locked away inside the stolen trailer – and without it, by policy, Officer Nanney was prohibited from entering the stolen trailer into ACR. Last, the Union bemoaned the fact that DVS incorrectly listed the LPLC's address. The City claims that while this was a complicating factor, it does not weaken the inappropriate connection between the Grievant and the stolen trailer.

Next, the City urges that the Grievant was not a credible witness. Citing arbitration treatises and relevant arbitral precedent, the Employer points out when a witness makes statements that are conflicting and inconsistent, the credibility of that witness is discredited. In the present case, the Grievant signed a Garrity Warning before being interviewed by Lt. Pelkey. By signature, he promised to be truthful and complete in the information he imparted; further, the Grievant testified under sworn oath at the arbitration hearing. Nevertheless, the Employer argues, the Grievant was not faithful to either his Garrity promise or to his sworn oath. Consider the following:

- (1) On September 30, 2011, the Grievant visited the Auto Medics lot for the stated purpose of trying to identify the trailer's owner. However, while at the lot, he did not search the trailer himself because its physical location prevented him from climbing into it: information that he did not provide in his Garrity statement. Moreover, he did not ask Auto Medics staff to empty the trailer of its contents to facilitate his search. The evidence does not establish that he was prevented from taking either of these affirmative steps.
- (2) At the arbitration hearing, the Grievant claimed that the name of the LPLC was not on any of the paperwork that was retrieved from the trailer on September 30, 2011, but his Garrity statement indicates that an Auto Medics' employee came across paperwork with the name of Pastor Matthew Flom and it listed the church's name with a P.O. Box in Blaine, MN.
- (3) At the arbitration hearing, the Grievant claimed that he drove to LPLC's Blaine, MN address, albeit incorrect. Yet, he neither mentioned this fact during his Garrity interview, to his supervisors or in any supplementary reports.
- (4) The Grievant testified that he was told by Lt. Pelkey and Chief Olson, that his testimony would be "protected," and that the investigation was intended to protect the BPD, respectively. Lt. Pelkey and Chief Olson contradicted this testimony and, the Employer argues that because the Grievant's testimony was self-serving (i.e., designed to protect his job), it was less credible than that proffered by Lt. Pelkey and Chief Olson.
- (5) Fellow police officers typically testify on behalf of colleagues at arbitration hearings. The Employer points to the absence of collegial support in this case, suggesting general disapproval of the Grievant's conduct.

Finally, noting relevant arbitral precedent, the City urges the Arbitrator not to substitute his disciplinary judgment for that of the Employer's because charges of discrimination, unfairness, or capriciousness by management are not at issue. In this vein, the Employer argues that to modify the penalty would be a signal to other officers in the BPD, the LPLC and to the City's citizens that it is acceptable for a BPD police officer to purchase stolen property – stolen property that the officer suspected was stolen all along.

For all of the above reasons, the City urges that the grievance should be denied.

**B. LELS Arguments**

The Union's argument begins with the observation that one of the case's more salient facts is that the Grievant did not complete the tow sheet that should have been appended to the police impound directive he gave to ACR. This misstep, however, was the result of a miscommunication and misunderstanding between the Grievant and CSO Fettig: it was not intentional. Thus, any discipline for alleged violation of BPD policies 368.01, "Police Report Writing," 312.01, "Conditions for Vehicular Impoundment" and 312.03, "Inventory Procedures for Impounded Vehicles" would be totally unwarranted.

The Union recalls that Mr. Phelps telephoned the Grievant at night, when he was off-duty, stating that an abandoned trailer was creating a safety hazard at BHS and it needed to be removed immediately. Thus, the Grievant took appropriate steps and, thereafter, he was contacted by CSO Fettig. The latter was not a sworn, licensed police officer but, regardless, the Grievant was compelled by circumstance to "rely" on him.

During his AI interview with Lt. Pelkey, CSO Fettig stated that the Grievant "... requested that I call Auto Medics on [the school's] behalf as a private tow." (Employer Exhibit 1, Tab 11, p.

6) However, the Union argues, during the arbitration hearing, CSO Fettig testified that he could not recall whether the Grievant had ordered him to conduct a private tow. Continuing the Union urges that there was a miscommunication and misunderstanding between the two (2) officers because the Grievant consistently has maintained that he did not order a private tow, but rather directed CSO Fettig to determine whether a police impound was warranted after assessing the situation. Further, the ICR that was left in the Grievant's BPD mailbox added to the confusion; it was a preliminary draft, with an Auto Medics business card attached, partially written in longhand and it was not signed by a supervising officer. (Union Exhibit C and Employer Exhibit 1, Tab 19) The Union points out that the trailer's circumstance was unusual – stolen or broken down, on a private road on which public traffic was being directed and the owner unidentified. The Grievant thought that the trailer should be handled as a police impound and he mistakenly assumed that CSO Fettig's "final" ICR would show it as a police impound, trailer tow sheet attached.

Further, the Union argues that BPD policy 101.3(D), "Recovery and Return of Property," was not violated, as the Employer claimed. Clearly, the Union urges, the Grievant made a "reasonable" effort recover the stolen property, identify its owner and return same to owner. The Grievant took the following affirmative steps: first, he flagged the trailer as a police impound to be entered into the NCIC database because such action would increase the odds of locating its owner; second, he ran the trailer's license plate through the DVS database in order to identify the owner and the owner's address; third, he ran searches through ACR and the Internet, trying to locate the trailer's registered owner; fourth, he visited the Auto Medics lot to search the trailer for owner-identifying information; and fifth, he visited a Blaine, MN address

that came close to matching the registered owner's incorrect address. Still further, there was a considerable time lapse between Mr. Wong's stolen trailer report on September 26, 2011 and its December 12, 2011 return to its owner. However, the Union maintains, the Grievant was not the sole party responsible for the delay. The Grievant did not realize that the tow sheet that he assumed CSO Fettig would prepare and his police impound report were never entered into the NCIC database, which seriously limited the odds of locating the trailer's owner; the DVS database's erroneous address additionally delayed matters; the BPD did not assign Mr. Wong's stolen property report to Investigations for immediate enquiry.

Still further, the Union argues, the Grievant did not violate BPD policy 102.6, "Integrity," 102.6(A), "Gratuities" and 102.6(B), "Solicitations." The Grievant paid \$1,000 for the trailer, the Union points out: a price that Mr. Smith thought was "fair," considering the trailer's condition; a price that was close to the \$1,500 estimate that Mr. Wong gave to Officer Nanny about three (3) months before he told Lt. Pelkey that it was worth between \$2,000 and \$2,500. Moreover, the Union acknowledges that while the Grievant told Lt. Pelkey and the Arbitrator that it was Mr. Smith who first proposed the \$1,000 price, Mr. Smith told Lt. Pelkey that it was the other way around; regardless, as the Grievant testified, he and Mr. Smith did not haggle over the trailer's sale price. For these reasons, the Union maintains that the \$1,000 price paid for the trailer was not a gift, gratuity, benefit or special privilege, it was a fair-value transaction and, further, the City did not prove that the Grievant's purchase was a deliberate act of dishonesty or that he used his standing as a police officer to solicit a "sweetheart deal."

Citing a scholarly treatise and arbitral precedent, the Union argues that the Grievant's testimony about the trailer's price was cross-examined at the arbitration hearing and, as such,

is more credible than Mr. Smith's AI account, which was hearsay evidence that could not be cross-examined. Continuing, the Union argues that the Grievant contacted ACR to flag the trailer as a police impound, and he made an earnest and protracted effort to locate the trailer's owner, which is not the conduct of a person who was scheming to buy the trailer for himself at a "bargain basement" price.

Last, the Union argues that to have suspended the Grievant for four (4) days was too harsh a penalty, demonstrating that the City did not give weight to mitigating factors such as the Grievant's tenure in law enforcement, clean record of discipline and outstanding job performance. Further, it is bothersome, the Union continues, that the City did not see fit to use progressive discipline in this case because nothing in the record suggests that a reprimand, for example, would not have been corrective of the misconduct alleged, and that a more punitive level of discipline – a four (4) day suspension – was necessary.

For the above-discussed reasons, the Union contends that the Grievant was suspended for four (4) days without just cause in violation of Article 10, §10.1 in the CBA. As a remedy, the Union requests that the suspension should be revoked and the Grievant "made whole." In the alternative, the Union requests a reduced level of discipline with all derogatory references to honesty and integrity expunged from the documented records involving this matter.

**V. DISCUSSION & OPINION**

BPD policy 312.01, "Conditions for Vehicular Impoundment," lists ten (10) conditions that require a police officer to impound a vehicle. When the vehicle's driver is an arrest suspect and when the vehicle is evidence in a criminal case are among these conditions. The two (2) impoundment conditions that the Grievant allegedly violated are 312.01(A)(4) and

312.01(A)(6), which require the impoundment of “stolen” vehicles and vehicles that are “unsafe” to drive on public roadways, posing a danger to public safety, respectively. In the opinion of the Arbitrator, neither of these police impound conditions applied to the LPLC’s trailer. Policy 312.01(4) is inapplicable because on September 21, 2011, the trailer was *not* reported stolen. In fact, the first report of theft was made by Mr. Wong on September 26, 2011, and, for technical reasons, that report was not entered into ACR. Too, policy 312.01(A)(6) was inapplicable because the trailer was *not* an unsafe, motorized vehicle, making 312.01(A)(6) inapplicable.

However, it could be argued that policy 312.01(7) was applicable in the present matter and, therefore, a police impound was required. This policy states: “The vehicle is abandoned or parked on public streets or highways in such a manner as to create a hazard for other traffic.” (Employer Exhibit 1, Tab 26) This argument is not persuasive because the trailer was abandoned on Bengal Drive, which is *not* a public roadway. Based on this analysis the undersigned concludes that the City failed to prove by a preponderance of evidence its allegations that the Grievant violated the above-identified policies.

The foregoing conclusion notwithstanding, the record evidence does suggest that both the Grievant and the BPD believe that the LPLC’s trailer should have been reported as a police impound. If it had been reported as such, the odds that its owner would have been identified sooner would have improved significantly. However, even though CSO Fettig and the Grievant thought that the trailer might have been stolen, CSO Fettig ordered a private tow. In this regard, arbitral notice is made of the fact that the record is replete with contradictory statements by the Grievant and CSO Fettig about whether the trailer’s tow should be a private

tow or a police impound. But after blowing away the fog of contradictory statements, it is clear that the Grievant did not direct CSO Fettig to order a police impound on September 21, 2011, even though he called ACR to report the tow as a police impound on September 22, 2011. It is also clear that even though the City, believed that a police impound was in order, it did not discipline CSO Fettig for failing to follow the controlling conditions for vehicular impound and the related reporting procedures. Of course, as the Union argued, it may be that both the Grievant and City implicitly concluded that the circumstances of the present tow fell between cracks of the conditions listed for a vehicular impound. That is, with policy 312.01(A)(7) in mind, for example, even though the trailer was abandoned on a private road, public traffic was being rerouted on it.

As mentioned above, on September 22, 2011, the Grievant called ACR to report that the trailer's tow was a police impound. The undersigned surmises that the motivation for this action – a legitimate exercise in professional discretion – was to relieve BHS from the obligation of paying a tow fee and to act on his suspicion that the trailer was stolen. However, after taking this step, the Grievant took three subsequent missteps. First, after calling ACR to report the tow as a police impound, the Grievant, *per* BPD policy, should have amended CSO Fettig's ICR, noting that the tow was a police impound, not a private tow, and he should have performed an inventory of the trailer's content, attaching the resulting tow sheet to the amended ICR. In the alternative, he should have provided ACR with the amended ICR, posted under his name, plus the supplemental tow sheet. These procedural steps were not taken, as the City persuasively argued. The Grievant was guilty of violating BPD policies 368.01(A), 368.02(A), 312.02(B) and 312.03.

Second, at the arbitration hearing, the Grievant testified to believing that CSO Fettig's "final" ICR would show the tow as being a police impound and that he would attach the required supplemental tow sheet. The Grievant may have believed that this testimony would provide some cover from the City's barrage of allegations regarding the Grievant's violation of several "report writing" and related procedural policies. To the Grievant's misfortune, however, this part of his testimony was not credible. As preliminary as CSO Fettig's ICR was, there is absolutely nothing in it to cause a reasonable person to conclude that his final report would show that he ordered a police impound tow and that a tow sheet would be attached. On point, note that after Auto Medics towed the trailer away and CSO Fettig roughed out his ICR, leaving a copy in the Grievant's BPD mailbox to see, there was no subsequent communications about the LPLC's trailer between the two (2) officers.

Third, the uncontroverted record is that the Grievant did endeavor to locate the trailer's owner, which he believed was stolen all along. However, the Grievant failed to report his continuing search activities to ACR and supervision. He also failed to report the "Pastor Matthew Flom" information he came across on September 30, 2011, while, with others, going through the trailer's content in search of leads about the trailer's owner. Indeed, the Grievant used the "Pastor Matthew Flom" information in his continuing search for the trailer's owners. BPD policy requires that this information should have been reported: more evidence of incomplete reporting. However, these facts fall short of proving that the Grievant violated BPD policy 101.3(D), which, in relevant part, requires a police officer to make every reasonable effort to identify the owner and to ensure the prompt return of the stolen item in question. Further, the undersigned is not persuaded by the City's argument that the Grievant's purchase

of the trailer shows that he did not make a reasonable effort to identify the owner. After all, up to that point, the record suggests that the Grievant's search was ongoing.

This conclusion leads to an analysis of the Grievant's November 14, 2011 purchase of the trailer. At that point in time, it is important to observe, the Grievant did not know that the trailer was *in fact* stolen. Nevertheless, the Arbitrator concludes that his decision to purchase it was a colossal lapse of good judgment. The Grievant, in his role as police officer, was inextricably linked to the abandoned trailer and, to make matters worse, he believed that it was stolen, as he readily acknowledged, and as his September 22, 2011 ACR call and subsequent search activities confirm. It comes as no surprise to the undersigned that Lt. Pelkey would advise and Chief Olson would conclude that the Grievant's purchase was behavior unbecoming a police officer: a violation of BPD policies 102.3 and 300.03 (A) and (D).

The record shows that the Grievant was always mindful that the trailer's owner could appear to claim the trailer. He was, as previously observed, suspicious that it had been stolen. Thus, the Grievant knew or should have known that the confluence of a reported trailer theft and the owner's identify would subject his purchase to close scrutiny and could discredit him, as a police officer, and the BPD. Moreover, from its onset, the Grievant was personally involved in investigating whether the trailer was stolen and in the search for its owner. Thus, he knew or should have known that questions about his integrity and that of the BPD would be raised if the trailer's owner subsequently reported it as stolen, learned that it was impounded and further learned that it was purchased by the very police officer who had been on the case from the start. Accordingly, given this review of facts and Grievant-controlled circumstances, it is entirely

reasonable that Lt. Pelkey would advise and Chief Olson would conclude that the Grievant's purchase violated BPD policies 102.6, "Integrity," and 300.03 (A), (B), (D), (F) and (G).

However, these arbitral conclusions do not support the inference that the Grievant's purchase of the trailer was intentional misuse of his position as a police officer or otherwise violated the principles governing the conduct of a sworn officer. The Grievant did search relevant databases and the Internet for the trailer's owner and reports of a stolen trailer, as the undersigned previously concluded. The Grievant went to the Auto Medics lot on September 30, 2011 in search of owner-identifying information and after finding some information of possible value, he engaged in follow-up investigatory work. Further, for the next forty-five (45) or so days, the Grievant continued to search for reports of a stolen trailer. The Arbitrator concludes that the Grievant did not visit the lot with the intention of buying the trailer but, after seeing it, he did inquire of Mr. Smith about its disposition in the event that an owner did not step forward. In that eventuality, the Grievant did indicate an interest in purchasing the trailer, following the statutorily-prescribed "hold" period that Mr. Smith outlined for him. There is nothing in the record to suggest that Mr. Smith and the Grievant had any other conversations about the trailer during the next six (6) weeks.

Rather, about forty-five (45) days following the Grievant's visit to the Auto Medics lot, he called Mr. Smith or *vice versa* about selling the trailer – either way, the Grievant expressed an interest in purchasing the trailer. The evidence also shows that either on or about November 13, 2011, the Grievant offered Mr. Smith \$1,000 for the trailer or during their phone conversation Mr. Smith proposed the \$1,000 sale price. Regardless, the City did not prove that \$1,000 worked to the specific benefit of the Grievant. In fact, the record suggests that the price

was “fair” and that it was not haggled over.

The City alleged that the Grievant violated policies 102.6(A), “Gratuities,” and 102.6(B), “Solicitations.” The undersigned demurs. A gratuity, according to one source, is defined as “... a gift of money, over and above payment due for service, as to a waiter or bellhop; tip.”<sup>5</sup> As suggested above, however, neither the City’s evidence nor its arguments persuade the undersigned that the trailer’s sale price of \$1,000 was a gift in the sense that the Grievant, as a result of his police officer stature, received a “bargain basement” deal. Similarly, by a preponderance of the evidence, the above discussion of the facts does not support the City’s charge of solicitation. A solicitation is an “urgent request, plea or entreaty,” it involves “enticing” and “asking.”<sup>6</sup> The present record shows that the Grievant expressed an interest in buying the trailer, which he confirmed and repeated nearly six (6) weeks later. This pattern of conduct does not impress the Arbitrator as being an urgent request or entreaty, with enticement and asking. Mr. Smith could have listed the trailer for sale after lapse of the referenced forty-five (45) days but, instead, he chose to sell it to the Grievant because the price was fair and not because he was a BPD officer.

The City demonstrated with credible evidence that some, but not all, of the charges it brought against the Grievant were proven. His alleged shortcomings in report writing, incomplete record keeping and violation of impound procedures were proven. However, the Grievant’s most significant misstep involved his trailer-purchase transaction which was shown to be an exhibition in poor judgment, unbecoming of a police officer and a threat to the

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<sup>5</sup> See: [dictionary.reference.com/browse/gratuity](http://dictionary.reference.com/browse/gratuity).

<sup>6</sup> See: [legal-dictionary.thefreedictionary.com/solicitation](http://legal-dictionary.thefreedictionary.com/solicitation).

perception that he and the BPD have placed a high value on trust and on personal and institutional integrity. However, the City did not establish that the Grievant violated policies 312.01(A)(4) and (6), 101.3(D), 102.6(A) and 102.6(B), as charged. Of particular significance here is that the Grievant's trailer-purchase transaction was not the result of a solicitation designed to result in a gratuity or personal benefit that he otherwise would not have received but for his stature as a police officer.

The Grievant's tenure with the BPD and his, heretofore, good job performance, as the Union argues, are factors that work in favor of mitigating the four (4) day suspension the City meted out. Further, the fact that the City failed to show that the Grievant was guilty of all charges brought against him is another factor commending mitigation. Most certainly, the Union would argue, the above referenced "not-guilty" findings demonstrate that the City's discipline was not for just cause; it is now more than ever disproportionately harsh.

This reasoning has weighed heavily in determining the content of a just cause remedy in this case. The Grievant was not guilty of accepting a gratuity and solicitation but, at the same time, he totally mismanaged his administration and reporting about the trailer incident and, in plain view of the LPLC's Pastor, his trailer-purchase transaction cut at the core of reasonable expectations about how an officer of the law ought to behave, calling into question the trustworthiness and integrity of the Grievant and the BPD. The City's proven "conduct unbecoming" and "integrity" charges alone warrant stern punishment, making the lesser steps of progressive discipline untenable. For this reason, the undersigned is not persuaded that a just remedy is one that would reduce the number of suspension days. Rather, a just and equitable remedy would be to sustain the City's four (4) day suspension but, in view of all the

facts, circumstances and finding as discussed above, to also order that the Grievant's disciplinary file be expunged of references relating to the City's unfounded "Gratuities" and "Solicitation" charges.

**VI. AWARD**

As discussed above, the City's discipline of the Grievant is sustained in part and modified in part. The Grievant's four (4) day suspension was for just cause, but not for all of the reasons alleged by the Employer. Among the latter allegations, the most salient are that the Grievant violated the Employer's policies governing "Gratuities" and "Solicitation:" charges that were unproven. Accordingly, the City is ordered to expunge any and all references to these charges from the Grievant's disciplinary file.

For the limited purpose of overseeing enforcement of the ordered Award, the undersigned shall retain jurisdiction over the case.

Issued and Ordered on the 15<sup>th</sup> day of March, 2013 from  
Tucson, Arizona.

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Mario F. Bognanno, Labor Arbitrator & Professor Emeritus