

**IN THE MATTER OF ARBITRATION**

**OPINION & AWARD**

**-between-**

**Grievance Arbitration**

**LAW ENFORCEMENT LABOR SERVICES**

**B.M.S. Case No. 11PA351**

**-and-**

**Re: Employee Discipline**

**THE COUNTY of DAKOTA  
HASTINGS, MINNESOTA**

**Before: Jay C.Fogelberg  
Neutral Arbitrator**



**Representation-**

For the Union: Scott A. Higbee, Staff Attorney

For the Employer: Pam Galanter Hansen, Attorney

**Statement of Jurisdiction-**

The Collective Bargaining Agreement duly executed by the parties, provides in Article VI for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial three steps of the grievance procedure. A formal complaint was submitted by the Local on behalf of the Grievant in July of 2010, and thereafter appealed to binding arbitration when the parties were unable to resolve this matter to their mutual satisfaction. The under-signed was then mutually selected as

the neutral arbitrator by the parties, and a hearing convened on April 11, 2013, in Hastings, Minnesota. Following receipt of position statements, testimony and supportive documentation, each side expressed a preference for submitting written summations. These were received on May 14, 2013, at which time the hearing was deemed officially closed.

At the commencement of the proceedings, the parties stipulated that this matter was properly before the Arbitrator for resolution based upon its merits, and that the following represents a fair description of the issue.

**The Issue-**

Was there just cause for the written reprimand issued to the Grievant on July 1, 2010? If not, what shall the appropriate remedy be?

**Preliminary Statement of the Facts-**

The record developed during the course of the proceedings indicates that Law Enforcement Labor Services (hereafter "Union," or "LELS") is the exclusive representative for all employees in the Dakota County Sheriff's Department ("Employer," "County," or "Department") classified as General Duty Deputy and Special Duty Deputy (Joint Ex. 1, Article II, Sec. 1). Together,

the parties have negotiated a labor agreement covering terms and conditions of employment for members of the bargaining unit (*id.*).

The Grievant, Brent Lohmann, is classified as a General Deputy with the Department. He has held that title since 1996. During the time in question, his duties included responding to calls from the Dakota County Communications Center (“DCC”) – a dispatching service operated by the County and serving some eleven different departments – as well as performing other routine patrol tasks.<sup>1</sup>

On June 11, 2010, Deputy Lohmann was assigned to a patrol shift that began at 6:00 a.m., and covered the southeast portion of Dakota County.<sup>2</sup> At that time he was operating a “take-home” squad car, meaning he kept possession of his assigned vehicle on a 24/7 basis. The records show that he logged into his equipment in the car that day at 5: 49 a.m., which among other things, activated his radio contact with DCC (Employer’s Ex. 3).

At 5:50 a.m. Sergeant Penny, whose shift ended six o'clock that same morning, was on patrol in the very southern part of the County (Waterford Township) investigating a “suspicious vehicle” occupied by three individuals and located at a vacant business. Penny called into DCC with a “Code 5” which the Communications Center's publication for law enforcement states

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<sup>1</sup> Currently Officer Lohmann works as a Bailiff within the County's court system.

<sup>2</sup> Department Commander Daniel Scheuermann testified that the County covers an area of approximately 355 square miles.

is a request by the officer for frequent contact as he/she is alone and encountering a situation where they may need additional help (Union's Ex. 1). The Grievant was the closest officer to Sgt. Penny's location at the time, and in his patrol area where he had initiated a "premises check" for the River County Co-op (Department's Ex. 3).

Officer Lohmann had heard the Code 5 call on his radio, but did not respond to it immediately. According to the Grievant, he did not believe it was necessary as such a call does not mandate that he immediately proceed to the area where Sgt. Penny had made the call. The Grievant cleared the premises check at the co-op at approximately 6:07 a.m. and then proceeded to meet Sgt. Penny at 6:27 who, by that time, had contacted the City of Northfield's Police Department. They, in turn, sent an officer to the vacated business where he met Penny.<sup>3</sup>

The Grievant's supervisor, Sergeant Enderlein, was assigned to the same shift on the day in question. When he got into his squad car and activated the equipment, he heard the Code 5 calls that were repeated by Sgt. Penny to central dispatch three times that morning. He contacted Penny by phone ("Nextel") and was informed that he had interrupted an

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<sup>3</sup> The record indicates that Sgt. Penny had contacted Northfield as it was close to the vacated radio station where he was investigating the suspicious activity, and he believed that an officer in their department (Wierson) might have personal knowledge of the occupants of the vehicle he had observed.

attempted burglary at the closed business that morning (County's Ex. 1). Sgt. Enderlein then sent a message to the Grievant asking why he had initiated a premise check rather than backing up Sgt. Penny as he was the closest officer to him. According to the Employer, the practice has always been for fellow officers to immediately begin "rolling toward" the officer who calls in a Code 5. The Grievant however, did not respond to his supervisor but proceeded to clear his premise check and meet Sgt. Penny at 6:27 that morning (*id.*).

Later that day Sgt. Enderlein met with Officer Lohmann and reviewed the morning's events. At that time the supervisor noted that the situation Sgt. Penny found himself in was "cause for heightened alert" and yet the Grievant had not been proactive as was expected of him when he did not contact Penny or respond to his location. Enderlein's report was thereafter forwarded to Commander Scheuermann who conducted an investigation. He eventually concluded that not responding to assist a fellow officer under the circumstances that took place that morning was "unacceptable" as it was a safety issue requiring his immediate attention and concomitantly, a violation of departmental policies (Joint Ex. 2). Lohmann was then issued a "Written Notice of Reprimand."

Thereafter the Union filed a formal complaint on behalf of Officer Lohmann claiming that the disciplinary action taken against him lacked just cause and seeking a make whole remedy. Eventually the matter was appealed to binding arbitration pursuant to the grievance mechanism contained in Article VI of the parties' Labor Agreement.

**Relevant Contractual & Policy Provisions-**

From the Master Contract:

Article IX  
Discipline

9.1 Just Cause. The Employer will discipline employees who have completed the required probationary period only for just cause.

From Department Policies:

Order 2-1001.1 Responsibility

Members of the department shall be held responsible for the proper performance of any and all duties assigned to them and for strict adherence to the regulations adopted from time to time for the administration of the department....

Order 2-1001.8 Failure to Respond

Members of the department shall properly respond to radio calls, requests for assistance, or suspicious circumstances without unreasonable delay, both on and off duty.

Proper response to a....request for assistance dictates that their initial response is carried out with necessary and reasonable dispatch. Any member who fails to take appropriate action on matters brought to their attention is guilty of dereliction of duty. Gross neglect is distinguished from mere mistake or poor judgment, because it consists of willful neglect in the face of obvious conditions warranting investigation or other actions.

### **Positions of the Parties-**

The **EMPLOYER** takes the position that their decision to issue the Notice of Reprimand to Officer Lohmann in July of 2010, was entirely proper and justified under the circumstances. In support of their claim, the Department maintains that in spite of knowing that Sgt. Penny had made a number of Code 5 calls to central dispatch, the Grievant failed to once communicate with him via either his mobile data computer, his Nextel phone, or by police radio. Officers in the Department have been trained, and the Grievant knew that he is to be proactive and to move immediately toward any officer who has made a Code 5 call. Yet the Grievant failed to react on June 11, 2010, even though he knew that Sgt. Penny had made not one but three such calls to DCC. Nearly half an hour transpired between the first time Officer Lohmann heard Penny's Code 5 call and when he finally made contact with him. This in spite of the fact that he (Penny) was in the Grievant's patrol area that morning. Sgt. Penny's call regarding suspicious

activity at the radio station should have resulted in immediate action on the part of Officer Lohmann who was merely making a self-initiated premises check. His failure to assist another officer under the circumstances that day constituted unacceptable behavior that is a violation of Department policy. In the Administration's view, the discipline issued was appropriate, particularly in light of the Grievant's prior work history. Accordingly, they ask that the grievance be denied in its entirety.

Conversely, the **UNION** takes the position in this matter that the oral reprimand received by Officer Lohmann was not justified under the circumstances. In support, L.E.L.S. asserts that the Grievant was never asked to assist a fellow officer that morning. It is undisputed that Sgt. Penny had made a Code 5 call into dispatch. Under the Communication Center's own published procedures, a Code 5 call mandates only further status checks from central dispatch. Code 6, on the other hand, calls for "routine backup" by fellow officers and further status checks if desired. The Grievant argues that he had been trained in the new Codes when they were first issued in 2007, by his former supervisor (Johnson) who told him that Code 6 requires immediate action by other officers, and that Code 5 calls do not mean the other law enforcement personnel are to roll toward the caller immediately. Neither Sgt. Enderlein nor anyone else from management,

ever discussed their expectations of him regarding a response to Code 5 calls. Rather, all his training was received from Sgt. Johnson. Code 5s were never identified as meaning there was an unstable situation where the calling officer might be in immediate danger, according to the Union. Further, on the day in question, the Grievant claims he was aware that another officer from Northfield's Police Department had answered Sgt. Penny's call and was on his way to assist him. For all these reasons then they ask that the grievance be sustained; that the letter of reprimand be rescinded and, that all reference to the incident be expunged from Officer Lohmann's personnel record.

### **Analysis of the Evidence-**

The evidence entered into the record establishes a number of salient facts that bear upon the outcome of this dispute. To wit:

- As a matter of the Department's published policies, its Deputies are expected to respond to radio calls, requests for assistance, or suspicious circumstances without unreasonable delay (Order 2-1001.8).
- Within one minute of starting his shift on the day in question, Deputy Lohmann heard on the radio in his squad car that Sgt. Penny was checking on a vehicle at a deserted building which was located in his (the Grievant's) patrol area, and within a matter of minutes (at 5:59 a.m.) he hearing the sergeant call in a Code 5.

- After hearing of the Code 5 call, Deputy Lohmann did not contact Sgt. Penny but rather proceeded with a routine premise check at the Cennex Co-op which was in his assigned area as well.
- The Grievant was not specifically dispatched, directed, or requested to proceed to Sgt. Penny's location that day, but once he cleared the premise check he proceeded to the sergeant's location at the abandoned radio station.
- Sgt. Enderlein, once he became aware of Sgt. Penny's position and that he had called in a Code 5, did not immediately order the Grievant to proceed immediately to Penny's location.
- The Dakota County Communications Center's ten code procedure (Union's Ex. 1) indicates that a Code 5 means further checks are desired, and Code 6 means routine backup and further checks are desired.

Braided together, these facts create a backdrop against which the merits of this case must be viewed.

In light of the established facts, pared to its essence Deputy Lohmann's grievance turns on the Department's assertion that training and past practice should have caused the Grievant to "begin rolling" towards Sgt. Penny's location as soon as he heard the Code 5 on his radio that morning, versus the Union's argument that his previous instructions and the wording of the dispatch codes did not mandate an immediate response.

At first glance, LELS's defense of Deputy Lohmann would appear to be persuasive. Their Exhibit 1 – the "Translation/Comments" published by the

County – signals a distinction between Code 5 and Code 6. The latter adds the comment “routine backup” to the former’s translation that “further status checks are desired.” Based upon his training and experience, the Grievant stated he believed that a Code 5 meant Sgt. Penny was okay and simply wanted the DCC to continue checking on his status. Additionally, the Union maintains that there was no evidence proffered by the Employer to indicate that as a matter of due course, Code 5 constitutes an unstable situation. Indeed, they note, the suspects in question were not taken into custody but rather were questioned and then released. Moreover, the Union argues that it is undisputed Deputy Lohmann’s conduct does not fall under Order 2-1001.8, as there was no “radio call” or “request for assistance.” Nor was he dispatched or directed to proceed immediately to Penny’s location.

LELS’s cogent argument however, must necessarily be contrasted with the balance of the record and the position advanced by the County. When this is done, I find the Employer’s position to be the more persuasive of the two based upon the clear weight of the evidence.

In the notes taken by Sgt. Enderlein in his interview with the Grievant shortly after the incident on June 11, 2010, the following observations were recorded:

“As a patrol deputy, it is your duty to be proactive as well as to respond to and investigate calls for service or *suspicious*

*circumstances* in your area and to assist other law enforcement personnel in the course of their duties.

It is commonplace for our deputies to go 'Code 4' on the radio when they feel a situation is under control and no further backup is needed. In our vast, rural patrol area, *a deputy who responds 'Code 5' several times and is out with three suspicious people at a closed business in the pouring rain is cause for heightened alert"* (County's Ex. 1; emphasis added).

Under direct, Sgt. Enderlein testified without challenge that although the Grievant had an opportunity to comment on the observations of the supervisor at the time, if he disagreed with the content, he did not. Indeed, Deputy Lohmann signed off on the document.

While the Union's observation that the Grievant was not asked to respond to a radio call, or a request for assistance that morning is accurate, their argument omits the third condition referenced in 2-1001.8. The order specifically includes "suspicious circumstances" as requiring an officer's proper response. The record shows that Sgt. Penny interrupted an attempted burglary/theft by three individuals who were in possession of several burglary tools, drug paraphernalia and wire that had been stolen from spools at the location. Two of the three suspects were eventually charged with felonies as a result (Testimony of Commander of Operations for the Department, Daniel Scheuermann). Under cross-examination, the Grievant acknowledged that he "knew something was going on" with Sgt.

Penny that morning. Yet by his own admission, he did not respond or render assistance to what appeared to be a suspicious situation until after he was contacted by his supervisor. Indeed, LELS witness Deputy Tim Gonder testified that even though his shift was nearly over and he was some nineteen miles from Sgt. Penny's location that morning, he nevertheless made contact with Penny to ascertain whether he needed backup, after hearing the repeated Code 5s on his radio.

Notwithstanding the wording of Codes 5 & 6, I am further persuaded by the Employer's argument that historically, officers have routinely rolled in the direction of their fellow officers when they hear a Code 5 called in, keeping with the Department's policy for their deputies that they be proactive in the course of performing their duties (testimony of Sgt. Enderlein). Both Enderlein and Commander Scheuermann testified that they were not aware of any other deputy on the force that has not immediately started rolling toward an officer who calls in a Code 5. More particularly, under direct, Scheuermann offered the following:

County: "Is there any question in your mind that Deputy Lohmann should have been rolling toward Sgt. Perry when he heard the Code 5?"

Scheuermann: He should have known that. Clearly he should have been moving toward that call."

The Union counters there was no evidence presented that Grievant has ever been instructed or advised that he was expected to immediately head to the location where a fellow officer had reported a Code 5. Further they maintain that there is no clear policy or directive in place with which Deputy Lohmann failed to comply. I must however, respectfully disagree. Initially, as previously noted, the Grievant recognized (as did Deputy Gonder who called Penny that morning) the number of Code 5s and the situation facing the sergeant at minimum constituted a "suspicious circumstance." Perhaps most telling, Deputy Lohmann, under direct testimony, allowed that when he has gone Code 5 in the past his partners have rolled in the direction of his location if they are not a great distance away.

The Grievant noted that he was trained on the Codes by his former Supervisor Sgt. Johnson who represented to him that a Code 5 within Dakota County's 10 Codes did not require an officer to begin immediately rolling to the location of the caller. At the same time however, Deputy Lohmann allowed that a Code 5 called in multiple (3) times could well mean an officer was in trouble and in need of assistance. Sgt. Johnson (now retired) was not called as a witness. However, Employer's Exhibit 7 – Johnson's notes of a conversation he had with the Grievant in 2004 – indicate that he had spoken to Deputy Lohmann at that time about a "perception that [he]

was not taking calls in his area," and the expectations of the Department that officers are to provide a quick and professional response to calls. Such conduct would not appear altogether inconsistent with the charges being made against the Grievant in this instance.

While I would concur with the Union that further clarification of the County's Dispatching Code vis-à-vis the Department's own policies would be preferred, this alone does not exonerate the Grievant of any misconduct on the morning of June 11, 2010. Rather, the weight of the evidence aptly demonstrates that he failed to provide timely assistance and radio contact to a fellow officer in his area who had interrupted a burglary; that he was aware, or should have been aware, of his responsibilities in this regard but failed to carry them out properly.

Having demonstrated justification for the imposition of discipline, the remaining component in matters such as this concerns the reasonableness of the penalty itself. In this regard the employee's work record is routinely factored into the evaluation process. The record indicates that Deputy Lohmann has been a relatively long-term employee with over twenty years of service to the County. At the same time however, it is noted that he has been counseled and coached about being proactive and responding to calls in a timely manner (County's Ex. 7), and has received two oral

reprimands relating to punctuality (Employer's Exs. 5 & 6). In both reprimands he was cautioned that continued failure to follow policies and procedures could lead to additional discipline. In light of this evidence, I find that the action taken by the Department in July of 2010, was not unreasonable.

**Award-**

Accordingly, for the reasons set forth above, the grievance is denied.

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Respectfully submitted this 5<sup>th</sup> day of June, 2013.

/s/  
Jay C. Fogelberg, Arbitrator