

IN THE MATTER OF ARBITRATION

OPINION & AWARD

-between-

Grievance Arbitration

TEAMSTERS UNION, LOCAL 346

B.M.S. Case No. 13PA0706

-and-

Re: Unpaid Suspension

**THE CITY of PEQUOT LAKES
PEQUOT LAKES, MINNESOTA**

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

Representation-

For the City: Marylee Abrams, Attorney

For the Union: Jane C. Poole, Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties, provides in Article 6 for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial two steps of the grievance procedure. A formal complaint was submitted by the Local on behalf of the Grievant on or about January 21, 2013, 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 from a list of qualified neutrals provided by the Bureau of Mediation Services, and a hearing convened on July 18, 2013, in Pequot Lakes. Following receipt of position statements, testimony and supportive documentation, each side indicated a preference for submitting written summations. These were received on August 15, 2013, at which time the hearing was deemed officially closed. 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-

Did the Employer have just cause to issue a fifteen (15) day suspension to Officer Joshua Gartner? If not, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The record developed during the course of the proceedings indicates that the Teamsters Union, Local 346 (hereafter "Union" or "Local") represents, all Police Officers employed by the City of Pequot Lakes ("City," "Employer," or "Administration") who are public employees within the definition of Minn. Stat. §179A.03, subd. 14, excluding the Chief of Police, Sergeants, and other supervisory personnel. Together, the parties have negotiated a labor

agreement covering terms and conditions of employment for members of the bargaining unit (Joint Ex. 1).

The Grievant, Josh Gartner, is a licensed thirty-four year old law enforcement officer who has served as a patrolman in the Pequot Lakes Police Department since 2005. During the course of his tenure with the City, the Grievant has constructed a personnel file that is at once favorable and troubling. His work history contains a number of commendations and positive performance reviews for his police work, while at the same time he has been the recipient of written reprimands, suspensions, and placement on two separate performance improvement plans ("PIPs").

The most recent events giving rise to his fifteen day suspension and the grievance which is the subject of this arbitration, were the result of three separate charges brought by the Department. The first, concerns a complaint brought by a citizen of Pequot Lakes, "TJ", in reference to a traffic stop which occurred on April 22nd of last year. At the time, TJ was an eighteen year old woman the Grievant had met several months earlier while on patrol duty, and with whom he had been having sexual relations. That relationship had ended at the time he made the traffic stop and issued her a citation for underage consumption of alcohol and driving under the influence ("DUI"). During the course of the stop, he had placed her in the

back seat of his squad car but paused the in-squad video and audio prior to the conclusion of the stop, thereby interfering with both the criminal and department investigations that were subsequently conducted. That inquiry further revealed that while in the relationship with TJ he had occasionally taken her with him while on patrol, but had failed to first obtain permission from his supervisor or to fill out the Department's necessary paperwork.

On September 10, 2012, another complaint was filed against Officer Gartner by two citizens (husband and wife) concerning an incident that occurred at a bar in town (Pestello's). The investigation that followed revealed that a good friend of the Grievant (Brandon Rick) who was at the bar at the same time, had reached him on his cell phone concerned about a disturbance that was developing between Rick and the couple. Gartner was on duty at the time, and responded but without first generating a "call for service" with the Department which, in the Administration's view, gave the appearance of favoritism toward a personal friend. The Grievant performed what is termed a "walk-through" in the bar, which he referenced in his written report at the end of his shift.

On January 3, 2013, a third interview was conducted with Officer Gartner concerning yet another citizen's complaint in connection with

comments he had posted on his Facebook page in November following the presidential election. More particularly, Gartner had written:

- “They are projecting O-fuckhead to win again.....so disappointed in America (or formerly known as)
- Fuck this Country....I'm going to Canada...Who's in?
- I'm embarrassed how a lot of the elections turn out.”

Following a receipt of these complaints, the Administration referred the matters to the Cass County Sheriff's Office for an independent criminal investigation. Thereafter an internal investigation was conducted by the City's Chief of Police Eric Klang who concluded that Officer Gartner had “exercised poor judgment in each of the instances...and violated department policies, warranting discipline” (City's Ex. 1; Union's Ex. 4). Consequently, he was issued a fifteen day suspension effective January 17th.

On January 21, 2013, Teamsters Local 346 filed a formal complaint on behalf of Officer Gartner claiming that the suspension lacked just cause and seeking a make whole remedy (Joint Ex. 1). Eventually the matter was appealed to binding arbitration pursuant to the grievance mechanism contained in Article 6 of the parties' Labor Agreement.

Relevant Contractual Provisions, Department Policies & Directives-

From the Master Contract:

Article 7
Discipline

7.1 The Employer will discipline for just cause only. Discipline shall be in the form of:

- a) Oral Reprimand;
- b) Written Reprimand;
- c) Suspension without pay;
- d) Demotion;
- e) Discharge

From Department Policies:

Ride-A- Long Procedures

* * *

II. Policy

It is the policy of the Pequot Lakes Police Department to permit ride-a-longs at the discretion of the Chief or a supervisor. Any non-law enforcement person must sign a liability waiver prior to riding with the officer.

In Squad Video System

* * *

III. General Regulations:

All video cameras installed in departmental vehicles will activate when the emergency lights are activated and will remain operational until the system is manually turned off. * * * It is the Officer's responsibility to ensure the camera activates during each stop. * * * **ALL** events/incidents that have evidentiary value will be taped. Each officer should exercise

sound judgment in determining which events/incidents are of evidentiary value and which are not. **When in doubt, TAPE IT.**

Impartial Policing Policy

I. Policy

It is the policy of the City of Pequot Lakes Police Department to reaffirm our commitment to impartial/unbiased policing and to reinforce procedures that serve to assure the public that we are providing service and enforcing laws in a fair and equitable manner to all.

Law Enforcement Code of Ethics

* * *

I will keep my private life unsullied as an example to all and will behave in a manner that does not bring discredit to me or my agency...

I will never act officiously or permit personal feelings, prejudices, political beliefs, aspirations animosities or friendships to influence my decisions. * * * I will enforce the law courteously and appropriately without fear or favor, malice or ill will....

From the Department's Procedural Directives:

Internal Investigations on Complaints

A. Complaints

1. All complaints, including anonymous complaints against an officer or against department, alleging violation of the rules of conduct shall be recorded on a standard complaint form as soon as practicable by the officer receiving the complaint.

* * *

6. Any officer who is complained against shall be notified by the Chief or Sergeant of the complaint pursuant to Section B, unless to do so might jeopardize the investigation of the complaint.

B. Intermediate Review

The Sergeant or other designee who takes responsibility for a complaint forwarded pursuant to Section A, Paragraphs two (2) and three (3) of this policy shall:

* * *

2. Notify the officer who is complained against pursuant to Paragraph six (6) , Section A.

* * *

C. Internal Investigations

* * *

6. At the conclusion of an Internal Investigation, which shall not be more than thirty (30) calendar days after the original COMPLAINT FORM is recorded, unless a necessary extension of time is granted by the Chief....shall in writing, document all evidence gathered and shall forward the report(s) to the Chief. The Chief has sole authority and responsibility for case disposition and shall proceed by:

- a. Issuing formal charges and recommendations for corrective or disciplinary action pursuant to policy.
- b. Issuing a dismissal of the complaint.

Positions of the Parties-

The **EMPLOYER** takes the position that their decision to suspend Officer Gartner for fifteen days in January of this year was entirely proper and justified under the circumstances. In support of their claim, the City maintains that although the Grievant has performed many of his duties admirably, he has also developed a history of policy violations, poor judgment and sloppy work performance. The three most recent incidents that led to the suspension are illustrative of the problems demonstrated in connection with Officer Gartner's assigned duties. He served alcohol to a minor (TJ) in his home and thereafter allowed her to drive from his house to her residence, yet he ticketed her for under-age consumption and driving after drinking following their break-up. The Grievant had been charged by his employer previously for providing alcohol to under-age friends at a party. He also took TJ on a number of ride-a-longs without first obtaining permission from his superiors and without having her fill out the necessary paperwork.

In connection with the citizen's complaint surrounding the incident at Pestello's bar, he was clearly responding to a request for a favor by a personal friend, and using his uniform to intimidate a patron who was getting into an altercation with that friend. Moreover, he neglected to report the event as a call for service as required.

Third, he used extremely poor judgment making inappropriate and inflammatory comments on his Facebook page toward the President of the United States violating the published Code of Ethics that he was very familiar with.

Finally, the employer argues that they have used progressive disciplined and counseling as an attempt to correct the Grievant's deficiencies, but without the desired results. Indeed, two performance improvement plans have been developed to bring about changes to his approach to many aspects of his job, and yet Officer Gartner continues with his misconduct, ignoring the requisite policies and procedures and failing to take any responsibility for his behavior. For all these reasons then, they ask that the grievance be denied in its entirety.

Conversely, the **UNION** takes the position in this matter that Officer Gartner's suspension was not justified under the circumstances. In support, the Local asserts that traffic stop of TJ was performed entirely consistent with both the law and departmental policies. The Grievant had observed her vehicle driving by with an object hanging from the rear view mirror which is a ticketable offense. Once he made the stop and confronted her, he realized she had been drinking. After administering a breathalyzer he placed her in his squad car and called her parents to have them come pick her up. The

only reason he turned off the audio while waiting for the parents was due to the fact that their discussions had nothing to do with the traffic stop. Further, the Grievant claims that he has not ever served TJ alcohol nor has he allowed her to drive a car from his home after consuming alcohol.

As regards the second charge the Union notes that it was not sustained by the Chief who acknowledged in writing that there was insufficient evidence present to either prove or disprove the allegations brought forward by the couple. In his letter to the Grievant of October 25, 2012, dismissing the charge, the Chief stated that neither the allegations nor the information gathered in connection with the investigation surrounding the complaint would be placed in his personnel file, and yet the City has made the incident now a part of the decision to suspend him.

In connection with the Facebook matter, the Union asserts that the alleged misconduct occurred in early November of last year and the Chief of Police was required by policy to address the issue as soon as practicable after learning of it. While it had been brought to his attention shortly after the presidential election, the Chief did not interview Officer Gartner about it until mid-January 2013. Certainly, they argue, this delay was not consistent with the published mandates of the Procedural Directive addressing complaints brought against an officer by a citizen. Additionally, they

maintain that it had nothing to do with the performance of his duties (he was not on duty at the time); that the comments were addressed to a personal friend alone, and; that he had never been told that what he posted was a violation of the Code of Ethics as the City now charges. For all these reasons then they ask that the grievance be sustained with Officer Gartner's suspension being reversed, and he be made whole with these charges being expunged from his personnel file.

Analysis of the Evidence-

The approach taken here when first analyzing the evidence surrounding a disciplinary dispute such as this, closely parallels the procedures consistently followed in countless arbitral decisions. As the City has observed, an employer is routinely assigned the initial burden of proof, requiring them to demonstrate justification for their decision via competent, accurate and reliable evidence that the offense(s) which the employee has been accused of has in fact been committed by him or her and then, if established, whether the degree of discipline imposed is warranted. *Kroger Co.*, 71 LA 989; *Chemical Leaman Tank Lines*, 55 LA 435; *G. Heilman Brewing Co.* 54 LA 1.

Essentially, in order to establish just cause, the Administration must demonstrate: 1) that the Grievant's conduct indeed violated published and disseminated rules of conduct (or was otherwise so blatant as to require a simple application of common sense) 2) that the accused was aware of the rules and knew of the consequences for violating same; 3) that it conducted a fair and thorough investigation; and 4) that the penalty imposed "fit" the offense committed. See: *Trinity Industries, Inc.*, 109 LA 86 (1997); *Fry's Food Stores of Arizona*, 99 LA 1161 (1992). These factors have been applied to each of the three charges leveled against Officer Gartner in this instance which ultimately led to his suspension.

The Grievant has been employed by the Pequot Lakes Police Department since 2005. There is no dispute but that in the course of his tenure he has been educated on the policies and rules promulgated by the Employer concerning appropriate conduct for a police officer and the expectations of management. The evidence shows that Officer Gartner has been provided with copies of policies outlining workplace expectations, including the Department's Mission Statement and the Code of Conduct (Union's Ex. 8; Employer's Ex. 9). Further, through coaching, counseling and prior discipline he has – by his own admission – been made aware of the consequences should it be determined that he violated the policies and or

rules. This evidence, in the aggregate, satisfies the City's second evidentiary obligation identified above, as it relates to all three charges.

As the Union has accurately noted, that portion of Ms. Johnson's complaint alleging that she was provided alcohol at the Grievant's residence and that she had sexual relations while she was intoxicated, was ultimately not cited by Chief Klang in the letter of suspension as support for the discipline administered (Joint Ex. 4).¹ Similarly, the Employer's assertion that the Grievant was guilty of "Impartial Policing" as it relates to his motive for stopping Ms. Johnson on the morning in question, fails to reach the level of reliable and convincing evidence in my judgment. While the complainant maintains that the Grievant had been made aware by Brandon Rick that she was drinking and driving on April 22, 2012, testimony of witnesses and supporting documentation relating to this particular charge was insufficient. The Grievant claims that he observed Ms. Johnson drive by his residence early in the morning of April 23rd and noticed an object hanging from her rear view mirror. This violation, he claims, gave him probable cause to follow and stop her, ultimately issuing a ticket for underage drinking and driving. Suspicious as it may be, given the relationship between the two and the Grievant's knowledge obtained from Brandon

¹ Neither did Cass County's criminal investigation into the charges result in any prosecution.

Rick earlier that evening that she had been drinking while attending a wedding reception, does not reach the preferred evidentiary threshold.

Two other charges relating to Ms. Johnson's complaint however, have been adequately established on the record. It is unrefuted that Gartner elected to shut off the audio portion during the traffic stop that night while the complainant was seated in the back of his squad car for a period of over fifty minutes. During the course of the Employer's investigation, the Grievant indicated that he could not recall specifically what he and Ms. Johnson discussed during that interval, but stated that he stopped the recording to prevent the court from hearing "her personal matters" (Employer's Ex 2-M, p. 9 – 10). Ms. Johnson, on the other hand, plainly stated both during the initial investigation and in the course of her testimony at the hearing, that she asked Gartner, while seated in the squad car, how many times she had left his house in the past, after consuming multiple drinks there in his presence (City's Ex. 2-D).

The relevant Department policy mandates that video cameras and audio equipment be activated by the officer during all traffic stops, and that each officer "...should exercise sound judgment in determining which events/ incidents are evidentiary value and which are not,".....adding "**when in doubt TAPE It**" (Administration's Ex. 2-S). The record shows that the

Grievant had a sexually intimate relationship for two months with an eighteen year old female whom he had met while on duty. There is also ample evidence indicating that she had been known to have consumed alcoholic beverages at his residence during that time. I would agree with the City's conclusion that the Grievant's motive for shutting off the audio was self-serving more than anything else, in order to protect himself. As the policy plainly states (in bold letters) when in doubt tape it.

There is no dispute concerning Officer Gartner's violation of the Department's Procedural Directive No. 12, which mandates that any ride-along by a civilian in a squad car must first be cleared by a supervisor. It also requires that certain paperwork be completed in advance to avoid liability exposure to the City. The record demonstrates conclusively – both through the testimony of Ms. Johnson and the admission of the Grievant – that she had ridden along with him on multiple occasions without first obtaining permission from the Chief of Police, and without providing the necessary documentation (Employer's Ex. 2).

The second allegation cited in Chief Klang's letter of January 16, 2013, addressing the Grievant's "walk through" of Pestello's Bar on July 15, 2012, has been carefully considered but rejected here as justification for the discipline imposed. Initially, the evidence is uncontroverted that the Chief's

review of the complaint from citizens Randy and Jody Langland, did not establish wrong-doing on the part of Officer Gartner and notified him and his Union representative that the complaint was not sustained, indicating, "...the information obtained in this investigation will not be placed in [the Grievant's] personnel file (Employer's Ex. 3-R). I would agree with the Local that to subsequently use the allegation as a basis for the action taken against Officer Gartner is both inconsistent and akin to double jeopardy.

However, a far different conclusion has been reached in connection with the third charge cited by the Administration relating to comments posted by the Grievant on Facebook.

Factually, there is no dispute but that Officer Gartner authored a number of posts on Facebook shortly after the November elections in 2012. Indeed, he has never denied making the comments. In his defense however, the Union maintains that neither the Code of Ethics, nor the Department's Mission Statement (both cited in Chief Klang's January 16th letter of suspension) unambiguously convey a prohibition against such use of social media. The Mission statement however, urges officers to exhibit "professional conduct at all times" (Local's Ex. 8-h). The Code of Conduct further prohibits peace officers from demonstrating conduct which "...discredits themselves or their agency..." (Union's Ex. 4-f). And the Code

of Ethics includes a promise for licensed officers to keep their “....private life unsullied as an example to all,” and to “....behave in a manner that will not bring discredit to [the] agency” (City’s Ex. 4-D). To make such negative and incendiary comments in the very public social media that he is “ashamed to be from Minnesota;” to write “fuck this country, I’m going to Canada,” because the president won re-election, and; to ridicule calling him “O-fuckhead,” is not only a violation of established policies for licensed police officers, it borders on the absurd. Common sense does not need to be codified in a policy or procedural manual in order to find misconduct. As the City has accurately observed, it is a reasonable employment expectation of an experienced officer to know how inappropriate it is to make negative derogatory posts on Facebook concerning the President of the United States. Indeed, the Grievant must have realized as much, albeit after-the-fact, when he eventually removed the objectionable posts. Moreover, his poor judgment is exacerbated when one considers his prior work record and the fact that he has been placed on not one but two performance improvement plans (“PIPs”).

Finally, I find the Union’s argument regarding Officer Gartner’s First Amendment protections to be less than persuasive under the circumstances unique to this dispute. Police officers are most often held to a higher

standard due to the sensitive nature of their profession and their image and relationship with the communities they work in. As noted by the Chief, in a town the size of Pequot Lakes, it was common knowledge that the Grievant served as a licensed officer. A clear nexus then exists between his position and the public he has sworn to serve and protect.

The Union has advanced two other arguments in defense of the Grievant. The first concerns the delay between the time the Department received Ms. Johnson's initial complaint in the spring of 2012, and when the fifteen (15) day suspension was ultimately issued in January of this year. Calling the time it took to issue the letter of discipline "unreasonable," the Local claims that Officer Gartner was subjected to uncertainty regarding the outcome for a period of approximately four months with no acceptable reason given to him regarding the inordinate delay.

The Union's argument however, ignores a number of salient facts. First, Ms. Johnson's complaint initially necessitated a criminal investigation by an outside agency which was not completed until late August 2012 (City's Ex. 2). Additionally, while the Johnson complaint was being reviewed, the Department received the second (Langland) complaint on September 10th of that same year (Employer's Ex. 3-A). Ultimately this was followed by the third complaint regarding the Facebook postings which came to the

Department's attention in November at approximately the same time the investigation surrounding the Langland matter was drawing to a close. Furthermore, no one disputes the fact that the Department itself is relatively small and that consequently all internal investigations fall to the Chief who described himself as the lone administrator in the Department. Consequently, there was no one to delegate the investigatory responsibilities to. Moreover, within this same time frame Chief Klang had to complete the Grievant's annual performance evaluation and train in a new secretary. Finally, Officer Gartner acknowledged that he was aware of the criminal investigation being conducted (and its attendant delays) as well as the fact that an internal inquiry would necessarily follow (Administration's Ex. 4-H). Braided together, I am satisfied that there existed extenuating circumstances in this instance surrounding the three charges attendant to their investigation and final decision made by the Chief, sufficient to excuse the delay of imposing discipline.

The Local's argument regarding the Employer's failure to follow its own published procedures relative to internal investigations, on the other hand, is more persuasive. The Department's own policies regarding internal investigations into alleged acts of misconduct against an officer references rules that were developed and adopted by the Board of Peace Officers

Standards and Training (Minn. Rules 6700.0200). Under same, the Chief is required to establish written procedures governing the investigation and resolution of allegations of misconduct against one or more of his/her officers and to process complaints according to those procedures. At hearing, Chief Klang acknowledged that he was aware of the procedures, but conceded that he did not comply with them in regard to a number of mandates. For example, a citizen's complaint form is normally to be signed by the complainant prior to considering it "filed." While it allows for a complainant to remain anonymous, the Chief is still obligated to sign it in the absence of the accuser (Union's Exs. 8-A & B). Here the evidence shows that no complaint was ever filed or signed relating to the Facebook posting. While the complainant wished to remain anonymous in that instance, the Chief, according to the Department's published procedures should have signed and filed it on the citizen's behalf. Similarly, the process mandates that the Administration should begin its investigation after receipt of the citizen complaint. In this instance however, the record demonstrates that the Chief asked Cass County to initiate an external investigation prior to the time Ms. Johnson filed her complaint (City's Ex. 2-C).²

² Cass County contacted Johnson on May 23, 2012 commencing the investigation, yet Ms. Johnson had not signed a citizen complaint form until May 24th (Administration's Ex. 2-A).

The same written procedures require that the officer complained about be provided with a copy of the complaint within five days of it being filed or after it has been determined that there was no criminal violation involved (*id.*). The evidence demonstrates that the external (criminal) investigation was completed on or about July 24th following the Grievant's recorded interview with the Administration. Yet Officer Gartner was not given a copy of Ms. Johnson's complaint until August 27th, over a month later (Employer's Ex. 2-M). The Grievant testified, without challenge, that he asked for a copy of the complaint while inquiring why it was not delivered to him in a timely manner. The Chief's response was only that there were a "number of things" behind the delay (*id.*). I would agree with the Local that the approximate four months that passed between the time Ms. Johnson filed her complaint and the time the Grievant was interviewed by the Chief may have unduly prejudiced the Grievant as he was unable to recall some of the details of the events surrounding that particular charge. While the Chief testified that he gave himself an extension of time to complete the investigation of the Johnson complaint, pursuant to the Department's Procedural Directive (Union's Ex. 8-A), he failed to notify the Grievant of such an extension as required. Moreover, he did not inform Officer Gartner or his Union Representative of his findings and conclusion relative to the

Johnson matter, nor did he provide them with a copy of his rationale until the letter of suspension was issued in January of the following year.

The time delays in completing all three investigations surrounding the three complaints are understandable under the circumstances previously addressed, and thereby do not mitigate the penalty imposed. However, the Department's own published policies concerning internal investigations and the procedural obligations of the Administration as set forth therein, render a different result. Those procedures governing investigations into allegations of officer misconduct are not optional, as the Union points out, rather supervision is required to adhere to them, just as the employees they oversee are obligated to follow other rules and policies that govern their conduct as police officers.

Award-

For the reasons set forth above, the grievance of Officer Gartner is denied in part and sustained in part. To the extent that his conduct fell short of the established standards expected of the Department's police officers, a disciplinary suspension is warranted. The unrefuted fact that the Grievant has compiled a checkered personnel record at best which includes a number of counseling sessions, coaching, a written reprimand, along with two PIPs,

lends further support to the decision reached here. Moreover, he continues to take little responsibility for his misconduct while exhibiting a supercilious attitude toward management. At the same time however, the second complaint carries no weight and cannot be used to justify the action taken. Moreover, the Administration must take some responsibility for failing to follow their own published investigatory measures in connection with this matter that raise questions concerning the process accorded the accused. Accordingly, the fifteen (15) day suspension of Officer Gartner is hereby reduced to ten (10) days and he is to be forthwith reimbursed for the loss of wages and related benefits incurred while serving the last five days of his suspension in early February of this year.

I will retain jurisdiction in this matter for the sole purpose of resolving any issue that may arise in connection with the implementation of the remedy ordered.

Respectfully submitted this 4th day of September, 2013.

Jay C. Fogelberg, Neutral Arbitrator