

**IN THE MATTER OF ARBITRATION BETWEEN**

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<b>POLICE OFFICERS FEDERATION</b>	)	
<b>OF MINNEAPOLIS,</b>	)	<b>ARBITRATION</b>
	)	<b>AWARD</b>
<b>Union,</b>	)	
	)	
<b>and</b>	)	
	)	<b>BERRY</b>
	)	<b>DISCHARGE GRIEVANCE</b>
	)	
<b>CITY OF MINNEAPOLIS,</b>	)	
	)	
	)	
<b>Employer.</b>	)	
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Arbitrator: Stephen F. Befort

Hearing Date: October 26, 2007

Post-hearing briefs received: November 14, 2007

Date of decision: December 5, 2007

**APPEARANCES**

For the Union: Ann E. Walther

For the Employer: Trina Chernos

**INTRODUCTION**

The Police Officers Federation of Minneapolis (Union) is the exclusive representative of a unit of peace officers employed by the City of Minneapolis (Employer). The Union brings this grievance claiming that the Employer violated the parties' collective bargaining agreement by discharging Sergeant Robert Berry without just cause. The grievance proceeded to an arbitration hearing at which the parties were

afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

### **ISSUES**

- 1) Did the Union grieve only the level of discipline or also the underlying issue of whether the grievant engaged in conduct warranting discipline?
- 2) Did the Employer discharge the grievant for just cause?
- 3) If not, what is the appropriate remedy?

### **RELEVANT CONTRACT LANGUAGE**

#### **ARTICLE 4** **DISCIPLINE**

**Section 4.1** The City, through the Chief of the Minneapolis Police Department or his/her designee, will discipline employees who have completed the required probationary period only for just cause. The unit of measurement for any suspension which may be assessed shall be in hours. . . .

### **FACTUAL BACKGROUND**

The Employer hired Robert Berry as a police officer in 1992. He was promoted to the position of sergeant in 2001. At the time of his discharge, Sergeant Berry was assigned to the STOP Unit, a proactive mobile tactical unit with city-wide jurisdiction.

Sergeant Berry was scheduled to work the 4:00 p.m. to 2:00 a.m. shift on January 11, 2007. After clocking in at the SWAT garage, his home base, he signed on to Workforce Director and prepared the STOP unit work schedule for the pay period to begin on January 21, 2007. Workforce Director is the computer program used by the Police Department for posting work schedules and for recording work time, leave time, and absences. Because a colleague, Sergeant \_\_\_\_, was being bumped to a lower classification following the January 11 work shift, Sergeant Berry's intention was to prepare the schedule (which needed to be prepared ten days in advance) and then take

compensatory time in order to spend the evening with Sergeant \_\_\_\_\_. In order to take the time off, Berry needed to make sure that Sergeant Chris Granger, another sergeant in the STOP Unit, was willing and able to supervise the shift. Sergeant Granger was running late that day, and did not report to work until about 5:45 p.m. According to the testimony of both Berry and Granger, Berry asked Granger if it was okay for him to “comp out” for the shift, and Granger responded in the affirmative.

With Sergeant \_\_\_\_\_ driving, Sergeant \_\_\_\_\_ and Sergeant Berry then drove to O’Donovan’s Irish Pub in Minneapolis in an Employer-owned vehicle, an unmarked Chevrolet Tahoe. Sergeant Granger, who was still on duty, drove separately and met them for dinner. Sergeant \_\_\_\_\_ and Sergeant Berry consumed some alcoholic beverages, but Sergeant Granger did not. Sergeant Granger departed before the other two officers at around 9:00 p.m.

Sergeant Berry testified that he assumed that he and Sergeant \_\_\_\_\_ would return to the SWAT garage after leaving O’Donovan’s. But, Sergeant \_\_\_\_\_ drove them to Ground Zero, a bar in Northeast Minneapolis. According to Sergeant Berry’s testimony, Sergeant \_\_\_\_\_ had another drink, while Berry unsuccessfully tried to talk him into returning to the SWAT Garage. From Ground Zero, the Grievant walked with Sergeant \_\_\_\_\_ to a nearby unidentified bar, after which the pair returned to the Tahoe on foot.

Sergeant \_\_\_\_\_ then drove the pair to Laura’s 1029 Bar where he drove the Tahoe into a picnic table outside the bar. At this point, Sergeant Berry demanded the keys from Sergeant \_\_\_\_\_, who refused. Sergeant Berry then called Sergeant Granger, telling him that Sergeant \_\_\_\_\_ was out of control and asking him to bring a second set of keys for the Tahoe. Following an argument, Sergeant \_\_\_\_\_ agreed to drive back to the SWAT Garage,

but en route pulled into the parking lot of Déjà Vu Nightclub. Sergeant Berry again called Sergeant Granger who arrived taking custody of the Tahoe while two other SPOT officers drove Sergeant Berry back to the SWAT garage. Sergeant Berry clocked out at the SWAT garage at around 12:30 a.m. and drove home.

Meanwhile, Sergeant Granger received a call from Sergeant \_\_\_ who was now at Sinners, a strip club, asking for a ride. When Sergeant Granger reached Sinners, he learned that a dispute had arisen due to the fact that Sergeant \_\_\_ had refused to pay for a lap dance. Granger paid the fee and drove Sergeant \_\_\_ back to the SWAT garage. After Sergeant Granger left, Sergeant \_\_\_ took the keys to one of the squad cars parked in the garage and drove the car in an intoxicated condition. When Night Watch Commander Leaf called Sergeant Granger later because she had heard information about Sergeant \_\_\_'s use of the Tahoe, Sergeant Granger failed to report Sergeant \_\_\_'s drunken use of the squad car.

When the Employer conducted its investigation into these events, it discovered that Sergeant Berry had not officially recorded his use of compensatory time on either Workforce Director or the hard copy schedule posted in the SWAT garage during the evening of January 11 in spite of having opportunities to do so. Instead, on the following day, Sergeant Berry placed a telephone call from home to Sergeant Granger who was on duty asking him to note on the schedule that Berry had taken a comp day for January 11. Sergeant Granger declined, thinking that Berry should take care of it himself given the controversy that had developed concerning the events of that day. Sergeant Berry then asked newly detailed Sergeant O'Rourke to mark the schedule change. Testimony at the hearing established that the Employer's policy does not require an officer to

contemporaneously record compensatory time off on Workforce Director, but instead only requires that such be accomplished by the end of the payroll period, which in this instance was January 22, 2007.

The Internal Affairs Unit conducted an investigation into the events of January 11 and 12, 2007. The Internal Affairs investigation resulted in a written report which was then reviewed by a three-member disciplinary panel. The Internal Affairs report concluded, among other things, that Sergeant Berry was on duty during the January 11 bar-hopping trip. The panel recommended the termination of Sergeant \_\_\_ and Sergeant Berry, while proposing a lesser sanction for Sergeant Granger. The Employer acted upon the recommendations by discharging Sergeant Berry and by imposing a 40 hour suspension on Sergeant Granger. Sergeant \_\_\_ resolved his status by resigning.

Assistant Chief of Police Sharon Lubinski testified that Sergeant Berry's prior disciplinary record was a factor in the discharge decision. In 2004, an investigation sustained allegations that Sergeant Berry had falsified information on a police log in order to obtain overtime pay. The Employer imposed an 80-hour suspension for this conduct. Assistant Chief Lubinski testified that the two incidents are related since both appear to involve the manipulation of time records, and that the earlier discipline justified a progressively higher sanction for this second infraction.

The Union filed a grievance challenging Sergeant Berry's termination on June 8, 2007. On the grievance form, the Union wrote "severity of discipline" under the Statement of Grievance heading and "make whole" under the Remedy Sought heading. The parties were unable to resolve the grievance through the steps of the contract grievance procedure, and the dispute proceeded to arbitration.

## POSITIONS OF THE PARTIES

### **Employer:**

The Employer initially contends that the Union's statement of the grievance on the grievance form indicates that it is challenging only the level of discipline imposed and not the existence of the alleged underlying misconduct.

Turning to the merits, the Employer argues that Sergeant Berry violated a number of promulgated department policies regardless of whether he was on duty or off duty during the January 11 series of incidents. If he was on duty, the Employer maintains that Sergeant Berry violated employer policies by consuming alcohol on duty and by deceptively altering time records after-the-fact. But, even if he was off duty, the Employer asserts that Sergeant Berry violated Employer policies by failing to contact Internal Affairs about Sergeant \_\_\_'s behavior and by not taking affirmative steps to prevent Sergeant \_\_\_ from driving the Tahoe in an intoxicated state.

The Employer further argues that discharge is a proper sanction under the circumstances of this case. The Employer points out that the Internal Affairs investigation found that Sergeant Berry committed "D" level offenses under the department's disciplinary policy for which termination is listed as an appropriate remedy. Moreover, since Sergeant Berry had committed a prior "D" level offense by altering time records in 2004, the concept of progressive discipline warrants a heightened sanction for this second offense. Finally, the Employer argues that Sergeant Berry's situation is sufficiently distinguishable from that of Sergeant Granger so as to justify a difference in their respective penalties.

**Union:**

On the procedural issue, the Union maintains that by asking that the grievant be “made whole” on the grievance form, it necessarily raised a proper challenge to both the existence of the purported misconduct and the severity of the remedy imposed.

As for the merits, the Union contends that the City’s termination decision was premised upon the assumption that Sergeant Berry was on duty during the night of January 11. The Union argues, however, that the evidence clearly shows that Sergeant Berry had “comped out” for that shift. Once Sergeant Berry’s off duty status is recognized, the Union maintains that most of the misconduct alleged by the Employer simply melts away. All that is left are the relatively milder complaints that Sergeant Berry did not report Sergeant \_\_\_’s misconduct to Internal Affairs or take earlier affirmative steps to stop Sergeant \_\_\_’s bar hopping escapade.

The Union asserts that these remaining violations, even if established, do not warrant the discharge sanction. First of all, the Union argues, these allegations do not constitute “D” level offenses. Second, these allegations are substantially similar to those asserted against Sergeant Granger and notions of equal treatment compel that Sergeant Berry not be subject to discipline more severe than that meted out to Sergeant Granger.

**DISCUSSION AND OPINION**

**Scope of the Grievance**

The City maintains that the Union has waived its right to contest the City’s conclusion that the grievant violated department policies because, on the grievance form, under the Statement of Grievance heading, it wrote “severity of discipline.” According to

the Employer, this description of the grievance suggests that the Union only has asserted a timely challenge to the severity of the Employer's sanction, but not to the accuracy of the Employer's findings with respect to the underlying misconduct.

I find this line of argument to be unpersuasive for several reasons. First, the Union also wrote on the grievance form, under the Remedy Sought heading, that it was seeking "make whole" relief for the grievant. A remedy that seeks to eliminate a disciplinary sanction in total strongly suggests an attack on both the Employer's findings of misconduct and its chosen level of discipline. In addition, a similar challenge involving these same parties was rejected by Arbitrator Jeffrey Jacobs in Minneapolis Police Officers Federation and City of Minneapolis (Jacobs, Arb., Nov. 15, 2004).

Arbitrator Jacobs based his ruling on the fact that the Union has used this same language on its grievance form with respect to other discharge cases over several years without objection, plus the fact that the Union asserted challenges to the purported violations of department policies at the *Loudermill* hearing. Although Arbitrator Jacob's findings are not binding, his logic is persuasive given the similarity in circumstances between the two cases.

### **The Merits**

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is

appropriate in light of all of the relevant circumstances. *See* Elkouri & Elkouri, *HOW ARBITRATION WORKS* 948 (6<sup>th</sup> ed. 2003).

### **The Alleged Misconduct**

The Employer based its termination of Sergeant Berry on a finding that his conduct on January 11, 2007 violated four provisions of the Minneapolis Police Department Policy and Procedure Manual (MPD P/P). Each of these purported violations is discussed below.

#### **1. MPD P/P 5-101 Truthfulness**

The MPD P/P provision relating to truthfulness provides, in pertinent part, as follows:

Officers shall not willfully or knowingly make an untruthful statement, verbally or written, or knowingly omit pertinent information pertaining to his/her official duty as a Minneapolis Police Officers. Officers shall not willfully or knowingly make an untruthful statement or knowingly omit pertinent information in the presence of any supervisor, intended for the information of any supervisor, or before any court or hearing. . . .

This policy, in a nutshell, prohibits officers from intentionally making an untruthful statement relating to official duties. While the Internal Affairs summary report did not identify a specific violation of this policy by the grievant, Assistant Chief Lubinski testified that Sergeant Berry violated the truthfulness policy by changing time records to make it look as if he were off duty during the January 11 shift. In essence, Assistant Chief Lubinski's claim is premised on the assumption that Sergeant Berry was on duty during the events of that evening, but deceptively doctored records after-the-fact to make it look like he was off duty.

The problem with this line of reasoning is that there is scant evidence to show that Sergeant Berry was on duty during the bar tour lead by Sergeant \_\_\_\_ that evening. The

Employer asserts that Sergeant Berry clocked in at work, prepared the SPOT Unit schedule, and failed to change his status on the schedule to off duty during the course of that shift. But, the Union's competing evidence is far weightier, including the following: 1) Sergeant Berry and Sergeant Granger testified without contradiction that Berry asked if he could "comp out" and Granger agreed; 2) the Employer's policy does not require employees to alter their duty status on Workforce Director contemporaneously, instead they may do so at any time prior to the end of the payroll period; 3) after Sergeant Berry was given a ride to the SWAT garage at 12:30 a.m., he went home rather than work the remainder of this shift; and 4) the Employer reduced Sergeant Berry's compensatory time bank for ten hours, reflecting the full January 11-12 shift.

Assistant Chief Lubinski's testimony suggested that she believed that Sergeant Berry likely altered time records in this instance because he had altered time records three years earlier with respect to an incident resulting in discipline. That, however, assumes too much. Sergeant Berry's prior transgression certainly warrants a heightened penalty if competent evidence shows that the same type of misconduct was repeated, but it cannot independently establish such a violation in the absence of evidence to show that the latter violation actually occurred. Here, that evidence is missing.

In sum, the Employer's conclusion that Sergeant Berry violated the truthfulness policy was based upon the assumption that Sergeant Berry was on duty during the evening of January 11, 2007. Because the evidence does not support such a conclusion, this alleged violation is not sustained.

## 2. MPD P/P 5-102 Ethics

The second purported violation relates to the department's policy with respect to ethics. The language of this policy states:

All sworn and civilian members of the department shall conduct themselves in a professional and ethical manner at all times and not engage in any on or off-duty conduct that would tarnish or offend the ethical standards of the department. Employees shall abide by the City's Ethics in Government Policy, Chapter 15.

The Internal Affairs report found that Sergeant Berry, as an on-duty employee, violated the Ethics policy by getting in the Tahoe after he had consumed alcoholic beverages and by allowing Sergeant \_\_\_ to use the Tahoe for a bar-hopping spree. Assistant Chief Lubinski opined at the hearing that, even if Sergeant Berry had been off duty at the time, he violated the Ethics policy by not taking affirmative steps to prevent Sergeant \_\_\_ from driving the Tahoe after leaving O'Donovan's Pub.

As noted above, the evidence shows that Sergeant Berry was off duty during the evening of January 11. As such, the findings of the Internal Affairs report are without support. The pertinent issue, instead, is whether Sergeant Berry committed an ethical error by not making adequate efforts, such as using his tactical skills, to separate Sergeant \_\_\_ from the Tahoe.

Sergeant Berry testified that he thought at first that he could convince Sergeant \_\_\_ to drive the Tahoe back to the SWAT garage and that it was best to stay with Sergeant \_\_\_ in order to keep a lid on the situation. However, once Sergeant \_\_\_ drove the Tahoe into the picnic table, Sergeant Berry realized that the situation was out of hand and he changed tactics by asking Sergeant \_\_\_ to give him the keys and by calling Sergeant Granger to ask for a ride back to the SWAT garage. Sergeant Berry also testified that he did not attempt to forcibly obtain the keys to the Tahoe from Sergeant

\_\_\_ because he thought that such a move would result in an embarrassing physical and perhaps injurious altercation that was unlikely to conclude in a transfer of the keys.

Under these circumstances, Sergeant Berry did not commit an ethical violation in deciding that a physical altercation might cause more harm than benefit. Nonetheless, he should have contacted Sergeant Granger or some other officer in authority at an earlier stage once Sergeant \_\_\_ began his bar-hopping tour after leaving O'Donovan's. A violation of the Ethics policy, accordingly, is sustained but only to this more limited extent.

### **3. MPD P/P 5-103 Use of Discretion**

The third policy violation found by the Employer concerns the department's Use of Discretion policy. This provision states as follows:

The police profession is one that requires officers to use considerable judgment and discretion in the performance of their daily duties. Officers have a large body of knowledge from Department policies and procedures, training, their own professional police experience and the experiences of their fellow officers to guide them in exercising proper judgment and discretion in situations not specifically addressed by Department rules and regulations. In addition, officers must always adhere to the following principles in the course of their employment with the Minneapolis Police Department:

POLICE ACTION - LEGALLY JUSTIFIED: Officers must act within the limits of their authority as defined by law and judicial interpretation, thereby ensuring that the constitutional rights of individuals and the public are protected.

EQUALITY OF ENFORCEMENT: Officers shall provide fair and impartial law enforcement to all citizens.

LOYALTY: Officers shall be faithful to their oath of office, strive to uphold the principles of professional police service, and advance the mission of the Department.

Both the Internal Affairs report and Assistant Chief Lubinski relied on the same factual basis for finding a violation of the Use of Discretion policy as it did for the Ethics

policy. As such, the same conclusion as applicable with respect to the previously discussed policy also is applicable here: Sergeant Berry fell short of policy expectations only to the extent that he should have contacted Sergeant Granger or some other officer in authority at an earlier stage concerning Sergeant \_\_\_'s conduct on the evening of January 11. Thus, the finding of a violation of this policy is sustained, but at a markedly lower level of culpability.

**4. MPD P/P 5-105 Professional Code of Conduct**

- a.** 5-105 (3) provides that “Officers shall use reasonable judgment in carrying out their duties and responsibilities. They need to weigh the consequences of their actions.”

This portion of the Professional Code of Conduct policy, by referring to conduct occurring with respect to an officer’s “duties and responsibilities, appears to apply only to on duty conduct. But, even if it applies more broadly, the only plausible violation as to Sergeant Berry, once again, is that he failed to alert the proper authorities at an earlier stage as to Sergeant \_\_\_'s bar-hopping trip.

- b.** 5-105 (6) Employees shall immediately report any violation of rules, regulations, or laws that come to their attention to the Internal Affairs Unit, regardless of the violator’s assignment or rank within the Department.

It is undisputed that Sergeant Berry did not notify the Internal Affairs Unit concerning Sergeant \_\_\_'s activities on the evening of January 11. As a result, the Employer’s finding that the grievant violated this policy is sustained.

- c.** 5-105 (15) Employees shall be decorous in their language and conduct. They shall refrain from actions or words that bring discredit to the Department. They shall also not use words or terms which hold any person, group or organization up to contempt. The use of such unacceptable terms is strictly forbidden.

Sergeant Berry acknowledged in his testimony that he drank two beers while at O'Donovan's Irish Pub. However, neither the testimony of Sergeant Berry nor that of Sergeant Granger provide any support for a finding that Sergeant Berry, who was not on duty and not in uniform, was intoxicated or acting in a non-decorous manner on the evening of January 11. The mere fact that Sergeant \_\_\_ subjected Sergeant Berry to a non-consensual bar-hopping spree does not establish a sufficient basis to find Sergeant Berry in violation of this policy.

- d. 5-105 (21) Employees shall never be under the influence of alcohol while on duty. A reading of .02 blood/alcohol concentration is considered under the influence of alcohol. Employees shall not consume alcoholic beverages while on duty or in uniform unless it's necessary in the performance of a non-uniformed officer's undercover work.

It is clear that this portion of Policy 5-105 is violated only with respect to on-duty or in-uniform conduct. Since neither of those predicates existed in this context, the employer cannot make out a violation of this provision.

### **The Appropriate Remedy**

The Employer considers a number of mitigating and aggravating circumstances in determining the appropriate level of discipline for police officer employees. These factors include the following:

- the employee's motive
- the employee's past and present performance
- the degree of culpability
- the employee's forthrightness
- the employee's disciplinary history
- the severity of the infraction
- acknowledgement of error by the accused employee, and
- other pertinent factors

In addition, the department applies the matrix below in an attempt to achieve consistency in determining disciplinary levels.

<b>Discipline Type</b>	<b>Description</b>	<b>Appropriate for:</b>
Oral reprimand	A one-on-one meeting with the employee's supervisor	B violations
Written reprimand	Letter of reprimand is presented to the employee and is retained in the case file as well as the employee's personnel file	B, C violations
Suspension without pay	Employee is given time off without pay	B violations: up to 40 hours C violations: up to 80 hours D violations: up to 720 hours
Demotion	Employee is temporarily or permanently demoted from the rank of sergeant, lieutenant, or captain, or any Appointed position	C, D violations
Termination	Employee is terminated from Employment with the MPD	D violations

The Internal Affairs summary report found that Sergeant Berry's conduct on the evening of January 11 constituted "D" level offenses. This finding, coupled with Sergeant Berry's prior "D" level offense which resulted in an 80-hour suspension, led the Employer to conclude that discharge was warranted. In contrast, the Internal Affairs summary report found that Sergeant Granger's conduct on January 11-12 constituted only a "B" level offense. While Assistant Chief Lubinski raised Sergeant Granger's offense level to a "C" status, the Employer imposed only a 40-hour suspension on Sergeant Granger.

It is clear that the heightened level of discipline imposed on Sergeant Berry was premised on the assumption that Sergeant Berry's conduct on the evening of January 11 occurred while he was on duty. Certainly, if Sergeant Berry had consumed alcohol and

participated in a bar-hopping spree while on duty, such conduct would represent a significant dereliction of duty and trust.

The evidence, however, establishes that Sergeant Berry was not on duty during these events. Under these circumstances, as noted above, Sergeant Berry's missteps concerning the events of that evening are reduced to two: 1) he should have contacted Sergeant Granger or some other officer in authority concerning Sergeant \_\_\_'s conduct once Sergeant \_\_\_ failed to drive the Tahoe back to the SWAT garage after leaving O'Donovan's, and 2) he should have reported Sergeant \_\_\_'s conduct to Internal Affairs. While these missteps violate department policies and justify discipline, they fall far short of "D" level violations warranting discharge.

In the end, Sergeant Berry's misconduct essentially is equal to or lesser than that of Sergeant Granger. Sergeant Granger, like Sergeant Berry, observed Sergeant \_\_\_ consume alcohol while in possession of the Tahoe, but took no action to intervene. Sergeant Granger, like Sergeant Berry, did not report Sergeant \_\_\_'s conduct to Internal Affairs. Moreover, Sergeant Granger left an intoxicated Sergeant \_\_\_ unsupervised in the SWAT garage where he commandeered a squad car and drove drunk. Sergeant Granger also failed to disclose this latter incident when questioned by the Night Watch Commander. Under these circumstances, the 40-hour suspension issued to Sergeant Granger establishes the upper boundary of discipline appropriate for Sergeant Berry under notions of equal treatment.

#### **AWARD**

The grievance is sustained in part and denied in part. The Employer had just cause to discipline the grievant, but the sanction is reduced to a suspension of forty (40)

hours without pay. The Employer is directed to reinstate the grievant and to make him whole for any resulting loss in pay and benefits less any compensation earned in mitigation. The Employer also is directed to correct the grievant's personnel files to reflect this determination. Jurisdiction is retained for a period of sixty (60) days from the date of this award to address any remedial issues as may be necessary.

Dated: December 5, 2007

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Stephen F. Befort  
Arbitrator