

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
GREEN BAY POLICE PROTECTIVE ASSOCIATION

and

CITY OF GREEN BAY

Case 336
No. 61365
MA-11903

Appearances:

Thomas J. Parins, Jr., Attorney at Law, Parins Law Firm, S.C., appearing on behalf of the Association.

Jerry H. Hanson, Assistant City Attorney, City of Green Bay, appearing on behalf of the City.

ARBITRATION AWARD

The Association and City named above are parties to a 1999-2001 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear the grievance of Stephanie Gulovich. Steve Morrison was assigned as the arbitrator and heard the dispute on April 9, 2003, in Green Bay, Wisconsin. After the hearing, but before the parties completed their briefing schedule, Mr. Morrison left the WERC and the case was transferred to Arbitrator Karen J. Mawhinney for a decision. The parties completed filing briefs on August 20, 2003.

ISSUE

The parties stipulated at hearing that the issue is whether Officer Gulovich was appropriately disciplined with a written reprimand as a result of an incident on January 22, 2002.

BACKGROUND

The Grievant is Stephanie Gulovich, a police officer with the Green Bay Police Department. At the time of the accident on January 22, 2002, which led to the reprimand being grieved here, she had been employed with the Department for two and a half years.

About 4:00 p.m. on January 22, 2002, the Grievant was working her regular shift on the east side of the downtown area when she was dispatched to a call over the radio and also called on a computer. The Grievant and another officer, Brenda Kulow, were both sent to a house on the west side of the city for an uncontrollable 14-year-old. Officer Kulow, who was closer to the scene, responded first to the call, and the Grievant could hear her siren over the radio. The Grievant then acknowledged to the dispatcher that she was also headed to the scene. The Grievant believed the situation required an emergency response because there was a 14-year-old male out of control and anyone could be in danger. The officers were told that the juvenile had kicked the caller and he was out of control. The Grievant responded with her red lights and siren - then there was another dispatch that said that he had grabbed a video game and went into the basement and was possibly separated from the caller at that time. The Grievant did not feel that she knew enough about the situation to believe that things were under control. She wanted to get to the scene as quickly as possible to back up the other officer, because she did not know the size of the juvenile, how he would react to the other officer or how much out of control he was at the time. She was uncertain whether the parties were actually separated. The Grievant was about five miles away from the scene.

The Grievant came up to the intersection of West Mason and 12th Avenue on the west side, which was about two miles from where she started the call. She was heading west in the left lane on West Mason. As she approached the intersection, all the traffic in front of her was blocked in all the lanes. She slowed down, went into the clear eastbound lane because there was a red light, then cleared the intersection and was going back through the westbound lane when she accelerated and the back of her car spun out. The car apparently spun out due to a puddle on the road, which the Grievant did not see before the accident. It was a sunny day and the roads were dry for the most part. After the car spun out of control, she crossed a raised median and the front end of her car struck the rear bumper of a vehicle that was waiting at the red light on the other side. She was not over the speed limit when she started to accelerate and slide. She believed she used due regard as to the situation and her driving. The Grievant had a sore neck from the accident, and the other driver indicated that she was fine at that time. The Grievant received medical treatment for her injury. Both vehicles sustained some damage - the investigating officer estimated damage to the squad car at \$1,000 and less to the other vehicle. The investigating officer also marked the accident report as the Grievant driving too fast for conditions and failure to have control. The Grievant agreed that she could not get control of her car after she spun out but disagreed that she was driving too fast for conditions.

The Grievant testified that a situation requiring an emergency response would be where someone is in danger of being seriously injured or there could be serious property damage. Once she makes the decision to respond to an emergency, she turns on her lights and sirens.

The severity of the call determines how fast she drives. At stop signs and traffic lights, she makes sure that the intersections are cleared and there are no vehicles in her way. The Grievant believed that she was responding to an emergency based on a potential crime of violence in progress or to prevent a crime of violence. She has responded to emergencies in the past without discipline or counseling. In this case, the Grievant did not discontinue the red lights and siren because she did not feel that the threat was gone and that everyone was out of danger. Had she known that there was no danger, she would have turned off her lights and siren.

Officer Kulow was meeting with Lieutenant Mark Hellmann in a city-owned parking lot when she received a call from the dispatcher who contacted her and the Grievant and told them to start heading to Shirley Street for an out-of-control juvenile. Kulow told Hellmann, "That sounds like an emergency response to me." He said, "Yeah, you're out of here." (Hellmann testified that he did not recall that she received a dispatch during their meeting.) She pulled out of the parking lot with her lights and siren on. She called the dispatcher to try to get more information and received the notice that the juvenile had gone to the basement. However, she did not know if the caller was in the basement with the juvenile or whether anyone else was in danger. When she got to the house, she knew the Grievant was coming and could hear sirens, but then they stopped. Kulow approached the house and listened for a disturbance, but it was quiet. By then, Kulow knew that the Grievant had been involved in an accident and would not be responding, so she knocked at the door. Kulow was not counseled or disciplined for using her lights or sirens in this incident. No one spoke to her about it, and she was positive that Hellmann would have known that she was responding in an emergency fashion. Kulow has responded in similar situations with emergency lights and sirens and has never been counseled or disciplined for responding in that manner.

Lieutenant Andrew Lewis was dispatched to the accident that involved the Grievant. Both the Grievant and the other driver told him that they were not injured and declined any medical attention. Both drivers gave him the same account of the accident. Lewis found most of the road surface to be dry but there was a wet spot on West Mason right before the point of collision. The wet spot was not something one could clearly see. He concluded that the wet pavement and the speed of the squad car caused the squad car to go out of control, hop the divided median and crash into the stopped vehicle. Lewis testified that in order for the squad car to lose control, hop up on the median, crash into another vehicle and have the bumpers lock, acceleration would be a contributing factor to the accident. Lewis believed that the Grievant would have to be accelerating throughout the whole process including while going over the median strip. He did not believe that she got off the gas and was not sure what she did with her steering. The bumpers could have hooked together because of the height disparity between the squad car and the struck vehicle, a sport utility vehicle. While both drivers agreed that the Grievant went through the intersection slowly, the Grievant told him that she started to accelerate. Lewis testified that he could have issued the Grievant a citation for the accident, citing driving too fast for conditions. He also could have cited her for failure to use due regard or crossing the centerline. Emergency vehicles are granted certain exceptions regarding the

rules of the road. On the night of the accident, Lewis counseled the Grievant to accelerate more slowly when on wet pavement. He noted in his report that she displayed a good attitude. He also met with Commander Alan Timmerman to review the incident.

Timmerman was the Chief of Police at the time of the hearing in this matter but was the Commander of the Operations Division at the time of the accident. He reviewed all accidents involving police department vehicles. Timmerman reviewed the disk of the dispatch incident and the accident report. After listening to the recording of the dispatch, he found that an emergency response to the call was unnecessary and that the accident was completely avoidable. Timmerman testified that it was clear that the juvenile had taken a Nintendo game and gone downstairs, that he was separated from the caller and there was no threat or a continuing physical disturbance. Timmerman added that while the 14-year-old had kicked the caller, he was not continuing the kick the caller, and if the caller felt threatened, the caller could have left the house.

The Department policy and procedures state that emergency response using emergency lights and sirens requires a true emergency. It also provides that an officer must be able to articulate the reason for believing that there is a high probability of death or serious injury to an individual or significant property loss. The elements that may indicate a high probability of death or serious injury include 1) a serious public hazard; 2) a crime of violence in progress; 3) the prevention of a crime of violence; and 4) an officer needing assistance and immediate aid. Timmerman did not believe that any of those elements were present in the situation at issue here.

In determining the disciplinary action, Timmerman also considered the fact that the Grievant had a prior accident with a personnel file entry report. While on duty on September 25, 2001, the Grievant had made a traffic stop in a parking lot and pulled her car over to make room for a third party to leave when her bumper rubbed up against the bumper of another parked vehicle. There was a black scuff mark on the vehicle that she hit.

Timmerman thought the Grievant had a good attitude about this current accident and that she admitted that she lost control of the car. He noted that she used due regard going through the intersection before the accident, but when she lost control of the car, she no longer was using due regard. State law requires one to operate a vehicle at a reasonable and prudent speed limit and control it to avoid colliding with any object, person or vehicle. State law also requires one operating an emergency vehicle to drive with due regard under the circumstances for the safety of all people using the highway.

An attorney representing the person who was struck by the Grievant's car filed a notice of claim. The vehicle struck sustained damages between \$547 and \$580 and the driver had incurred about \$2,000 in medical and chiropractic costs with total damages unknown, and the claim alleged damages of \$10,000.

THE PARTIES' POSITIONS

The City

The City asserts that it had just cause to issue a written reprimand given the totality of the circumstances. There was the questionable use of emergency lights and siren where the dispatcher had informed the Grievant that that the violent juvenile was in the basement and possibly separated from the caller. The Grievant failed to properly control her car, causing a significant accident and her second accident within a four-month period. She received an administrative registry discipline for the prior accident.

The City submits that the Grievant could be expected to know the probably consequences of her conduct and even admitted that the accident should not go without discipline. The rules that she violated are reasonable – based on state law and department policy. An emergency response may have initially been required but was no longer needed once dispatch informed the Grievant that the male grabbed a video game, went into the basement, and may possibly be separated that that time.

The Chief met with the investigating officer, listened to a recording of the dispatched radio call, and met with the Grievant. His effort to get the relevant information was fair and objective. When Timmerman listened to the tape, it was very clear that the caller and the juvenile were separated. He considered giving the Grievant a suspension because of the severity of the accident. He found that Kulow's actions were distinguished from the Grievant's where Kulow sought clarification of the facts and the Grievant did not. The Grievant's good attitude was a factor in the ultimate decision for a written reprimand. It was a reasonable disciplinary measure under all the circumstances.

The Association

The Association notes first that management has the burden of proof to show that the discipline is warranted and proper. It asserts that the Grievant responded properly to the call when she used an emergency response which included emergency lights and siren. Officers are to respond with emergency lights and sirens when a crime of violence is in progress or to prevent a crime of violence. The officers were responding to the call that there was a crime of violence in progress and a fast response may have kept it from escalating. Both of the officers responding independently felt that an emergency response was necessary. Furthermore, Kulow's siren was audible to the dispatchers, and no one from management or dispatch told her that an emergency response was inappropriate. Kulow was never disciplined for using an emergency response. Rules must be enforced and penalties assessed consistently, and the two officers that responded to the same call in the same fashion were not treated equally – one received discipline and the other was not even counseled.

Referring to the first factor of the seven criteria used in Section 62.13, Wis. Stats., for discharge and suspension cases, the Association states that the Grievant did not have any knowledge of the possible consequences of her conduct. On its face, the emergency response

policy is reasonable but leaves a lot of discretion and judgment to the officer. The Association admits that management did some investigating in this case but did not discuss the matter with Kulow to see if she also thought that this was an emergency situation. The Association further asserts that the effort was not fair and objective. Management wanted to discipline the Grievant because she was involved in an accident, and did just enough investigation to justify a discipline in their minds.

The Association also contends that the Chief did not discover substantial evidence that the Grievant violated the rule or order as described in the discipline. Both officers independently came to the same conclusion about what type of response was warranted to the call. The Chief did not apply the rule or order fairly and without discrimination against the Grievant. Moreover, the discipline is not reasonably related to the seriousness of the alleged violation and the Grievant's record of service. The Grievant has a clean record and her only violation is when she backed into a parked car in a parking lot. The discipline is too severe and there should be no discipline in this matter given the circumstances.

The Association submits that the Grievant used due regard in operating her squad car. After going through the intersection, she accelerated as she had been trained to do. She used techniques taught to her. Road conditions were dry and she would not be expecting a wet patch on the road. The only fact that management is using to say that she did not use due regard is the fact that the back end of the car spun out and she happened to lose control. While the Grievant used due regard in operating her emergency vehicle, that does not always prevent accidents. That is why they are called accidents.

In Reply, the City

The City responds by stating that while the Association indicated that the Grievant merely hit a puddle in the road, the pictures show the entire westbound lane was wet. Officer Lewis found it strange that the car would spin, pop up over the raised median, cross two lanes of traffic and strike a vehicle unless the squad car was accelerating throughout that process.

The City asserts that officers understand that they may receive discipline if they are not acting or reacting reasonably. For some reason, the Grievant was accelerating throughout this accident, thereby causing significant damage. When you add the other questionable activities, such as whether there was a true emergency and her previous discipline, you can find that the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged action.

While the Association indicates that management did not do enough when investigating what happened, Timmerman met with Lewis and got a copy of the dispatch from Brown County Communications. Timmerman met with the Grievant and made a decision based upon all the facts he could accumulate. Timmerman's effort was fair and objective, and the Association does not state what else he should have done.

Section 346.03, Wis. Stats., requires the operator of an authorized emergency vehicle to drive with due regard under the circumstances for the safety of all persons around them. The Grievant was required to look for actual and potential hazards that existed. As the picture exhibits show, the westbound lanes of Mason Street were wet. The Grievant attempted to accelerate and did so improperly, so much that her car spun out and went over a raised median. A reasonably careful officer performing similar duties at least would not have lost control of the vehicle to such an extent that the officer pushes on the accelerator and proceeds to jump a tall median. That is not how reasonable officers are trained to react during a spin out. As Lewis testified, he would have gotten off the gas, made sure he wasn't over braking, and tried to steer out of a skid. He did not believe that the Grievant got off the gas.

Timmerman also indicated that a reasonable officer would have come to the conclusion that there was no need for an emergency response. Once the Grievant learned that the male had gone into the basement and was possibly separated from the caller – and the Grievant knew this before the accident – there was no true emergency and the emergency response should have ceased at that point. The City submits that Kulow's actions were quite different from the Grievants. Kulow asked for clarification regarding the information as to whether the male had gone into the basement. It was her zone, she was closer to the scene, and she waited at the scene for the Grievant to arrive before listening at the door to see if there was any physical disturbance.

Finally, the City disagrees with the Association that there should be no discipline in this matter. The discipline was reasonable based on the totality of the circumstances. The Grievant did not need to be responding in an emergency fashion as there was no true emergency, she did not seek any clarification of the emergency, she did not control her car while accelerating, and during the spin, she accelerated, jumped a median and hit another vehicle, causing significant property damage and personal injury. Four months prior to this, she was involved in another accident where she received a discipline of counseling registry.

In Reply, the Association

The Association responds to the City by stating that the reasoning regarding the circumstances used by the City is faulty. The first circumstance that the City uses is a questionable use of emergency lights and sirens. However, the other officer also concluded that an emergency response was appropriate, and the Grievant's own conclusion was affirmed when she heard Kulow using her siren. If the emergency response was inappropriate, all officers responding in that manner should have been disciplined or at least counseled. While the City tries to distinguish the actions of Kulow and the Grievant by noting that Kulow sought clarification, all radio traffic from the cars is heard by the other cars. Therefore, Kulow and the Grievant would both hear the same dispatch, and it would not make sense for the Grievant to make the same request to the dispatcher and tie up the airways. Also, there is no indication that Kulow changed her type of response to the situation at any time prior to arriving on the scene. The Association asks – why is the use of emergency response with red lights and sirens

appropriate and not questionable for Kulow but the same type of response by the Grievant deemed inappropriate and questionable? The response was not questionable and should not be figured into the basis for discipline.

The Association also reviews the next circumstance, whether the Grievant failed to properly control her car. While Lewis found the pavement in the westbound lanes to be wet, the eastbound lanes were dry. The Grievant was approaching the intersection using the dry eastbound lanes because she needed to pass other cars at the red lights. She then went back into the westbound lane and hit the puddle which she could not see before the accident.

The Association notes that the Grievant could not reasonably be expected to have knowledge of the probable consequences of her conduct – that just because she had an accident, she would be disciplined. She used due regard in driving up to the point where the back end of her car spun out. A reasonable officer could not expect to be disciplined for using emergency lights and sirens in this type of matter. Three members of the Department felt an emergency response was appropriate and no other officers were disciplined. The Association agrees that the rules are reasonable but submits that no rules were violated.

Further, the Association agrees that a reasonable effort was made to find out the facts, but the parties differ on the interpretation of the facts. The effort was not fair and objective, because management wanted to discipline the Grievant because she had an accident, and they were going to find a reason to discipline if at all possible. The City argued that there was substantial evidence that the Grievant violated state laws and Department policies. That contention cannot be sustained. Just because the caller and juvenile may have been separated does not mean that the juvenile was not being violent with somebody else in the home, or that he was not going to get some weapons or come back and be violent again. The officers responded in an emergency fashion because there was a crime of violence in progress and a fast response may have prevented the situation from escalating. The City also argued that the Grievant failed to control her car. The Association notes that just because someone loses control of a car does not mean he or she is not using due regard and driving as trained. The City has no evidence that the Grievant was not using due regard.

DISCUSSION

The collective bargaining agreement provides a just cause standard for discipline. Both parties also look at Section 62.13, Wis. Stats., as their guidance for the just cause standard. Since both analyze it from that basis, the Arbitrator will also look at the seven factors listed in Sec. 62.13, Stats. They are:

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
2. Whether the rule or order that the subordinate allegedly violated is reasonable.

3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.
4. Whether the effort described under subd. 3 was fair and objective.
5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

As to the first factor, the alleged conduct in this case is based on two things – the emergency response and the loss of control of the squad car. The emergency response is an important factor in this case, because the City states (Joint Exhibit #3) that “An emergency response to this call was unnecessary and this accident was completely avoidable.” If the Grievant had not been responding in an emergency fashion, the accident would not have happened. She would not have been accelerating in a manner to get to the scene quickly. Therefore, an analysis of whether or not the emergency response was needed is in order here.

The policy for using emergency lights and sirens states that there must be a true emergency, and an officer must be able to articulate his or her reason for believing there is a high probability of death or serious injury to an individual, or significant property loss, and that action by an emergency vehicle operator may reduce the seriousness of the situation. Whether or not there was a “true” emergency is only seen in hindsight in this case. At the time of the dispatch, there was a caller concerned about a young male being violent, and two officers decided independently that an emergency response was warranted. They were able to articulate their reason – that there was a probability of serious injury. They did not have enough information to discount that probability, even after the dispatcher told them that the caller and juvenile may have been separated. It was the unknowns that caused the two officers to respond as they did.

The problem with determining whether an emergency response was needed is two-fold. First, it becomes a convenience of hindsight to say now that it was not needed. Would it have ok if the Grievant did not have an accident? The answer to that appears to be yes. So once one knows the results, the actions can be judged. Secondly, if the emergency response was appropriate for Officer Kulow, why not for the Grievant, who was farther away and needed to back up another officer? Accordingly, the emergency response has to be appropriate for both, as long as it is appropriate for one officer answering the same call and having the same information.

The Grievant could not reasonably be expected to know that she would be disciplined for using an emergency response in this situation. She already knew that another officer was responding with a siren, since she could hear it on the radio dispatch.

As to the matter of her driving conduct, the Grievant could reasonably be expected to know that using an emergency response could result in an accident. That would seem to be common knowledge, and the reason why emergency responses are restricted in the manner the policy states. However, if emergency responses are appropriate in some situations, the resulting consequences of potential traffic accidents have to be accepted as well. One should only receive discipline in those cases where one has been negligent or not using the due regard for the safety of all persons. The Grievant did not appear to do anything wrong as far as the Arbitrator can tell. Everyone agrees that she moved through the intersection in an appropriate manner, and it would have been the intersection that was potentially more dangerous than the street. The evidence is not clear whether the whole street side was wet from melting snow or whether there was a puddle that the Grievant hit. At any rate, she hit something that caused the rear end of her squad car to spin out. Further, the evidence is not clear whether the speed of the car and the spin caused the car to jump the median strip or whether the Grievant continued to accelerate, thereby causing the car to jump the median strip. Either is possible, and accidents happen so fast that no one knows for sure. The only thing the record shows with certainty is that the Grievant was using due regard going through the intersection and driving appropriately in an emergency response.

The second factor is whether the rule or order allegedly violated is reasonable, and both parties agree that the rules and orders are reasonable.

The third factor is whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order. The Arbitrator finds that he did. He talked to the investigating officer as well as the Grievant and reviewed the dispatch tape.

The fourth factor is whether the effort to discover the evidence was fair and objective. It seems to be – and there is no record evidence to the contrary.

The fifth factor is whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate. The Arbitrator finds there is not substantial evidence that the Grievant violated the rule or order regarding when to use an emergency response. The record shows that it could have been an appropriate response and another officer was not disciplined for using the same emergency response to the same dispatched call. The officers were able to identify at least one of the elements of the policy for using an emergency response – that a crime of violence was in progress. It is inappropriate for the City to say in hindsight that an emergency was not needed, and it appears to say so only because of the accident that occurred while the Grievant was making the response to the call.

The sixth factor is whether the chief is applying the rule or order fairly and without discrimination against the subordinate. Clearly, the City's case falls down on this factor. The Association is absolutely correct in noting that Officer Kulow was not disciplined for using an emergency response, while it is a major part of the basis for the discipline of the Grievant. The City attempted to distinguish Kulow's actions by noting that she called dispatch for clarification of the situation while she was one her way. However, the Grievant heard that call and the dispatcher's answers, so why would the Grievant need to call for clarification also? The City also distinguishes Kulow's conduct by stating that address was in her zone, that she was closer to the scene, that the factual situation, time, location, and subsequent actions were different. Obviously, there are physical differences because the two officers were in separate squad cars. It is very basic that if the City deemed an emergency response inappropriate for the Grievant, it must deem an emergency response inappropriate for Kulow. The City has made the "unnecessary" emergency response a major basis for its disciplinary action. There is no logical reason to discipline one officer for an "unnecessary" emergency response (which resulted in an accident) while not disciplining the other officer who responded in the same manner (but did not have an accident). The rule or order has not been applied fairly or without discrimination in this case.

The seventh and final factor is generally known as whether the punishment fits the crime. Since there is no reason to issue a written reprimand or any type of disciplinary measure in the first place, there is no need to determine whether the discipline is reasonably related to the seriousness of the alleged violation.

Based on the record and for the reasons above, the Arbitrator finds that the City did not have just cause to issue a written reprimand for the incident on January 22, 2002.

AWARD

The grievance is sustained. The City did not have just cause to issue a written reprimand to Officer Stephanie Gulovich for the incident that occurred on January 22, 2002. The City is ordered to immediately remove the reprimand from the Grievant's records.

Dated at Elkhorn, Wisconsin, this 19th day of September, 2003.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator