

IN THE MATTER OF ARBITRATION BETWEEN

Minneapolis Police Officers Federation
Minneapolis, Minnesota
Union/Federation

and

City of Minneapolis, Minnesota
Police Department
Employer/City/Department

DECISION AND AWARD

Termination Grievance
Sergeant David Ulberg, Grievant

Award Dated: December 30, 2009

Date and Place of Hearing:

November 13, 2009
Offices of Rice, Michels and Walther
Minneapolis, Minnesota

Date of Receipt of Post Hearing Briefs:

December 4, 2009

APPEARANCES

For the Federation: Ann E. Walther, Attorney
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For the Employer: Mike Bloom, Assistant City Attorney
Minneapolis City Attorney's Office
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Minneapolis, Minnesota 55415

ISSUE

Did the Employer have just cause to discharge the Grievant, and if not what shall the remedy be?

WITNESSES TESTIFYING

Called by the Employer

Scott Gerlicher, Deputy Chief
Minneapolis Police Department

Called by the Federation

David, Ulberg, Grievant
Sergeant (Discharged)
Minneapolis Police Department

ALSO PRESENT

On Behalf of the Employer

No others were present

On Behalf of the Federation

Lt. Robert Kroll, Vice President
Minneapolis Police Officers Federation

JURISDICTION

The issue in grievance was submitted to the Arbitrator for a final and binding resolution under the terms set forth in Article 5, Section 5.4, Subd. 4 – Step Four – Regular Arbitration. The Arbitrator was selected by direct appointment of the parties.

The parties mutually stipulated at the hearing that the grievance had been properly processed through the required steps of the grievance procedure without resolution, and that it was properly before the Arbitrator for a decision.

At the hearing the parties were given full and complete opportunity to examine and cross-examine witnesses and present their proofs. Final argument was provided through post hearing briefs which were received by the agreed upon deadline. With the receipt of the post hearing briefs by the Arbitrator, the record in this matter was closed. The issue is now ready for determination.

STATEMENT OF THE ISSUE

The issue in this case is whether or not the Employer had just cause to discharge the Grievant, and if not what is the remedy? The section of the Collective Bargaining Agreement that bears on this issue is contained in ARTICLE 4 - DISCIPLINE. It reads in relevant part as follows:

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. ...

* * * *

Section 4.4 – Investigatory Interviews

(a) Before taking a formal statement from any employee, the City shall provide to the employee from whom the formal statement is sought a written summary of the events to which the statement relates. To the extent known to the City, such summary shall include: the date and time (or period of time if relating to multiple events) and the locations(s) of the alleged events; a summary of the alleged acts or omissions at issue; and the policies, rules or regulations allegedly violated. Except where impractical due to the immediacy of the investigation, the summary shall be provided to the employee not less than two (2) days prior to the taking of his/her statement. If the summary is provided to the employee just prior to the taking of the statement, shall be given a reasonable opportunity to consult with a Federation representative before proceeding with the scheduled statement. [sic]

* * * *

In addition the above contract language the City has promulgated certain Rules/Regulations and Policies that bear on the issue as follows:

2-106 Complaint Investigations – Garrity Decision

5-101.01: Truthfulness

5-102 Code of Ethics

5-106 On Duty Code of Conduct

**Civil Service Rule 11.03(b)18 – Violation of Department Rules, Policies,
Procedures or City Ordinance**

FACTUAL BACKGROUND

Involved herein is a grievance which arose when the Grievant was discharged effective February 23, 2009 for violation of Minneapolis Police Department Rules and Regulations. The Employer conducted an Internal Affairs investigation and subsequent Discipline Panel (Loudermill) Review which sustained a finding of violations by the Grievant of the following Department Rules and Regulations:

- MPD 5-102: Code of Ethics – Order for Protection, Category D**
- MPD 2-106: Complaint Investigation – Garrity Decision, Category D**
- MPD 5-101.01: Truthfulness – Category D**
- MPD 5-106: On Duty Code of Conduct – Occupied with Police Business During Tour, Category D**

The City charged the Grievant with violation of MPD Rule 5-102 based on an Order for Protection granted by Judge Murphy sitting as Ramsey County Family Court on February 22, 2008. In issuing its Order for Protection the Court concluded that the Grievant's wife at the time, Adriana Trevino, was in fear of imminent bodily harm from the Grievant based on his threats that she would "pay for it" if she reported the domestic abuse she had received from him to the Police. Ms. Trevino had given a statement to the Minneapolis Police Department Internal Affairs Unit on January 12, 2008, and the Court found that statement could trigger the Grievant into carrying out his threat.

The City charged the Grievant with violation of MPD Rule 2-106 based on his allegedly evasive and uncooperative responses to questions asked in the course of an Internal Affairs Investigation.

He was charged with violation of MPD Rule 5.101.01 based on his alleged refusal "to cooperate with Judge Murphy during the Order for Protection hearing" resulting in a

finding by Judge Murphy that the Grievant was not credible as a witness and causing the Judge to write in his order “with the lack of credibility comes lack of trustworthiness”.

On the final count of violation of MPD Rule 5-106 the City charged the Grievant with excessive use of his Department supplied computer to search the internet for information regarding and sources for steroids.

The Employer is a municipal corporation chartered under the laws of the State of Minnesota. The Federation is the exclusive bargaining representative of all sworn law enforcement personnel in the City except those appointed to serve in the positions of Chief of Police, Assistant Chief of Police, Deputy Chief and Inspector. At all times relevant to this grievance the Grievant was a member of the Federation and covered by the Collective Bargaining Agreement. The Collective Bargaining Agreement became effective on October 15, 2005 and continued in full force and effect through October 14, 2008.

At the time of the termination of his employment the Grievant was a Sergeant assigned to the Juvenile Division of the Department. He had approximately nineteen years of employment with the Department. During his tenure with the City the Grievant was disciplined on five separate occasions. One disciplinary action was issued on December 30, 1994. It was regarded by the Arbitrator to be too old to have relevance to this case. A 16 hour suspension of the Grievant that was imposed in January 2007 for allegedly violating the Department’s Code of Conduct and Code of Ethics was settled with the City

dismissing the sustained findings and the Federation withdrawing the grievance it filed in that matter. Accordingly, that discipline is not considered here. The three remaining prior disciplines that were considered in the case were as follows:

1. June 1, 2004 – Ten Hour Suspension for violation of MPD Rule 5-105 Professional Code of Conduct.
2. November 16, 2005 – Letter of Reprimand for violation of MPD Rule 5-102 Code of Ethics.
3. September 4, 2008 – Letter or Reprimand for violation of MPD Rule 5-102 Code of Ethics (Off-Duty Conduct).

The matter that gave rise to the Grievant's termination was his being served with an Order for Protection by Ramsey County Family Court on February 22, 2008. The evidence relating to the incidents that led up to that Court order was carefully considered by the Arbitrator. It has been thoroughly documented in the IAU report, and in the Court record. The facts underlying the Order for Protection were not seriously disputed in this arbitration hearing, and it would unnecessarily burden this Award to recite all that evidence again here in great detail.

The evidence in this case shows that the Grievant was married to Adriana Trevino on March 9, 2007. He had been married before and had two teenage daughters from that relationship. The Grievant and Ms. Trevino had a troubled relationship and separated around July 24, 2007. Ms. Trevino filed for divorce on October 19, 2007.

On May 19-20, 2007 an incident occurred that started at their home in Maple Grove, Minnesota. They were hosting a house warming party with a number of friends.

Alcohol was being consumed by the hosts and the guests at the party. At some time during the party the Grievant's two teenage daughters called their mother to pick them up because they were uncomfortable with the drinking and the loud and boisterous conduct of the Grievant. At about 1:00 AM the morning of May 20, 2007 Ms. Trevino left the Maple Grove Home to go to her condo in St. Paul. She left because she felt unsafe staying with the Grievant. After arriving at her St. Paul condo, the Grievant called her there repeatedly, and eventually showed up at that location. An argument ensued in which the Grievant was heard yelling at Ms. Trevino by a neighbor in an adjoining unit. The neighbor, who is a licensed psychologist, subsequently stated in Court and to the Internal Affairs Investigator that she had never before heard such violent rage-filled outbursts before and was so frightened that she did not get out of bed.

Some damage was done to the condo by the Grievant. Ms. Trevino called 911, but hung up before the 911 operator could fully respond. The 911 operator called back and Ms. Trevino stated that everything was alright. While she was on the phone with the 911 operator the Grievant continued to yell at Ms. Trevino stating that if he lost his job because of the incident she would pay. The 911 record shows that the operator heard a male voice screaming in the background during the call. The Grievant testified that he urged Ms. Trevino to call the police so that an accurate record of the incident would be made. The St. Paul Police showed up, but no arrests were made. Subsequently Ms. Trevino left the condo. Soon afterwards she was contacted by the Grievant by telephone who stated that he was locked out of the unit. Ms. Trevino's statement to IAU indicated that the Grievant threatened to break the door to the condo, and destroy her work

computer if she did not return to let him in. She returned to the condo and let the Grievant inside.

A second incident occurred in June 2007 in which the Grievant threw his wedding ring and keys at Ms. Trevino while they were at a restaurant in Maplewood. A third incident occurred on July 20, 2009 at a hotel in Hawaii where the Grievant and Ms. Trevino had gone for a belated honeymoon. Ms. Trevino discovered text messages of a romantic nature on the Grievant's cell phone from a Michelle Shields. Ms. Trevino confronted the Grievant and accused him of cheating on her. An argument ensued and hotel security entered the scene. The couple cut short their visit to Hawaii and returned home.

The record of this case also shows incidents of abuse between the Grievant and Ms. Shields in October, November and December 2007. The record also shows that the Grievant was arrested in January 2005 for domestic abuse on his former wife, Heidi Palm (Kist).

On January 18, 2008 Ms. Trevino filed a complaint against the Grievant with the Minneapolis Police Department Internal Affairs Unit. In her complaint Ms. Trevino alleged that the Grievant threatened her and caused her to fear for her safety during the incident that occurred on May 20, 2007. In response to her complaint the Department initiated an Internal Affairs investigation. On January 22, 2008 Ms. Trevino filed a petition for an Order for Protection in Ramsey County Family Court. Upon concluding

its investigation the Internal Affairs Unit recommended sustaining the following allegations against the Grievant:

1. Sgt. Ulberg engaged in actions and words towards the complainant that caused her to fear for her safety so much that she filed for and was granted an Order for Protection against Sgt. Ulberg in Ramsey County Family Court in violation of MPD Rule 5-102.
2. Sgt. Ulberg ordered and used illegal non prescription steroids while he was dating and married to the complainant. It is also alleged these were for non-medical reasons in violation of MPD Rule 5-102.
3. Sgt. Ulberg did not answer questions fully and truthfully as required in his Garrity Statement in violation of MPD Rules 2-106 and 5-101.01.

Subsequently, as described in a January 5, 2009 letter to the Grievant giving him notice of a Discipline Panel meeting, the allegation that the Grievant used non prescription steroids was not sustained. A new sustained charge was added in that letter, however, alleging that the Grievant excessively used his Department provided computer for searching the internet for information related to steroids in violation of MPD Rule 5-106.

On January 21, 2009 the Disciplinary Panel sustained violations by the Grievant of MPD Rules 5-102 (Order for Protection), 2-106 (Complaint Investigation – Garrity), 5-101.01 (Truthfulness) and 5-106 (On Duty Code of Conduct – Occupied with Police Business During Tour). All of these violations were categorized by the Department as Category D violations.

On February 23, 2009 the employment of the Grievant with the Minneapolis Police Department was terminated. The Union filed a timely grievance on February 24, 2009.

The grievance proceeded through the steps of the grievance procedure without resolution and was heard in arbitration on November 13, 2009.

POSITION OF THE PARTIES

Position of the Employer

The City claims that it had just cause to discharge the Grievant. It seeks an order that the Arbitrator uphold the discharge and deny the grievance. In support of this position the City offers the following arguments:

1. The Court's finding that the Grievant is not credible or trustworthy renders the Grievant worthless as a Police Officer. An officer who is not trustworthy cannot serve the Department, the judicial system or the public. If the Grievant were to be reinstated and were to testify in criminal proceedings, the prosecutor would be legally and ethically obligated to disclose to the defense counsel that there is an Order that states he is not credible or trustworthy.
2. The Grievant lied during his compelled Garrity statement and was evasive and non committal. He lied about his role in making the hole in door at Ms. Trevino's condo. In the Garrity statement and at the Arbitration hearing he testified that he "didn't hit the door", but in his testimony in Family Court he testified that he "hit it with my fist, and that's how the door got broke." He also lied during his Garrity statement when he claimed he did not steer business away from Ms. Trevino. He also lied during his Garrity statement when he stated that was not screaming during the 911 call from Ms. Trevino's condo on May 20, 2007. He lied when he denied that he referred to Ms. Trevino in vulgar, obscene terms. Ms. Lawrenz's testimony clearly confirmed how he referred to Ms. Trevino.

The Grievant was evasive and non committal during his Garrity statement. He admitted at the Arbitration hearing that he was defensive and uncooperative during his Garrity statement because he did not like the investigator. That is no excuse not to cooperate.

The Grievant's refusal to cooperate was further shown by his statement to the investigator that she should just read the transcript of the Order for Protection hearing. The investigator was asking questions she needed to

have answered by the Grievant, she had a right to expect the Grievant to answer in a compelled Garrity statement.

3. The Grievant's violation of the Minnesota Law Enforcement Code of Ethics justifies his discharge. He did not keep his private life unsullied, he did not exhibit self-restraint, he was not constantly mindful of the welfare of others. He has a long and undeniable history of physically abusing his significant others. He beat his former wife, Heidi Kist, he had physical fights with his girlfriend, Ms. Shields and he was abusive to his second wife, Ms. Trevino. The issued Order for Protection is the clearest example of a violation of the Code of Ethics.

The Grievant's conduct violated the very trust placed in him by the public. His conduct has irreparably harmed and dishonored the Minneapolis Police Department, and tarnished the hard earned reputation his fellow officers.

4. The Federation has not sustained its burden in support of its claim of disparate treatment. In order to prove disparate treatment the Federation must show that other officers received lesser punishment, and that the circumstances surrounding the Grievant's case are substantively the same as other officers who received discipline. While the City may have superficially satisfied the first of these tests, the record is totally devoid of any type of factual basis that would enable the Arbitrator to assess whether other officers were similarly situated to the Grievant.

5. Taken in its entirety, the conduct of the Grievant clearly warrants discharge.

Position of the Federation

It is the position of the Federation that the City did not have just cause to terminate the employment of the Grievant. In support of this position, the Federation offers the following arguments:

1. The Order for Protection issued on February 22, 2008 occurred more than six months after the Grievant and Ms. Trevino separated. Despite the lack of evidence of physical violence and in spite of the remoteness of the alleged acts by the Grievant the Court issued the order. The Court specifically excepted from the no-contact provisions of the order any contact the Grievant and Ms. Trevino may have had while at work. The Grievant immediately notified the Department of the Order, and he continued to work as a Sergeant in the Juvenile Division for a year after

the Order was issued. He received a satisfactory performance evaluation and there were no incidents involving the Grievant and Ms. Trevino during that year.

2. In the past the City has worked with another officer, Ka Xiong, who was charged with domestic violence involving physical abuse. In that case the City determined that a five day suspension, with two of those days held in abeyance was the appropriate discipline.

3. The Grievant has some prior discipline, but his record is relatively clean. His performance evaluations have been consistently good. There is no evidence that he has had any incidents involving Ms. Trevino since they separated in 2007. Thus, while the issuance of the Order for Protection against the Grievant violates MPD Rule 5-102, it falls far short of being a terminable offense.

4. The City is precluded from charging the Grievant with violation of MPD rule 5-106 for excessive use of the internet or of failing to be occupied with police business while working. That charge was not in the pre-statement summary contained in the September 30, 2008 Notification Letter. The Grievant was denied an opportunity to respond to that charge. The Union notified the City during the Loudermill hearing that it objected to the additional charge because no pre-statement notification had been given to the Grievant.

5. The City lacks just cause to find a violation of MPD Rule 5-106 for spending too much time surfing the internet for personal issues. The evidence shows that the Grievant used the City's computer for personal reasons for less than two hours over an 18 month period. The City's witness at the arbitration hearing conceded that the Grievant's personal internet use was within the City's policy for personal use.

6. The City lacks just cause to sustain violations of MPD Rules 2-106 and 5-101.01. The record shows no serious deviation in the Grievant's testimony at the Order for Protection hearing and his Garrity statement regarding how the door in Ms. Trevino's condo was broken. The words are different, but they are substantially similar.

The City lacks any evidence that the Grievant steered customers away from Ms. Trevino. The City did not call Ms. Trevino as a witness, and the investigation is devoid of evidence showing that she suffered any loss of business following her separation from the Grievant. The Grievant was simply advising Lt. Keefe that Ms. Trevino handled the Federal Court work, while Arthur did the precinct work. There was no evidence presented that the Grievant lied when he denied steering business away from Ms. Trevino.

The City's claim that the Grievant first denied, then admitted researching steroids on a City computer is baseless. The question the investigator asked first inquired about his use of steroids, and he denied that he did. The next question was whether he researched steroids on the City's computer, and he said that he did. Accordingly, he admitted to researching them, and denied using them. The City did not demonstrate that the Grievant was untruthful in his answer about his researching steroids.

The Grievant did refer the IAU investigator to his testimony in the Order for Protection hearing. That is not barred by departmental policy and is not a violation of MPD Rule 2-106. The Grievant was concerned that even the slightest deviation from his court testimony and his Garrity statement would result in him being called a liar.

The City has no evidence to show that the Grievant should have been able to recall the exact date of his marriage to Ms. Trevino and where they lived while married.

7. The City claims that the Grievant was untruthful in the Order for Protection hearing. It relied solely on the finding by the judge in the OFP hearing that the Grievant's testimony was not credible. The City bears the burden of proving that the Grievant's OFP testimony was untruthful. It cannot simply rely upon the court's order, which was brief and failed to set forth in detail the basis for the comment. The City did not call any witnesses to the alleged domestic abuse, and relied only on hearsay statements and the testimony of Deputy Chief Gerlicher.

8. Other Minneapolis Police Officers have given testimony that judges have considered not credible. None of these officers were ever disciplined, much less discharged. The City kept the Grievant at his position as a Sergeant in the Juvenile Division after it knew of the judge's comment in the Order for Protection hearing. At no time was any concern expressed that the Grievant's testimony would affect his effectiveness as a police officer. The judge's finding in regard to the Grievant's testimony at the Order for Protection hearing does not preclude him from being a police officer.

9. The City lacks just cause for termination in this case, and is trying to gloss over its lack of evidence by demonizing the Grievant. The Grievant had an Order for Protection issued against him, but that is not a terminable offense. The City did not have just cause to terminate the employment of the Grievant.

ANALYSIS OF THE EVIDENCE

The matter in dispute is whether or not the termination of the employment of the Grievant as a City of Minneapolis Police Officer is supported by just cause, given all the facts in evidence. The controlling contract language is found in Article 4, which specifies that disciplinary action may be imposed only for “just cause”.

In order to sustain a finding of just cause for termination of a Police Officer a showing must be made that the Officer is not a fit or proper person to honor the trust the public has placed in his office. In this case, just cause should be determined with reference to the character of the Officer, and the qualifications necessary to fill his position.

The labor contract (Joint Exhibit 1) does not define the term “just cause”. Accordingly, the character and qualifications of the Grievant to hold his position as a Police Officer can be applied by referring to the standards for just cause described in the landmark reference: Just Cause, the Seven Tests, by Koven and Smith, 2nd Ed., 1992, BNA. These seven tests are attributed to the distinguished arbitrator Carroll R. Daugherty, and described in Enterprise Wire Co. (46LA 363, 1966). They are 1) reasonable rules and orders, 2) notice, 3) investigation, 4) fairness of the investigation, 5) proof, 6) equal treatment, and 7) fairness of the penalty.

REASONABLE RULES/ORDERS AND NOTICE

Analysis of the evidence adduced at the hearing compels a determination that the rules and regulations that form the basis of the Grievant’s discipline are reasonable and related

to maintaining the public trust in the Department. It is also clear from the evidence that the Rules and Regulations of the Department were known to the Grievant prior to his being charged in this case. The Union did not argue that the rules and regulations were in any way unreasonable. Accordingly, the rules must be regarded as reasonable and that the Grievant had notice of them.

INVESTIGATION AND FAIRNESS OF INVESTIGATION

The evidence shows that the City conducted a comprehensive and thorough investigation before issuing the termination notice to the Grievant. The Internal Affairs unit conducted an investigation, a Loudermill hearing was conducted where the Grievant had an opportunity to present his position to the Disciplinary Review Panel. Statements were taken from relevant persons. The record compels a finding that the investigation conducted by the City was thorough. It is troubling, however, that a charge that the Grievant violated MPD Rule 5-106 for excessive use of his Department computer to search the internet for personal purposes was added after he was notified of the pending Internal Affairs investigation on September 30, 2008.

PROOF

The Employer has the burden to prove that the Grievant is guilty of the charges against him. The standard of proof applied in labor arbitration cases is not settled, however. Usually a preponderance of the evidence is sufficient. When, as here, an Officer is charged with underlying acts that could be considered criminal in nature a higher

standard is often applied. A standard of clear and convincing evidence is usually applied in such cases. That was done here.

The Grievant is accused of a number of rule violations in this case. The Disciplinary Panel sustained the following violations:

1. Violation of Rule 5-102 (Order for Protection)
2. Violation of Rule 2-106 (Complaint Investigation – Garrity)
3. Violation of Rule 5-101.01 (Truthfulness)
4. Violation of Rule 5-106 (On Duty Conduct – Occupied with Police Business)

Violation of Rule 5-106 (On Duty Conduct – Occupied with Police Business)

Considering first the alleged violation of Rule 5-106 for excessive personal use of his Department provided computer to search the internet for information related to steroids. The Union objected to that charge because it was not in the pre-statement notification letter of September 30, 2008. What was in the pre-statement notification letter was a charge that the Grievant used non-prescription steroids for personal use. The City could clearly inquire about that in the Internal Affairs investigation. Excessive use by the Grievant of his Department computer for personal reasons, however, is sufficiently distant from the charge of personal use of steroids to constitute a new charge that was not in the pre-statement notification letter. The labor agreement at Article 4.4 clearly requires that the City “shall provide to the employee from whom the formal statement is sought a written summary of events to which the statement relates”. A reasonable person would find that the charge of personal use of his Department computer is simply not close enough to the “events” which the City sought the Grievant’s statement to be covered by the charge of personal use of steroids. While the notification letter noted that

the “charges may be amended or changed at any time during the investigation” that cannot be considered, in view of the language of Article 4.4, to be an unrestricted license to inquire into areas that had not been previously noticed.

The evidence on this charge also shows that the Grievant did use his Department computer for personal purposes, but his total use over the 18 months that were examined was found to be within Departmental guidelines that permitted such incidental use.

For these reasons the charge that the Grievant violated MPD Rule 5-106 is dismissed.

Violation of Rule 5-101.01 (Truthfulness)

As to the Grievant’s violation of MPD Rule 501.01 (Truthfulness) the City based that charge on his refusal “to cooperate with Judge Murphy during the Order for Protection hearing” resulting in a finding by Judge Murphy that the Grievant was not credible as a witness and “with the lack of credibility comes lack of trustworthiness”. The finding of the Court on this issue must be given considerable weight. Such a statement by a judge would likely not be made lightly. The City appears to rely heavily on the finding of the Court to sustain that charge. While the Order for Protection hearing transcript was entered into evidence in this arbitration, the transcript does not provide an opportunity for this Arbitrator to assess the credibility of the Grievant as he gave his testimony in Court.

The City claims, because the Grievant was found by Judge Murphy to be not credible, his effectiveness as a Police Officer is destroyed and he would therefore be worthless to the

Police Department. That claim is misplaced. Judges (and Arbitrators) are frequently in the business of finding witnesses credible or not credible. Such a finding would not, however, rule out that witness giving credible testimony in another hearing. Here the Judge appeared to go out of his way to memorialize his finding that the Grievant was not credible. Deference to the Court's finding must be made. That is not to say that the Court's finding would rise to the level of dischargeable offense. The Grievant's violation of Rule 5-101.01 is sustained, but not regarded, in and by itself, as a dischargeable offense.

Violation of Rule 2-106 (Complaint Investigation – Garrity)

The evidence in this case makes it clear the Grievant and the Internal Affairs Investigator did not like each other very much. The Grievant was frequently uncooperative or unresponsive in his answers to her questions. In the Loudermill hearing he admitted to his attitude problem during the taking of this Internal Affairs statement and apologized for his conduct.

An Officer giving a statement under Garrity protection is compelled to tell the truth and be complete and forthright with his answers. While the Grievant was less than complete and forthright, the evidence does not support a finding that he was untruthful. The charges that he lied during his Garrity statement flowed from a comparison the City made of his testimony at the Order for Protection hearing to his Garrity statement. While different words were used in those different settings, the evidence does not show that he was lying. He came close to lying in regard to how the door in Ms. Trevino's condo

became broken. Close, however, is not sufficient to make a determination that he was deliberately lying to the Internal Affairs Investigator.

The record does not show that the Grievant attempted to steer business away from Ms. Trevino. In his email reply to Lt. Keefe he simply pointed out that he thought she was busy with the Federal Court translation work and that “Arthur” did the precinct work. The exchange of emails does not lead a reasonable person to conclude that he lied about steering work away from Ms. Trevino.

Accordingly, for all of these reasons, the charge that the Grievant violated MPD Rule 2-106 is dismissed.

Violation of Rule 5-102 (Order for Protection)

In this Arbitrator’s view this is the most serious charge against the Grievant. He is charged with domestic abuse on Ms. Trevino. Importantly, the facts surrounding that abuse were not challenged in this arbitration. It is also important to note that the abuse of Ms. Trevino was not an isolated instance. The evidence shows a pattern of abuse that ranged from the May 19-20 house party, to the incident at the Maple Grove restaurant, and to the incident at the Hawaii hotel. All of these incidents were unchallenged at the arbitration hearing.

Moreover, and importantly, the record also shows that the Grievant had been previously arrested for domestic assault on his former wife (Heidi Palm/Fist). Additional proof of

abuse was found in the evidence surrounding the incident at the Radisson Hotel involving Ms. Shields. There is clearly a sustained pattern of abuse by the Grievant toward the women in his life. It is also noted that the Grievant has prior violations of Rule 5-102 in his disciplinary record with the Department. It is not necessary to rely on the testimony at the Order for Protection hearing or the statements given in the IAU investigation, which can fairly be regarded as hearsay, to find a pattern of abuse by the Grievant.

The Code of Ethics incorporated in Rule 5-102 is entirely reasonable. Police Officers are held to high standards by the community. While it might be reasonable to excuse a momentary lapse in judgment even by a Police Officer held to a high community standard, a pattern of abuse as evidenced here would not be tolerated. The Code of Ethics requires Police Officers to keep their private lives unsullied, to exhibit self-restraint, and to constantly be mindful of the welfare of others. The conduct of the Grievant clearly shows that he failed those standards. Accordingly, the violation of MPD Rule 5-102 is sustained.

DISPARATE TREATMENT

The Union also argues that the Grievant was singled out for disparate treatment. The evidence does not support such a defense. The Union referred to other cases where Minneapolis Police Officers were found by Judges to be not credible in their testimony yet they were not terminated from employment in the Department. There was no

evidence presented, however, that any of those Officers were similarly situated to the Grievant. Indeed the totality of the record in this case would lead a reasonable person to find that no other Officer had a record of abuse approaching that of the Grievant.

FAIRNESS OF THE PENALTY

That brings analysis of the evidence to the point where the fairness of the penalty imposed is to be examined. The fairness of the sanction applied in this case needs to consider, among other things, the seriousness of the misconduct of the Grievant, any prior disciplinary actions taken against him, and his overall service record.

Clearly, the misconduct of the Grievant is very serious. Careful examination of the Grievant's record shows prior disciplinary actions involving some of the same charges as were presented here. His performance appraisals have been generally good or satisfactory. Overall, however, his record does not rise to a level that would mitigate the seriousness of the offense, and compel a lesser penalty than discharge.

Arbitrators do not lightly overturn the decisions of management in disciplinary cases. They will not hesitate to do so, however, if the record of the hearing shows that the employer acted in a capricious or arbitrary manner. The record of this case makes no such showing. Accordingly, the Arbitrator is without authority for imposing a lesser penalty. For all of the above cited reasons the record compels a finding that the Employer had just cause to terminate the Grievant. The grievance must be denied.

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DECISION AND AWARD

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Sergeant David Ulberg, Grievant

Award Dated: December 30, 2009

AWARD

Based on the evidence and testimony entered at the hearing, the termination of Grievant David Ulberg is found to be for just cause. The grievance and all remedies requested are denied.

Dated: 12/30/09

James L. Reynolds
Arbitrator