

IN RE ARBITRATION BETWEEN:

CITY OF MINNEAPOLIS

and

POLICE OFFICERS FEDERATION OF MINNEAPOLIS

DECISION AND AWARD OF ARBITRATOR

JEFFREY W. JACOBS

ARBITRATOR

MAY 11, 2010

IN RE ARBITRATION BETWEEN:

City of Minneapolis,

and

DECISION AND AWARD OF ARBITRATOR
Jason Anderson grievance

Police Officers Federation of Minneapolis

APPEARANCES:

FOR THE FEDERATION:

Ann Walther, Rice, Michels and Walther
Jason Anderson, grievant
Robert Kroll, Federation Vice President
Amy Quella, grievant's former wife

FOR THE CITY:

Trina Chernos, Minneapolis City Attorneys Office
Scott Gerlicher, Deputy Chief of Police
Carol Arthur, Exec, Dir. Domestic Abuse Project

PRELIMINARY STATEMENT

The hearing in the matter was held on April 14, 2010 at the Minneapolis City Attorney's Office in Minneapolis, Minnesota. The parties submitted Briefs, which were received by the arbitrator on April 23, 2010 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties' collective bargaining agreement covers the period from October 15, 2005 through October 14, 2008. Article V provides for submission of disputes to binding arbitration. The arbitrator was selected from a list maintained between the parties. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUES PRESENTED

Did the City have just cause to terminate the grievant? If not what shall the remedy be?

CITY'S POSITION:

The City's position was that there was just cause to terminate the grievant for his actions in this matter. In support of this position the City made the following contentions:

1. The City asserted that Officer Anderson was justly terminated from his employment as a Minneapolis Police Officer due to an incident of domestic abuse directed toward his former girlfriend. The City asserted that his allegation that he was as much the victim of the assault as the perpetrator of it rings hollow. The City put on an expert in domestic violence who testified that she sees the scenario that unfolded between the grievant and his girlfriend all too often – the aggressor tries to portray the victim as the aggressor and the victim often denies that it happened or indicates that she may have been at fault and eventually refuses to press charges against the person who hurt them. The City asserted that this is almost exactly what happened here.

2. The City further pointed out that the grievant has a prior incident involving very poor judgment. He was disciplined for wearing his uniform and appearing at a Court hearing involving another Minneapolis officer who was in an Order for Protection hearing in Ramsey County. The City further noted that this incident happened only a few months before the incident in question and should have been a stark warning to the grievant that he needed to exercise better and more prudent judgment in his off-duty conduct but that the message did not “sink in.” The City argued that the prior misconduct coupled with this incident shows that the grievant is irredeemable and must be terminated.

3. The City pointed to other cases of domestic abuse where the officers involved were terminated and their terminations were upheld. The City pointed to the very officer involved in the grievant’s discipline, Officer Ulberg, who was ultimately discharged for domestic abuse and that discharge was upheld by Arbitrator Reynolds, *In Re Arbitration Between, City of Minneapolis and Minneapolis Federation of Police*, (Reynolds 2009). See also, Civil Service commission Decision In RE: Officer Ko Xiong, who was also terminated for domestic abuse.

4. The City pointed to the Code of Ethics, MPD P/P 5-102, which provides as follows:

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.

5. In addition, the City pointed to the provisions of the Minnesota Peace Officer Code of Ethics which provides in relevant part as follows:

As a Minnesota Law Enforcement Officer, my fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation; and the peaceful against violence or disorder; and to respect the Constitutional rights of all to liberty equality and justice.

I will keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both personal and professional life, I will be exemplary in obeying the laws of the land and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided in me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

6. The City noted that the grievant was well aware of his obligations under these Codes of Conduct. He acknowledged receiving these codes and that he took an oath of office swearing to uphold them as a condition of his employment as a police officer. Moreover, the Chief of Police has made it clear that he fully expects his officers to remain unsullied in their personal lives. The City noted that this admonition has been enforced and that officers, such as those noted above, have been discharged for the very same actions as the grievant was guilty of here.

7. The City asserted that the grievant violated these basic precepts of the office and of his profession for his actions on June 13, 2009. The operative facts relied upon by the City were that the grievant met with his girlfriend who was also once his fiancé to go to a concert in Minneapolis on the evening of June 13, 2009. After several hours and some alcohol was consumed the two began arguing and eventually a physical assault occurred multiple times on the way back to the grievant's home.

8. At one point the grievant grabbed the victim by the hair and tore out a hoop earring in her left ear causing bleeding and a scratch on her face. The City further claimed that the grievant's story that his girlfriend was trying to climb out of the car so he had to pull her back into the car is unpersuasive and further asserted that he could have taken other actions to prevent injury. He could have pulled over or left her someplace on the highway or simply refused to give her a ride if she was indeed combative and potentially erratic. Further, there is no excuse for grabbing her by the hair and injuring her in this way.

9. Further, when they arrived at the grievant's home, the two began fighting again and he picked her up by the head after she had fallen and dragged her into his house. All this was witnessed by neighbors who were having a party that night. Those witness statements support the City's version of these facts. Further, the grievant then had his girlfriend taken to his ex-wife's home by a neighbor and left her there.

10. The grievant admitted his wrongdoing in this incident and while he denied that he was the aggressor, the City put on an expert who testified that based on the facts it was her opinion that aggressors in domestic abuse and violence situations frequently claim that the victim is to blame.

11. The grievant admitted that he "grabbed" the victim by the hair in the truck and that he grabbed her by the head and shook her in the driveway after she fell and that incidents like this have "happened 10 times before." Throughout all of this though he minimized his role, blamed the victim because she was intoxicated and made her out to be both the aggressor and in need of the assault she suffered. The City expressed extreme shock that a police officer would attempt to blame others for his misconduct and asserted most strenuously through testimony of its expert and through argument that this is exactly the sort of behavior that abusers exhibit through intimidation and manipulation of the victim and the process. This is made worse here because he is a police officer and police officers frequently tell their victims that no one will listen to them and that reporting the assault will not result in any action – furthering the manipulation and intimidation.

12. Further, the matter was thoroughly investigated by the Big Lake Police Department and by Minneapolis police department. Both determined that the grievant had assaulted the girlfriend and he was charged with Domestic Assault in violation of Minn. Stat. 609.2242 (12). While the prosecutor later dropped this charge, this too was because the victim recanted her story and the prosecutor found that there was a lack of evidence to go forward.

13. The internal investigation determined that the grievant had violated MPD P/P 5-102. The City further asserted that the grievant had been found to have violated this in the past and had been specifically warned about his conduct and to remain free of any off duty actions or activities that might bring disrepute to the department. The City pointed to the incident in which the grievant appeared at an Order for Protection hearing in uniform where another officer was in Court that day in St. Paul. There was no reason for the grievant to be there much less in uniform.

14. At the disciplinary hearings relating to that incident the grievant was hardly contrite and stated that he did not even think he had violated any Department policy. The review panel admonished him at the time about his actions but the City claims that despite these clear and repeated warnings he just “ doesn’t get it” and cannot be trusted to avoid these kinds of off duty activities. See City Exhibit 29. The discipline panel admonished the grievant repeatedly not to get involved in things like this in the future and to be cognizant of the image of the Department and to recognize that his actions may sully the reputation of the department and of him as well. They further told him that further ill-advised actions of this nature could result in further discipline up to and including discharge. The grievant’s actions showed not only poor judgment but revealed a somewhat callous disregard for the plight of battered women in domestic abuse situations. The City pointed to evidence from that incident that the grievant was trying to intimidate Officer Ulberg’s former wife in the hearing not only by being there in uniform but also through eye contact and body language towards her. The grievant was further quite cavalier in the discipline hearing involving that incident and never truly accepted that he had done something wrong and never accepted responsibility for his actions that day despite repeated admonitions by the discipline panel to get him to do so. Less than two months later the June 13, 2009 incident occurred – which was a violation of the very *same portion* code of conduct.

15. The City asserted that the code of conduct is both reasonable and well understood by all officers. The rule is designed to guide officers in their conduct both personally and professionally so that they do not bring disrepute on themselves and their fellow officers. Moreover, the grievant may well have to respond to domestic abuse situations and his actions and attitude towards these kinds of cases may well be adversely impacted by his actions of June 13th. The City argues that it simply cannot have officers on the street who minimize or ignore the clear signs of domestic abuse.

16. The City further argued that when Chief Dolan took over the Department he gave clear warning that he would not tolerate this kind of misconduct. Indeed, the grievant and the Federation are both well aware of Chief Dolan's feeling and his intentions to take decisive disciplinary action against officers who conduct themselves in this way. See above, the City cited the Ulberg and Ko Xiong cases in which discharge for off-duty domestic abuse misconduct was upheld.

17. The City countered the claims by the Union that the investigation was not thorough and that pieces of it were inaccurate. The City claimed that the initial statements by witnesses all backed up the domestic abuse. It was not until later, after the grievant had a chance to "get to" the victim that the story began to change. Further, the opinions about the injuries to the victim's left ear were entirely consistent with the reasonable inference that they were not caused by an attempt to "restrain" the victim from getting out of the car but were rather caused by the grievant's assaultive behavior in trapping her in his car. The City noted that that he had taken her purse and kept her from getting to her cell phone, which was in it, so she could not call anyone for help while she was in his car on the way to Big Lake that night.

18. Further, the City disputed the Federation's theory that Sgt. Zierdan, who performed the Internal Affairs investigation "lied" because he indicated that a female victim had called 911 when in fact his report was simply based on what the first responding officers had told him. There was no reason to doubt the accuracy of the Big Lake officers' reports in this regard and they were consistent with the City's version of this event.

19. Neither was there any reason to believe that Sgt. Zierdan nor anyone from the Minneapolis Police Department somehow influenced or bullied the Big Lake police into making an arrest. Those officers felt that a domestic abuse had occurred based on the acknowledged facts and witness statements given to them that night. The fact that the prosecution was later dropped does not change the fact that those officers believed in good faith that a crime had been committed.

20. Nor did Sgt. Zierdan “lie” in his report when he indicated that the grievant and the victim had a “significant sexual relationship.” This was true – the two had been engaged and had dated for many months. Whether they had been broken up at the time of this incident was not material - they had in fact been in that sort of relationship and Sgt. Zierdan’s report was accurate in this regard.

21. Finally, the department did not base its conclusion on whether there was or was not sufficient evidence to go forward with a criminal case, but rather on the facts as they were known at the time. Those showed that the grievant displayed a severe lack of judgment and was in fact involved in a domestic abuse situation. These facts as found by both Big Lake and Minneapolis officers and as acknowledged and admitted by the grievant himself showed that he violated the Minneapolis Code of Conduct as well as the more general peace officers code of conduct. His actions were picked up by the press and did in fact bring considerable bad publicity to the Minneapolis Police department.

22. Here the Department considered whether discharge was appropriate and found that it was given the severity of the actions involved and because of the grievant’s poor work record. The grievant was disciplined for his poor judgment only a few months prior to the incident in question and has demonstrated an inability to understand the consequences of his poor choices and is irredeemable. Accordingly, dismissal is the appropriate action here and should be left in place by the arbitrator.

The City seeks an award of the arbitrator denying the grievance in its entirety.

FEDERATION'S POSITION

The Federation's position was that there was no cause for the termination. In support of this position the Federation made the following contentions:

1. The Federation asserted that the grievant is a valued officer with a good work record except for the one disciplinary action taken against him for appearing in uniform at the Ulberg OFP hearing. The Federation also pointed out that he has not done anything of that sort since and frankly learned his lesson from that incident and the accompanying discipline.

2. The Federation also asserted that the grievant was involved in a high profile shooting and that the trial that stemmed from that incident generated controversy which all happened at about the time of the June 2009 incident. This, the Federation asserted, may well have jaded the Department's actions here due to the publicity that accompanied the civil trial surrounding that shooting. Officer Anderson was in fact commended by the Chief for his actions in that incident and there was no liability established as the result of the trial.

3. The Federation and the grievant acknowledged much of what happened in the incident of June 13, 2009 but told a very different story. The Federation indicated that it too is very concerned about domestic abuse and in no way condones domestic assault by anyone, much less one of its sworn peace officer members. The Federation asserted most strenuously that there was no domestic abuse or assault and that the grievant found himself in a bad situation and made the best judgments he could under difficult circumstances. Not only did he not intend to harm his former girlfriend but in fact he acted to save her from harming herself and others.

4. The grievant acknowledged that he had been in a relationship with the woman involved in the June 13th incident. He stated that he loved her and wanted to marry her; they were in fact at one point engaged. She had a severe drinking and alcoholism problem and that this put such a burden on the relationship that he broke it off due to her erratic and sometimes violent outbursts when she became drunk. Despite his continuing affection for this woman he knew that she needed to conquer her alcohol addiction. Since she refused or was unable to he broke off the relationship several months prior to the June incident involved in this case.

5. At the outset the Federation objected vigorously to the introduction of evidence from the City's so-called domestic abuse expert who it alleged gave only general, broad and unsubstantiated opinions about domestic abuse in general. She did not meet the grievant or his former girlfriend and confessed to knowing nothing about this case yet the City would have the arbitrator accept her conclusion that domestic abuse/assault occurred here without any basis in fact. The Federation urged the arbitrator to reject her opinions outright.

6. The Federation further asserted that the other cases cited by the City are distinguishable and involved both multiple incidents of spousal abuse, i.e. Ko Xiong, or well-documented situations of domestic abuse, i.e. the Ulberg situation. Here no such factors exist. The Federation noted that Officer Anderson was never found guilty of domestic abuse nor was there any basis here to make that conclusion. Moreover, in the Ko Xiong case, he was terminated after the second incident of domestic abuse; at best this was the first. Sgt. Ulberg was terminated only after an order for protection was extended against him and then only after the City established "a [clear] sustained pattern of abuse by the Grievant toward the women in his life." No such evidence or anything like it was found here.

7. The Federation noted that the former girlfriend became very abusive when intoxicated and frequently flew into uncontrollable and unpredictable episodes of rage and physical violence that was akin to a cross between a whirling dervish and a Tasmanian Devil. She was extremely strong even though petite in stature and would fly into a jealous fit without warning. It is against this backdrop that the June 13, 2009 incident occurred.

8. The Federation argued that at best, the poor choice made by the grievant was in falling in love with the wrong woman and trying to "fix" her alcohol abuse over time. When he realized he could not he broke off their relationship some two months before the June incident. They had however purchased tickets to a live concert in Minneapolis some months before that and the girlfriend called the grievant begging home to go with her and promised not to drink that night. She broke that promise.

9. Before the concert she began drinking and even though she promised the grievant she would stop she did not and began drinking heavily at the concert. By the time the concert was over she was quite intoxicated and before the grievant could make rational decisions about what to do with her she was drunk. He acknowledged that he could have left her earlier in the evening but had concerns for her safety already and decided not to leave her but to stay with her in order to make sure she was not in any danger. He then got a phone call regarding his children and who would watch them the following day the girlfriend became jealous and flew into a rage. She wanted to drive home to Howard Lake from Minneapolis. Knowing the obvious danger in that he prevented her from doing that and determined that he could drive her to his home, not wanting to leave her unescorted in downtown Minneapolis is an extremely drunken state and deal with her the following morning.

10. The girlfriend tried to jump from a moving vehicle on highway 94 at a high rate of speed and resisted the grievant's attempts to pull her back into the car. He tried grabbing her arm but she pulled away. He knew if he stopped she would jump and possibly be hit and injured or killed so he tried pulling her dress. That tore away so at the point where she was actually standing on the running board of his truck he grabbed her by the hair in a last desperate attempt to pull her back inside so she would not kill herself. It was at that point he inadvertently got hold of a large hoop earring and tore it out of her ear, dragging it across her face causing the cut seen in the photos.

11. She calmed down but when they arrived at his home she melted down again, falling on the driveway and thrashing around screaming like a 2-year-old child throwing a tantrum. Mortified by this and not wanting to make an even greater scene the grievant determined that if he could just get her inside and get her to lie down she would pass out and be OK in the morning. He tried picking her up but, like a child might, she collapsed into a heap and essentially threw a tantrum making it impossible to pick her up by her arms so the grievant was left to pick her up by the head to get her into the house.

12. The Federation alleged that there were several material misstatements in the reports. The report indicated that neighbors said that the grievant had struck the victim yet none of them saw the incident. Moreover, the Federation asserted that if the grievant had in fact struck the victim in the face multiple times as alleged her injuries would have been far more serious than the pictures showed. The only evidence of injury to her face was the scratch near her left ear when the earring was torn out and some blood on her lip. There was no bruising or no swelling that would be consistent with a punch or even a slap. Moreover, the injuries to her lip could well have been self-inflicted given the victim's thrashing about on the driveway.

13. The grievant decided she should not stay at his house and the grievant asked a neighbor to drive her to his ex-wife's home. The two women had met and were on good terms. The neighbor got her there without incident and the grievant's ex-wife began ministering to her to calm her down.

14. His ex-wife was the person who contacted Big Lake police and never once imagined that there had been any sort of abuse. She testified that the girlfriend was frequently in this state but that she did not want her in her home with her children there to see this so she called Big Lake police to get her out of the house.

15. When Big Lake police arrived they questioned the grievant's ex-wife who told them no abuse had occurred and that the girlfriend was simply like this when she got drunk. The Federation asserted that even though no one told them there had been abuse Big Lake PD charged both the grievant and his girlfriend with domestic abuse. This was either an attempt to get them both out of Big Lake's hair or was the result of pressure put on it by Minneapolis to charge the grievant with something in order to get rid of him due to the recent publicity over the trial involving the grievant and a shooting some years earlier. The civil trial over that incident had recently concluded and there was considerable publicity over it at the time of the June 13th incident involved here.

16. The Federation noted that the charges were later dropped and that literally everyone involved in this incident, including the girlfriend acknowledged that no assault had occurred nor was there any domestic abuse. Thus, this was not the simple case of the victim dropping the charges to everyone's chagrin as the City's so-called expert testified to, but was rather based on the stark reality that in fact no domestic abuse occurred. Thus, the charges were dropped because there never should have been charges in the first place and the prosecutor wisely realized that before wasting time and taxpayer money on a needless trial.

17. The Federation asserted that domestic assault is the intentional infliction of bodily harm on a family member or member of the household. Here there was no intentional infliction of any bodily harm; to the contrary the grievant was attempting to prevent his former girlfriend from harming herself. Neither was there any holding of her against her will. The grievant was trying to protect her and should not be punished for doing the right thing.

18. The Federation severely criticized the City's claim that the grievant could have somehow prevented this from happening through the use of magic hindsight. The Federation asserted that the claim by the City that he could have dropped her off somewhere would have placed her in far more danger than she would have been had she stayed with him. Further, the claim that he should have just left her to fend for herself in order to protect his job was heartless at best and might well have resulted in the grievant being charged with some form of reckless abandonment of the girlfriend who was clearly in no condition to be left alone anywhere. There was no domestic assault here and the City's reliance on other cases where there in fact was a judicial finding of domestic assault are clearly distinguishable and have no application here.

19. The Federation also asserted that the grievant did not cut the relationship off since he had contact with her again in August 2009 when she called him from a bar intoxicated. He then drove to the bar and attempted to keep her from leaving. When she did he called police and had her picked up for drunk driving. He has had no contact with her since that time.

20. The Federation contended that the actual eyewitnesses who testified at the hearing corroborated the grievant's version of events that night. Moreover, there were significant and material misstatements in the City's documents that are inconsistent with the eyewitness statements and should be disregarded or given little weight.

21. The Federation further contends that even if the grievant could have extricated himself from the situation earlier or had he been able to handle her better that evening, termination is far too harsh a penalty for his compassion.

22. The essence of the Federation's argument is that there was no intent to harm or assault the girlfriend and that the grievant's actions were intended to protect her; indeed if he had done anything different by allowing her to drive home, wander the streets of Minneapolis or Big Lake or in some gas station along the highway that action would have been irresponsible and a breach of his ethical and morale responsibility under City policy. He was perhaps taken in by the woman he cared for and accepted her word that she would not drink that night but she lied to him as she had done many times before. When she became violent and irrational he attempted to protect her and keep her from harm. Termination under those circumstances is far too harsh a penalty for this officer.

Accordingly, the Association seeks an award sustaining the grievance and to make the grievant whole for all lost time and accrued contractual benefits.

DISCUSSION

If ever there was a case that illustrates the old adage that love makes you do stupid things it would be this one. Having said that however it is not a case, despite what happened, that should result in the termination of the officer under these very unique facts.

The evidence showed that the grievant has been with the Minneapolis Police Department for four years and had extensive law enforcement experience in other jurisdictions prior to that. He received a letter of reprimand on April 27, 2009 for his actions involving an unauthorized appearance at a Court hearing in Ramsey County. That hearing was an Order for Protection hearing involving officer Robert Ulberg, a fellow officer who was apparently a friend of the grievant's.

The grievant appeared in the audience in uniform that day on duty but without authorization. The Department at first imposed a 10-day suspension but later reduced that to a letter of reprimand. See City Exhibit 30. This is the only other discipline on Officer Anderson's record. There was some evidence that there have been complaints raised by the public, which is not atypical for a police officer in a major metropolitan area, but that these were dismissed or found to be unsubstantiated.

There was further some evidence that the discipline panel had an extensive discussion with the grievant about his poor judgment in that incident and that they wanted him to be cognizant of the implications of his actions as they reflected on him personally and professionally as well as on the Department as a whole. This was especially true since he appeared in uniform.

The City also asserted that Officer Ulberg was eventually discharged and that his discharge was sustained by Arbitrator Reynolds in December 2009. The City also pointed to an officer, Ko Xiong, who was also discharged for incidents of domestic abuse. These cases were reviewed and were found to be distinguishable from the present case on a number of grounds. First, in Officer Ulberg's case the arbitrator determined that there had been 4 prior disciplines on the officer's record. He found that one of those was too old to be considered but there were then others that were. Further, there was abundant evidence on that record to show that the officer there had been involved in multiple instances of domestic abuse where the wife had in fact made the allegation of assault and other acts of abuse and pressed those charges. Slip op at page 8. There was obviously an Order for Protection hearing, the same hearing for which Officer Anderson was disciplined here, that resulted in an Order for Protection against Officer Ulberg in that case.

The arbitrator found that some of the allegations made against Officer Ulberg were unfounded, i.e. untruthfulness under Garrity and inappropriate use of a department computer. Significantly though, the arbitrator found that the allegations of abuse that gave rise to the Order for Protection were unchallenged, quite contrary to the record presented here.

Moreover, the grievant in that case had been found to have engaged in domestic abuse against a previous wife and that there was “a sustained pattern of abuse by the Grievant toward the women in his life.” Slip op at 20. These factors demonstrate a radically different record from the one presented here even if the allegations by the City were all found to have been true. As will be discussed below, those allegations were also in large measure unfounded as well.

The City further relied on the Ko Xiong case. In that case too there was a showing of multiple instances of domestic abuse as the basis for the discharge. That case is very different from this one.

The City claimed that the new Chief announced that he would usher in a new era of accountability for these kinds of actions and that officers found guilty of domestic abuse would be severely punished. The arbitrator was mindful of Chief Dolan’s comments in this regard and found evidence on the record that he made it clear that domestic abuse was a serious charge and would be dealt with severely. Here though, it was only after several documented and unchallenged instances of abuse that Officer Ulberg was fired. Moreover, here as will be discussed below, the allegations of domestic abuse against *this* officer were not supported by the evidence on *this* record.

There was considerable evidence on this record that the former girlfriend has a history of wild outbursts when intoxicated and that she has a propensity to sudden very violent outbursts. Obviously the events of the evening of June 13, 2009 will be reviewed and judged on the evidence in place about those facts but there was evidence in the form of statements, see Union exhibit B, and direct testimony, see testimony of Amy Quella, to suggest that the grievant’s version of those events is more accurate than the portrayal of them by the City’s expert witnesses, who was not there and who were left to draw conclusions from “other similar cases.”

This brings us to the events of June 13, 2009. The evidence showed that the grievant and his former fiancé had in fact been broken up as a romantic couple for several months. The grievant testified credibly that he loved her but that her alcohol abuse and pattern of conduct once she became intoxicated were intolerable despite his efforts to “fix” or rehabilitate her. There was significant evidence on the record that she had not gotten her alcohol abuse under control by June 2009 and that she frequently became irrational and violent both physically and verbally once she got drunk. She was difficult to control and even struck out physically when she became intoxicated making it difficult if not impossible for one person to control or restrain her. There as no such showing in either of the cases referenced above.

There was no evidence whatsoever of a pattern of abuse between the grievant and his former girlfriend. The grievant’s ex-wife testified credibly that she had never experienced that type of behavior between her and the grievant when they were married and that they remain on good terms. They share custody of their children and by all accounts get along well. Significantly, there is no spousal maintenance or child support being paid by the grievant, and this was apparently done by design as a part of the divorce between him and his former wife, so there was no evidence of secondary gain by the grievant’s ex-wife.¹

She further testified that she has been with the grievant and his former girlfriend when she became intoxicated and supported the story that she becomes frequently verbally and physically abusive and gets out of control when under the influence of alcohol. She further testified that she has not observed any sot of abusive behavior by the grievant toward the girlfriend. This of course does not prove that there was none but adds considerable credibility to the grievant’s version of the facts as they unfolded on June 13, 2009.

¹ The City’s expert witness testified that occasionally former spouses will testify on their ex-spouse or partner’s behalf in an effort to divert a charge of domestic abuse in cases where maintenance or support is being paid since they may know that such charges can lead to jail time and the loss of employment thus jeopardizing that income stream. No such evidence as present here and this frankly added credibility and cogency to the ex-wife’s testimony on this record.

Returning to the events of that evening, the evidence showed that the grievant had purchased Dane Cook tickets some time prior to the break up with his fiancé. She had wanted to see Mr. Cook perform and asked that the two of them go as friends that evening since they had tickets. The grievant at first protested but eventually relented to the condition that she not drink that evening. She promised him she would not.

When they had dinner however she did begin drinking even though the grievant noted that she said she would not. As is the case with many alcoholics, she manipulated the conversation and told him she would only have a few and would not drink to excess. The evidence showed that she did however and that she did so somewhat surreptitiously.

The grievant testified that he became concerned about her increasing alcohol consumption that evening but thought she would stop drinking once they got other concert. She did not. Again, somewhat behind his back she began drinking to excess at the concert. The grievant testified credibly that by the time he realized what was happening it was essentially too late and that she was drunk. He testified credibly that he feared for what she might do as he had seen her in this state before and worried she might try to do something truly dangerous like wander around Minneapolis after hours or, worse, try to get to her car and drive home to Howard Lake Minnesota in that condition. Neither seemed a good option.

As they were leaving he became involved in a conversation with his ex-wife about their children and who would watch them. The girlfriend overheard this conversation and flew into a rage; as she has apparently done before when intoxicated. There was evidence that the girlfriend becomes irrationally jealous when the grievant talks to his ex-wife even though the two women had met and liked each other. Rationally, the girlfriend knew there was nothing to fear, but alcoholism is the process by which the brain gives up the ability to think rationally and she became irrational and out of control.

The City alleged that the grievant should have extricated himself from this whole scenario well before he decided to drive her home and that his poor judgment in staying with her led to the series of unfortunate events later that evening. This was an exceedingly difficult call for an arbitrator to make. Clearly the grievant had an obligation to uphold the City's policy and avoid conduct that could sully his badge. However, at the time the girlfriend started drinking she was not out of control; although there was some sense that she certainly could have become so and that the grievant might well have been able to predict that. He testified that he asked her to stop drinking and that she said she would and that she had stopped. He learned only after it was too late and she was intoxicated that he realized she was not capable of driving home or keeping herself safe that evening.

Hindsight is always 20-20. Had the grievant known what was to unfold later that evening he testified he would certainly have done something to avoid it – either not go at all or leave at the restaurant and make arrangements to get her home safely. Here, for better or worse, he found himself faced with a very intoxicated woman who was acting increasingly erratically in downtown Minneapolis late at night. Was he to leave her there? Certainly not. Was he to allow her to take her own car home that night? No one in their right mind would have done that; certainly not a licensed peace officer. He reasoned that it would be best to take her home where she could essentially sleep it off and then he could get her to her car the next day since he was going back to Minneapolis the next day to work and could drop her off at the vehicle in the Uptown area.

It is important to note, much as is the case with any historical anecdote, that the decisions made by a person in this situation is done without knowledge of what is to come. In the past it is impossible to predict the future whereas in the present it is always easy to second-guess the past. It was into this vortex that the grievant found himself swirling around as he began driving home on Highway 94 toward Big Lake.

There was then the incident that occurred on the drive home. The grievant testified credibly that his girlfriend began trying to get out of the truck on the way home even though the vehicle was traveling at speeds in excess of 65 miles per hour. He tried to prevent her from doing this and tried grabbing her by the arm but she squirmed away from that. He testified that he knew he could not stop since she would run away and he would be faced with the prospect of trying to restrain her on the road at night while traffic flew by at 70 mph. Again, what was he to do? Could he leave her by the side of the road in her condition at night on one of the busiest highways in the State of Minnesota? No person with an ounce of compassion or common sense would even consider that option.

Could her drive to a gas station or roadside rest and dump her off there? Much the same answer comes to mind. There was no way to know if she would be safe, be kidnapped, fall and harm herself or wander out onto the highway again. This was not a good option and one that frankly might well have been violative of his duty as a police officer. Accordingly he determined to keep plowing ahead toward home and try to keep her in the vehicle.

At some point she attempted yet again to climb out of the vehicle. He grabbed her dress but that tore. The photos and the testimony were consistent in this regard. At the point where she was literally out of the door as the car was traveling on highway 94 and was standing on the running board of the grievant's truck he grabbed the only thing he could catch and that was her hair. In so doing the grievant was forthright about inadvertently grabbing her earring, which was a large hoop style earring. That tore out of her ear cutting it as the photos showed. There was also a scrape on the left side of her face that the evidence showed was caused by the earring in this incident and not from another separate strike to her face.

The evidence showed that she calmed down at that point and sat without further incident of that nature until they arrived at the grievant's home in Big Lake. As she got out of the grievant's vehicle however she began running and stumbled and fell on the driveway. She also began screaming and thrashing around on the ground like a child throwing a tantrum.

The neighbors, who were having a party in their yard heard the commotion and ran to see what was the matter. The grievant was seen trying to get control of the girlfriend and she twisted uncontrollably on the ground. Ms Lindsey Sprague gave an account that demonstrated the girlfriend in a wild drunken frenzy on the ground yelling obscenities and other indiscernible gibberish while he tried to restrain and calm her. She further corroborated that the grievant indicated that he had grabbed her by the hair to keep her from jumping from his vehicle on the highway and that was how the earring got pulled out. This at least indicated that the grievant's story has never wavered and that he told this consistently throughout the entire event and afterward at the investigation. See also Statement of Daniel Witkowski and Nicole Witkowski. No one saw him hit her or strike her face.

The grievant was forthright in all of his statements about his efforts to get his former girlfriend into the house after she threw her tantrum.² He tried to pick her up by the arms or some other way but she resisted and threw herself around violently. She was by this time causing quite a scene which was disruptive, loud, somewhat frightening to the people around it, some of whom were children and embarrassing at the very least. He then picked her up by the head, stood her up and guided her away.

He then determined that she should not spend the night with him or in his house and had a neighbor drive her to his ex-wife's house. It was there that the ex-wife ministered to her as well but decided that she was so drunk that she did not want her in the house with minor children and contacted Big Lake police to see if they could find a place for her to stay.

The statement of the former girlfriend was reviewed as well. She indicated that there were inaccuracies in the reports and that she never claimed to be struck in the face or that the grievant had forced her into the truck. The City asserted that these types of recanted statements frequently accompany domestic abuse situations for various reasons as stated by Ms. Arthur.

² The CD's of the Internal affairs interview and the Loudermill hearings were reviewed as well. The City claimed that the grievant was not at all contrite in these and that this lack of understanding of the seriousness of the charges or his inability to conform his behavior to the expectations of the department were well demonstrated in these hearings. The grievant could have been somewhat more cooperative to be sure but he was not being terminated for his lack of contrition but rather for engaging in a domestic assault in violation of law and of City policy. He maintained his innocence of the charge of domestic assault, which frankly on this record was accurate. One need not apologize for actions not committed.

On this record several factors mitigated in favor of the grievant's version of the facts and indeed supported the girlfriend's July 9, 2009 statement to police, despite the fact that there were other documents to the contrary.

First of all, while no one condones domestic violence in any form and neither the City nor the Federation nor the arbitrator for that matter would treat an actual event of domestic abuse or violence lightly or cavalierly there were some things here that did not add up to the allegations of domestic abuse asserted by the City. First, the grievant and his former girlfriend were not actively dating at the time this incident occurred. By all accounts they had broken up months before and there was no evidence that the former girlfriend was trying to rekindle things with the grievant. While this does not mean that an assault did not happen it undercuts the theory put forth by the City and Ms. Arthur that the victim of domestic violence frequently covers for the abuser in order to keep the relationship alive. There was no relationship to keep alive here and no reason for the former girlfriend to recant her story unless she in fact really *had not* told the investigator that she had been struck in the face and was in fact telling the truth in her July 9, 2009 statement.

Second, as noted above, on this record there was considerable evidence to suggest that this woman really is violent when she is drunk and is a force to be reckoned with. That too does not negate an assault nor does it excuse hitting her but that fact lent credence to the grievant's story about how the injuries occurred that night.

Third, while the grievant was charged with 5th degree domestic assault so too was his former girlfriend. This again does not mean that there was no assault but it was apparent from a review of the Big Lake Police department reports that at least one glaring inconsistency was found. The reports indicated that Ms. Quella "reported that [the girlfriend] had been assaulted by her boyfriend, Jason Thomas Anderson." Ms. Quella testified that she told them no such thing.

On this record a reasonable inference can be drawn that the police officers drew the incorrect conclusions here but charged both with 5th degree domestic assault and decided to simply let the prosecutors deal with it.³ Ultimately that is precisely what happened and the prosecutors decided to dismiss the charges against Officer Anderson. The totality of the evidence points to the grievant's version of this being the more likely and more accurate. Certainly he would have some incentive to minimize his actions that evening in an effort to save his job but that fact alone does not render his story unreliable. Further, there was clear evidence that he had not been drinking that evening and that she certainly had. This too taints her story since much of it was obtained before she was sober.⁴

There were some inconsistencies in several of the reports and the statements. This however is not uncommon and did not on this record demonstrate that the Minneapolis Police Department intentionally fabricated evidence or that they intentionally wrote things down incorrectly in some furtive effort to establish a reason to terminate the grievant. Sgt. Zierdan's reports were based on the best evidence he could obtain and some of what he got was from the former girlfriend whose state at the time was hardly conducive to a lucid and rational or accurate depiction of what had gone on that evening. He did the best he could with what he had. The problem is that what he had was not all that accurate.

The City pointed to the statement given to Sgt. Zierdan on June 18, 2009 wherein she indicated a desire that "nothing be done." The City asserted that this did not indicate that something did not happen and that the reasonable inference is that something in the nature of an assault did happen but that the victim of it did not want it prosecuted.

³ The Federation made much of the fact that the prosecutor dropped these charges and did not go forward with a trial. While this is a piece of evidence in a case like this it is not determinative. The question here is whether there was a violation of City Policy severe enough to warrant discipline or even discharge. The fact that there was a decision not to prosecute or even if there had been an acquittal, would not govern the result here.

⁴ This was a factor that was taken into consideration. Had the grievant been shown to have been drinking to excess or that he exhibited even the slightest level of intoxication during this scenario, the result might well have been different. He was not and this was a factor that weighed in his favor on this record. It was clear that the former girlfriend was quite intoxicated that night and that her story given that night was quite possibly affected by that.

A review of the statement reveals that more than one reasonable inference can be drawn from it. Without the girlfriend's testimony no firm determination can be made about whether she was saying that nothing in the nature of an assault occurred or that she simply did not want anything untoward to happen to Officer Anderson.

The City further asserted that this case fits a "typical" pattern of domestic abuse in that there are clear physical injuries to the victim and the abuser denies it or attempts to blame the victim for her own injuries. Domestic violence by anyone is a serious and dangerous matter not to be trivialized, minimized or ignored. Had there been evidence to suggest that Officer Anderson had intentionally forced this woman into the car, assaulted her in an effort to subdue her or harm her while she was there or that he had attempted to harm her once back at his home the parties can be assured that the result here would have been very different. Here however there was no credible evidence that any such assault occurred.

The ultimate question is whether the grievant's actions violated City policy. This was a somewhat close question. Certainly he could have done things differently and presumably would have if only he had been clairvoyant enough to predict the melee that was to unfold that evening.

Obviously too the policy at issue here is quite broad and provides that officers "not engage in any on or off-duty conduct that would tarnish or offend the ethical standards of the department." That could certainly encompass a wide variety of conduct but the question here is whether Officer Anderson's conduct that evening violated this policy.

On one level they did since he became involved in a situation that got out of hand largely due to the actions of another person with whom he happened to be with. However, there was nothing in this record to suggest that he caused this woman to drink; in fact he tried to prevent it. Neither was there any evidence to suggest that his actions somehow goaded or precipitated her actions that evening. He tried to prevent her from harm and it may well be that he did.

For what it is worth, the evidence showed too that some months after this incident, the former girlfriend called him for a bar and was obviously intoxicated. He met her there and told her not to leave because he could tell how drunk she was. Even though he tried to prevent her from leaving she did. He knew she was well over the legal limit and called police and she was eventually stopped and cited by Bloomington police for DUI. If not for the grievant's actions in that later incident she may well have killed someone or herself.

On the other hand, after reviewing all the of the evidence in the matter along with the expert opinions the totality of this record reveals that while things certainly did not go as planned that evening for Office Anderson, his actions did not rise to the level of domestic abuse nor did they violate City policy warranting this discipline.

The City asserted as noted above, that in many cases solid and hard evidence of domestic abuse is difficult to get due to the victim recanting the story and efforts to intimidate the victim by the abuser. In some cases that is true. Here however no such evidence was present. More significantly no inference can be drawn from the evidence we have to that effect. While the grievant did get physical with the girlfriend the evidence on this record shows that it was in an effort to protect her or restrain her. There was simply no evidence of any effort to intimidate her or influence her to recant her story. Thus, even taking into account the opinions of the City's domestic abuse expert, the factual background for her conclusions were unsupported by the evidence on the record.

Finally, much the same can be said for the conclusions reached by the Department. The physical evidence and testimony does not add up to a violation of policy on this record. Since there was insufficient evidence to sustain any discipline any discussion of whether discharge or some lesser form of discipline is appropriate is moot. Accordingly, the only result here is to sustain the grievance and reinstate the grievant to his former position with full back pay and accrued benefits. Any back pay is to be mitigated and reduced by any salary or wages earned or any government unemployment or other wage replacement benefits received by the grievant in the interim.

AWARD

The grievance is SUSTAINED. The grievant is to be reinstated to his former position with the Minneapolis Police Department within 5 business days of this Award with all accrued contractual benefits reinstated. In addition he shall be made whole for any back pay subject to the mitigation set forth above. The Federation and the grievant shall provide any appropriate documentation to verify the wage loss claim to the City upon request.

Dated: May 11, 2010

City of Minneapolis and Police Officers Federation Anderson award.doc

Jeffrey W. Jacobs, arbitrator