

IN THE MATTER OF THE ARBITRATION BETWEEN

LAW ENFORCEMENT LABOR SERVICES, INC.,
ST. PAUL, MN,

DECISION AND AWARD
BMS CASE NO. 10-PA-0386
GRIEVANT MICHAEL A. FICKEN

- and -

CITY OF PRIOR LAKE, MINNESOTA,

ARBITRATOR

William E. Martin
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APPEARANCES

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PROCEEDINGS

The hearing in this case was held on August 5, 2010 at 9:00 a.m. in the Prior Lake City Hall. The Employer argued that the grievance herein had not been properly "perfected" under the

Collective Bargaining Agreement, (“CBA”) but submitted this procedural issue to arbitration along with its case on the merits or substance of the just cause issue herein. Following the hearing, the parties filed written briefs, dated August 31, 2010 after agreement to a 5 day extension on the date for filing briefs. The parties also stipulated to a one month extension of the time for submission of the award herein until November 1, 2010.

At the hearing, the Employer presented the testimony of Randy Hofstad, a lieutenant in the Prior Lake Police Department; and William F. O’Rourke, City of Prior Lake Chief of Police. The Union presented the testimony of Michael Ficken, the Grievant.

In addition to the testimony of its witnesses, the parties submitted Joint Exhibits 1-17; City of Prior Lake Exhibits 1-11; and Union Exhibits 1-8. These exhibits include hearsay interview statements offered as Joint Exhibits by the Employer. All exhibits are listed in the Appendix to this Award.

In addition to the witnesses and the exhibits, the parties offered oral argument at the hearing and submitted written post hearing briefs as set out above. Based upon the testimony, exhibits and oral and written argument submitted herein, the Arbitrator makes the following Decision and Award for the reasons stated in this opinion.

DECISION AND AWARD

I. THE GRIEVANCE IN FACTUAL CONTEXT

The grievant, Officer Michael A. Ficken was terminated by the Employer, the city of Prior Lake on September 16, 2009 for an incident that occurred on June 10, 2009. [Jt. Ex. 4] The termination letter from the Prior Lake City Manager Frank Boyles was based upon a recommendation of the Prior Lake Chief of Police William J. O’Rourke reported in a letter of

September 8, 2009, [Jt. Ex. 5]. The Chief's decision is explicitly based upon an investigation of the June 10 incident conducted by the Shakopee Police Department, and an internal investigation of the same incident by the Prior Lake Police Department. The Shakopee investigation was undertaken to deal with the possible criminal aspects of Officer Ficken's conduct. The internal affairs investigation was undertaken to deal with the alleged incident from the employment perspective. Both investigations, though accomplished by different individuals resulted in interview statements of the same persons all of which were received in the record herein.

While the termination letter referenced numerous policy and legal violations, including violations regarding "Use of Discretion", "Conduct Unbecoming", "Conformance to Laws", "Neglect of Duty", "Abuse of Position", "Courtesy", "Abuse of Process", "Truthfulness", "Use of Force", "Arrest, Search and Seizure", "State Computer Terminal", "Conduct Unbecoming An Officer, Principle [sic] One, Two, Five; and "Data Privacy"; the incident resulting in these numerous cited violations was a single incident of some fifteen minutes in duration. While the repetition of different cited violations may enhance our understanding of the city's view of the nature and seriousness of the misconduct for which it acted against Officer Ficken, we should remain clear that the business of the arbitration is to evaluate the alleged conduct of Officer Ficken against the CBA standard of just cause. Thus, the critical findings here must relate to a determination of what happened and whether that incident justified then Officer Ficken's termination under the just cause provision of the CBA.

The incident herein followed the breakup of Mr. Ficken's relationship with his fiancée Lisa Urness (Ms. Urness). Previously Mr. Ficken had given Ms. Urness a very expensive engagement ring and he had moved into her residence, the Parkview Lane house, in February,

2009. Ms. Urness' sister Kari and a friend "Dan" also lived in the house. Mr. Ficken has stated that while he did not pay rent, after moving in, that he and Ms. Urness agreed the payments on the engagement ring were partly in lieu of rent. Officer Ficken also contributed furnishings to the house. He received his mail there, and regarded the house as his residence.

For personal reasons which are not relevant herein, Ms. Urness broke off her engagement with Officer Ficken on May 8, 2009. Ms. Urness returned the engagement ring to Mr. Ficken but he continued to make payments, hoping to repair the relationship. From the break up until the incident, about one month, Mr. Ficken stayed with friends on most evenings, but spent some evenings back at the Parkview Lane house. While there is some dispute regarding the conditions of his occasional return to the house, it is clear that Ms. Urness did not reestablish the relationship, and that she eventually moved many of Mr. Ficken's belongings into the garage. She called Mr. Ficken to have him pick up these belongings and told him to drop off his key to the house. Mr. Ficken went to the house on June 9, 2009 to pick up his belongings from the garage, but he did not return his key. He testified that he forgot to do so. He was, however, aware that Ms. Urness had told him to return the key.

The next morning, June 10, Mr. Ficken went to work beginning his patrol at 7:00 am. He said that he believed that he had left several items, including a calendar and notebook and "under belt" at the Parkview Lane house. He drove in his patrol car, in uniform and on duty to the house. When he arrived he saw a red vehicle in the driveway. To determine the owner of the vehicle, Mr. Ficken "ran" the license plate number through the Driver and Vehicle Services (DVS) Data Base which revealed the vehicle was owned by Joshua Sitzmann. Mr. Ficken recalled that a Josh had been in a volleyball league with Mr. Ficken and Ms. Urness, but testified

that he wasn't sure this was the same Josh since he didn't know his last name. Clearly, however, he suspected it might be the same Josh.

Next, using the key he had failed to return the night before, as instructed by Ms. Urness, Mr. Ficken entered the house. When he went into the kitchen he saw Kari Urness. Again there is some difference in the versions of Mr. Ficken and Kari as to details¹ but it is reasonable to conclude that Mr. Ficken was concerned, if not furious or even angry. He did inquire as to who was there and whether Lisa was dating. Kari confirmed Lisa was dating and disavowed knowledge of who it was. It is apparent that Mr. Ficken suspected it was "Josh" from volleyball.

Next, aware someone named Josh was there, Mr. Ficken went downstairs to Ms. Urness' bedroom. When he tried the door it was locked. He said in his interviews and testimony that he was still looking for his calendar and notebook and under belt. He knocked on the door, and when he got no reply he broke in the locked door. There are discrepancies in testimony whether he kicked in the door or whether he hit it with his hip. Either way, he left the door with a hole in it and the lock was broken. Then he forced his way into the bedroom, found Lisa and Josh from volleyball there, engaged in a shouting match with Lisa, yelled at Josh and left without picking up the items he purported to be his reason to break in. On his way out, Mr. Ficken offered to pay for the door. He then left the house and drove away. He called Ms. Urness a couple of times and left her a text message, but she returned none of these communications. Mr. Ficken also checked Mr. Sitzmann's drivers license on his squad car computer terminal. At this point it seems clear this was for personal reasons.

¹Where there are discrepancies, these are discussed below. At this point, I state only facts that are essentially undisputed.

Ms. Urness, after Mr. Ficken had left, called 911. She filed a complaint which initiated a criminal procedure. The investigation of the criminal complaint was referred to the Shakopee Police Department to avoid any appearance of conflict of interest. Also, an internal affairs investigation was conducted to deal with the employment aspects of the situation.

When he returned to the station on the morning of June 10, 2009, Officer Ficken was informed by Lt. Hofstad that Lisa Urness had called regarding the events at her house and that he was being given an administrative leave. Mr. Ficken turned in his fire arms and later that afternoon he was interviewed by Bob Forsberg of the Shakopee Police Department. Investigator Forsberg also interviewed Lisa Urness, Kari Urness and Josh Sitzmann.

Prior Lake Sargent Greg Zollner conducted the internal affairs investigation and took statements from the Urness sisters and from Josh Sitzmann. Mr. Ficken's compelled statement was taken on August 20, 2009 by Lt. Hofstad and Prior Lake Chief of Police William O'Rourke.

Following the investigations, on September 8, 2009 Chief O'Rourke recommended that Mr. Ficken be terminated. City Manager Boyles accepted the recommendation. He notified Mr. Ficken on September 16, 2009 that he would be terminated effective September 21, 2009. The letter of September 8 from Chief O'Rourke summarized the events of June 10, 2009 and specified the grounds for the discharge. As stated above, the Chief specified numerous departmental policies and several legal violations as the grounds for his recommendation.² These are discussed further below.

²The criminal proceeding continued at the same time and beyond the discharge. On March 2, 2010 the criminal case ended with a dismissal of counts one and four and a guilty plea to counts two and three pursuant to a plea agreement. The guilty pleas were to misdemeanor disorderly conduct and misdemeanor damage to property.

On September 17, 2009 the grievance herein was filed by the Union. The grievance states:

Nature of Grievance:

On September 16, 2009, Officer Ficken received a letter stating the City was terminating his employment with the City of Prior Lake Police Department as of September 21, 2009. The letter was from you, City Manager Frank Boyles. The Union believes the action was taken without just cause.

Contract Violation:

Article 11-Section 11.1 - The Employer will discipline for just cause only. Discipline will be in one of the following forms: Oral reprimand, written reprimand, suspension, demotion or discharge.

Settlement Sought:

That Officer Ficken's employment with the Prior Lake Police Department be reinstated and any and all benefits denied him be returned to him.

The grievance was denied and the case was referred to the arbitrator. In addition to denial of the grievance on the merits, the City, on September 18, 2009, in an email to the Union, protested that the Union had not "perfected" its grievance because it had failed to include a statement of the facts upon which it relied to justify the grievance. This claim also was repeated in the October 9 letter denying the grievance, referencing Article 7.5 of the CBA.

II. ISSUES

1. Did the Union fail to perfect its grievance under the CBA?
2. If the grievance was perfected, did the City have Just Cause under the CBA to discharge the grievant?
3. If the City lacked Just Cause, what is the appropriate remedy?³

³Included in the remedies issue, is consideration if necessary whether conduct of grievant subsequent to his discharge would limit his damages or preclude his reinstatement even assuming an absence of Just Cause at the time of the discharge. While this issue at the arbitration was

III. PERFECTION OF THE GRIEVANCE

The relevant contract provisions state:

ARTICLE 7: EMPLOYEE RIGHTS-GRIEVANCE PROCEDURE

7.1 Definition of a Grievance: A grievance is defined as a dispute or disagreement as to the application of interpretation of the specific terms and conditions of this Agreement.

7.5 Procedure: Grievances, as defined in Section 7.1, shall be resolved in conformance with the following procedure:

Step 1: An Employee claiming a violation concerning the interpretation of application of this Agreement shall, within twenty-one (21) calendar days after such alleged violation has occurred, present such grievance to the Employee's supervisor as designated by the EMPLOYER. The EMPLOYER designated representative will discuss and give an answer to such Step 1 grievance within ten (10) calendar days after receipt. A grievance not resolved at Step 1 and appealed to Step 2 shall be placed in writing setting forth the nature of the grievance, the facts on which it is based, the provisions of the Agreement allegedly violated, the remedy requested and shall be Appealed to Step 2 within ten (10) calendar days after the EMPLOYER designated representative's final answer in Step 1. Any grievance not appealed in writing to Step 2 by the UNION within ten (10) calendar days shall be considered waived.

Step 2: If appealed, the written grievance shall be presented by the UNION and discussed with the EMPLOYER designated Step 2 representative. The EMPLOYER designated representative shall give the UNION the EMPLOYER'S Step 2 answer in writing within ten (10) calendar days following the EMPLOYER designated final Step 2 answer. Any grievance not appealed in writing to Step 3 by the UNION within ten (10) calendar days shall be considered waived.

labeled an "after acquired evidence" issue, upon reflection the issue really involves after occurring conduct.

Step 3: If appealed, the written grievance shall be presented by the UNION and discussed with the EMPLOYER designated Step 3 representative. The EMPLOYER designated representative shall give the UNION the EMPLOYER's ANSWER in writing within ten (10) calendar days after receipt of such Step 3 grievance. A grievance not resolved in Step 3 may be appealed to Step 4 within ten (10) calendar days following the EMPLOYER designated representative's final answer. If Step 4 is not appealed by the UNION within ten (10) calendar days it shall be considered waived.

Step 4: A grievance unresolved in Step 3 and appealed to Step 4 by the UNION shall be submitted to arbitration subject to the provisions of the Public Employment Labor Relations Act of 1971 as amended. The selection of an arbitrator shall be made from a list of five (5) arbitrators provided by the Director of the Bureau of Mediation Services, tossing a coin to decide who strikes first, and alternately striking names off the list.

7.6 Arbitrator's Authority:

(A) The Arbitrator shall have no right to amend, modify, ignore, add to, or subtract from the terms and conditions of this Agreement. The Arbitrator shall consider and decide only the specific issue(s) submitted in writing by the EMPLOYER and the UNION, and shall have no authority to make a decision on any other issue not so submitted.

ARTICLE 11: DISCIPLINE

11.1 The EMPLOYER will discipline employees for just cause only. Discipline will be in one of the following forms:

- Oral reprimand
- Written reprimand
- Suspension
- Demotion
- Discharge

11.8 Grievances relating to this article shall be initiated by the UNION in Step 3 of the grievance procedure under Article 7.

The Employer argues that the definition of a grievance requires that a written grievance appealed from Step 1 must include a statement of “the facts on which it is based,” among other requirements, and that a failure to file a proper written appeal waives the grievance.

Acknowledging that this case, involving discipline is different because it properly starts at Step 3 under Article 11.8, the City none the less argues that even for Step 3 the Step 1 and 2 requirements for written grievance must apply. The Union however argues that since Step 3 is the start here that Step 1 and 2 provisions are “by their own terms” inapplicable.

Next the Union argues that there is a general presumption favoring arbitration over dismissal of grievances on technical grounds. Elkouri, *How Arbitration Works* at 206 (internal citations omitted). The Union argues the facts provided in the Step 3 grievance letter included the name of the grievant; the nature and date of the decision being challenged by the grievance; the provisions of the collective bargaining agreement that had been violated; and the remedy requested. And, at the time the grievance was filed, the City had already taken a compelled statement from Mr. Ficken and, was fully aware of the grievant’s view of the facts leading up to his discharge. Thus there was no actual lack of notice as to the nature and basis of the grievance, and no prejudice from the manner in which the Union drafted the grievance.

I am persuaded that, given the lack of prejudice and the City’s actual knowledge of the underlying facts, no technical procedural defense should preclude a decision on the merits here. Since the Union grievance expressed the contract provision it relied upon and the City had the

facts already including grievant's detailed interviews, I hold on Issue 1 that the grievant had not failed to perfect the grievance herein.

IV. JUST CAUSE

A. The Employers Case

The parties agreed from the outset that the burden of persuasion here is on the Employer. The Employer alleged and supported claims of misconduct by grievant justifying his termination. The Employer first argued in its brief that Mr. Ficken admitted in his testimony to serious violations of City and Department policy, as well as to violations of state and federal laws. The Employer argued that even setting aside additional contested offenses, grievant admitted offenses that establish just cause for the City's decision to terminate his employment. The admitted offenses include accessing Mr. Sitzmann's private information on the State computer terminal in his car. This violated Department policy governing use of that terminal, violated state and federal laws, and also violated Department policies requiring conformance to the law and prohibiting abuse of position. As noted, the City argues that Mr. Ficken admits that he accessed Mr. Sitzmann's driver's license information on the State computer terminal for personal reasons and without a valid law enforcement purpose. In this regard, the Department's Policy and Procedure Manual, provides that "[t]he State computer terminal shall be used for criminal justice purposes only.⁴ The City also argued that by accessing Mr. Sitzmann's private information without a valid law enforcement purpose, Mr. Ficken also violated state and federal law. Indeed, state law provides that willful violation of this law by any public employee *constitutes just cause*

⁴The City explained in detail this one act violated several policies and several state and federal laws. As stated above, duplication of violations based upon one act may reflect on the nature and seriousness of the act but must still be related to just cause, the issue here.

for suspension without pay or dismissal of the public employee.” Minn. Stat. § 13.09 (emphasis added).

The City argues that Mr. Ficken admitted in his statements and in his hearing testimony, his decision to access Mr. Sitzmann’s private information from the State computer terminal had absolutely no relation to any law enforcement function. Indeed, it resulted from his apparent jealousy in regard to his personal relationship.

Finally, the City also argues that Mr. Ficken’s decision to access Mr. Sitzmann’s private information for entirely personal reasons exposed the City to the risk of civil liability. Indeed Mr. Sitzmann and Lisa have served a Notice of Claim on the City, in which they allege that Mr. Ficken *and the City* violated their constitutional rights.

Next, the City argued that Mr. Ficken’s admissions demonstrate that he violated Police Department policies forbidding conduct unbecoming a police officer and requiring that officers treat the public with courtesy. Mr. Ficken admitted that Lisa told him to return his copy of the key to her home when he came to collect his possessions June 9, but he did not do so. The City compares this situation to a recent decision by Arbitrator Gerald E. Wallin which held under strikingly similar circumstances, that a grievant had engaged in conduct unbecoming a police officer when his former girlfriend asked him to return a key to her apartment, he failed to return the key, and he then used it to enter her apartment without express permission. *See In re. Wright County Deputies Assoc. v. Wright County*, BMS Case No. 09-PA-1012 (Apr. 18, 2010) (Wallin, Arb.).

The City argues that the same logic applies with equal, if not greater, force in this case. Whatever the arrangement between Lisa and Mr. Ficken may have been before June 9, 2010, it

changed that day when she told him to return his copy of her key. Thus, Mr. Ficken by using the key and breaking into the locked bedroom engaged in conduct unbecoming a police officer, a serious offense warranting serious discipline.

Indeed, the City argues that the basis for a finding of conduct unbecoming-as well as for a finding of additional policy violations for failing to use courtesy with the public, is compelling here. The City argues that Mr. Ficken admits that he forced open Lisa's locked bedroom door. Mr. Ficken admitted that he raised his voice to a level that would be alarming to Lisa. Under the Department's Policy, officers are to be courteous to the public, are not to use derogatory language intended to embarrass, humiliate or shame, and are to refrain from words that would bring discredit on the department. Similarly, the section on Conduct Unbecoming an Officer, Principal Five, provides that officers must "treat all members of the public with courtesy and respect." Mr. Ficken admitted that his acts of raising his voice to a level that would be alarming to Lisa and calling her a slut were prohibited by those policies.

The City next argued that Mr. Ficken's admissions demonstrate that he violated Department policy requiring the use of discretion. Mr. Ficken had several opportunities on the morning of June 10, 2009, to exercise his judgment and discretion, turn back, and thereby avoid finding himself, on duty and in uniform, in Lisa's bedroom engaged in a confrontation with her and Mr. Sitzmann. The Policy and Procedure Manual describes how officers, guided by their professional police experience, must use considerable judgment and discretion in the performance of their daily duties, including in situations not specifically addressed by the Department's rules.

The City argues that having run its plates and knowing full well that the car parked in

Lisa's driveway might belong to the same Josh who he believed was "sniffing around," Mr. Ficken decided to let himself into Lisa's home rather than exercising his discretion and driving away. Then, having learned from Kari that Lisa was dating someone new, and believing it to be very probable that Josh from volleyball was in Lisa's bedroom with her, and now upset Mr. Ficken could have exercised his discretion and left Lisa's home, but instead proceeded downstairs to Lisa's bedroom. Finding the door to Lisa's bedroom locked, Mr. Ficken had another chance to avoid a confrontation. But rather than leave, he broke open the bedroom door. Mr. Ficken should have known that a confrontation awaited him on the other side of the door. Had Mr. Ficken exercised his discretion in an appropriate manner, rather than allowing his jealousy and anger to drive his decisions, he could have avoided that confrontation entirely.⁵

While the City claims that just cause here may be based on admitted policy and legal offenses, it also argues that other contested offenses, supported by the interview statements of this complainants herein add to the just cause argument.⁶ As for the offenses the City claims that the contemporaneous statements of Lisa, Kari and Mr. Sitzmann are more reliable than Mr. Ficken's testimony, because their recollections are consistent with one another and with the physical and other evidence in the record. For example, the statements agree that when Mr. Ficken decided to force his way into Lisa's bedroom, he was furious, not just slightly upset; that he spoke with Lisa

⁵Mr. Ficken had previously been disciplined (a ten day suspension) for a December 2007 traffic incident in which he had escalated a situation out of control by his failure to exercise judgment and discretion.

⁶The Union argues that since the interview statements are hearsay they must be disregarded where they conflict with Mr. Ficken's live testimony. The City argues that the credibility of all evidence is for his arbitrator with the hearsay nature of evidence being only one factor for consideration.

before breaking open her bedroom door, and so knew with certainty that she was in the bedroom; and that he broke the door open with two or three loud “booms,” causing damage more consistent with kicks or forceful hits with a knee than with merely pressing his hip against the door until it “came open.” Thus, the City claims the evidence in the investigative record reasonably supports the City’s conclusion that, in addition to the violations of policy and law to which Mr. Ficken effectively admits, he also committed violations of City and Department policies for abuse of position, abuse of process and search and seizure, neglect of duties and use of force.

Again, the City claims that the offenses that Mr. Ficken admits committing, standing alone, establish just cause for the City’s decision to terminate his employment, but that the additional instances of misconduct supported by credible evidence underscore the appropriateness of that decision.

B. THE UNION’S CASE

The Union made its arguments regarding just cause against the seven element Daugherty test stating the seven elements as follows:

1. Notice: Did the employer give the employee forewarning or foreknowledge of the possible or probable consequences of the employee’s disciplinary conduct?
2. Reasonable rule and order: Was the employer’s rule reasonably related to business efficiency and the performance the employer might reasonably expect from an employee?
3. Investigation: Did the employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Fair investigation: Was the employer’s investigation conducted fairly and objectively?
5. Proof: At the investigation, did the decision-maker obtain substantial evidence or proof that the employee was guilty as charged?

6. Equal treatment: Has the employer applied the rules, orders, and penalties evenhandedly and without discrimination to its employees?
7. Penalty: Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the employer?

The Union then argued that the City did not have just cause because: 1) it did not conduct a fair investigation, 2) it did not have sufficient proof that grievant committed "all of the policy violations with which he was charged" 3) it did not apply its rules equally and without discrimination, and 4) its penalty of termination was too extreme.

1. THE INVESTIGATION

The Union's initial argument is that the Employer should have referred the internal affairs investigation outside the department to avoid a conflict of interest, as it did the criminal complaint to Shakopee. The Union also contends that the fact that this is normal practice in Prior Lake does not justify the practice.

Secondly, the Union argues that the City violated the Peace Officers Discipline Procedures Act. PODPA, Minn. Stat. § 626. 89, Subd. 5 because it provided no signed complaint prior to the grievant's compelled statement or even prior to the hearing. The Union argues it is no excuse that the Union and Mr. Ficken failed to ask for a complaint.

2. PROOF OF POLICY VIOLATIONS

The Union argues that the City's case must fail because it relies entirely on hearsay statements, while Mr. Ficken testified at the hearing. The Union relies here on two stated principles. First that a discharge should not be upheld on hearsay evidence alone. And second, that conflicts between hearsay and live testimony should be resolved in favor of the live

testimony. The Union then details the differences between the testimony of Mr. Ficken and the investigation interviews of Lisa and Kari Urness and Josh Sitzmann, arguing that these conflicts must be resolved in favor of Officer Ficken. Among other effects, the application of this principle would (according to the Union) require the conclusion that Mr. Ficken remained a resident of Ms. Urness' house at least through the incident of the morning of June 10, which could cast a completely different light on the argument regarding whether his actions were policy or legal violations. The ultimate conclusion of the Union is that there is no adequate proof of just cause as a result. One example of this argument is that in this light there could be no neglect of duty because it is not neglect of duty for an officer to stop at his own residence to retrieve gear he had left behind. A second example regards the breach of courtesy violation. The Union argues this courtesy obligation applies to "the public" but that the altercation of June 10 did not involve the public "because Mr. Ficken still lived in the house." One final example relates to the abuse of process or arrest, search and seizure rules laws and policies. Regarding this violation the Union states: "by the City policy, "[o]fficers shall take no action knowing it will violate the constitutional rights of any person," nor shall officers "make any arrest, search or seizure which they know is not in accordance with law and department procedures." Mr. Ficken is accused of violating these policies by entering the house and by forcing open the bedroom door, which according to the City were violations of the residents' 4th Amendment right against an unreasonable search. According to the Union the charges cannot be sustained because Mr. Ficken was himself one of the residents of the house.

3. UNEQUAL TREATMENT

The Union presented evidence and argument that others in the Prior Lake Police

Department have not been disciplined for conduct similar to Grievant's. Acknowledging that I have considered the Union's claim, I will not address it in detail because I do not consider the conduct alleged to be sufficiently similar to be regarded as relevant herein.

4. SEVERITY OF PENALTY

The Union argued that Mr. Ficken's conduct did not justify the severe penalty of termination even if there was just cause for some discipline. The first argument stresses the earlier point that many of the policy violations here are unsupported by any proof except perhaps heresay evidence, and that Mr. Ficken's testimony consistently diminishes even that conduct.

Beyond the heresay argument and claims diminishing the severity of the June 10 incident, the Union argues that prior discipline should not be used to find just cause. This argument refers to the City's contention at the arbitration hearing that Mr. Ficken's termination was justified in part by his conduct prior to the June 10, 2009 incident. The Union argues that none of the prior incidents were mentioned in Chief O'Rourke's September 8, 2009 letter recommending Mr. Ficken's termination, or in Mr. Boyles' September 17, 2009 termination letter. The Union relies here on the principle that a precise statement of charges is necessary to due process during an internal affairs investigation, especially in a discharge case.

The Union next argued the City failed to notify Mr. Ficken that his prior conduct - including some incidents for which no discipline was imposed - was among the purported reasons for his termination. The Union argued that the failure of notice severely prejudiced the Union and Mr. Ficken in preparing for the hearing. Finally, it contends even if Mr. Ficken's suspension arising from a traffic accident on December 9, 2007 is considered relevant despite the lack of notice, that other incidents or prior conduct relied upon the City should not be considered. This is

an issue of progressive discipline, which is based on the premise that discipline should be corrective rather than punitive, and that discharge should be a last resort reserved for serious and repeated misconduct.

Finally, the Union contends that Mr. Ficken's overall record was not sufficiently considered as a factor in deciding upon the severe penalty of termination. On his 2004-2005, 2005-2006 and 2006-2007 evaluations, Mr. Ficken was rated as fully qualified or exceptional in all categories of his work performance, but Chief O'Rourke admitted that he had not reviewed Mr. Ficken's evaluations prior to 2008 before making his decision to recommend termination.

C. DISCUSSION AND CONCLUSIONS

The contract at Article 11.1, see above, contains a familiar just cause provision stating that discipline will be for just cause only, but not further defining just cause. Also, by listing penalties in order of severity, the provision implies some version of progressive discipline to select a penalty based upon the seriousness of the misconduct involved and the prior record of the employee being disciplined.

While the contract does not define just cause, the Union has argued for the Daughtery Seven Elements of Just Cause test. This test breaks up the idea of just cause in a way that is useful in some cases. However, the substance of the concept and the purpose of the seven steps is a holistic analysis of just cause issues, which generally, excludes arbitrary, unfair, or unreasonable discipline. Put affirmatively, the Employer may fashion a reasonable penalty for an employee who actually has committed the offense for which discipline was given; that this offense merits discipline within the framework of reciprocal duties owed at the particular work place; and that the penalty selected bears a reasonable relationship to the nature and severity of the offense.

In this case the grievant was terminated for what he did the morning of June 10, 2010. And the penalty of discharge was selected in part because of his recent past record of discipline. The question of just cause here depends then upon a determination of what the evidence shows that the grievant did; an evaluation of the nature and significance of those actions in the employment setting as a whole, and a judgment of whether the City acted reasonably and fairly in its choice of discharge as the penalty for this offense or set of offenses.

The first question here is whether the grievant violated multiple policies of the Department and committed unlawful acts on the morning of June 10. Adjunct to this question is the hearsay evidence question, whether and to what degree the witness statements from the criminal and internal affairs investigations may be relied upon as "proof" herein. I start this analysis where the Employer did by assessing the situation through the lens of Grievant's testimony and Grievant's statements including his compelled statement, and grievant's testimony at the hearing for his guilty plea. Taken as a whole, I agree with the Employer's argument that Grievant's own testimony demonstrates that he violated several policies, and laws at the house of his ex-fiancee that morning. Most critically, based upon his own testimony and not withstanding his attempts to avoid the conclusion that he no longer resided there, it seems clear that permission to reside there had been withdrawn. The critical point was when Ms. Urness told him to return the key to the house and he failed to do so. While his version of events was a good deal "milder" than the other witnesses, his testimony does not avoid the conclusions that he entered the house illegally and without permission, that he broke into the locked bedroom knowing that it was likely Ms. Urness and Josh were there, that in uniform, with weapon, on duty, he created an anxiety producing confrontation. That he did not physically assault anyone and left fairly quickly offering to pay for

the door does not negate that he committed several policy and legal violations during his visit to the house. Also, he admits that he “ran” Josh’s drivers license with no law enforcement purpose. Indeed, it must be concluded that he did so for some reason related to his jealousy and dislike of Josh.

As to his admitted conduct that amounts to violations of policy and law, the nature and seriousness of the offenses support the City’s determination that discipline is merited. In uniform, on duty and armed, Mr. Ficken used his patrol car computer to access official and restricted data bases for personal reasons in violation of law and the privacy rights of Mr. Sitzmann and he entered the house of his former fiancée without permission. While there he broke into a private bedroom which was locked, destroying the door and it’s lock as he did so. While in the bedroom, again in uniform and with a weapon he yelled at his former fiancée and the man with whom she was in the bedroom, while refusing at first her instruction to get out.

Again, even without reference to the slightly more serious version of events in Ms. Urness and Josh Sitzmann interview statements, the event as testified to by Mr. Ficken established violations of several police department policies and several rules of law as well. The violations include 1) a failure to use proper discretion or judgment to always act within the limits of police authority; 2) engaging in conduct unbecoming an officer including that which brings the department into “disrepute”; 3) engaging in conduct which fails to conform with all laws including constitutional requirements,⁷ engaging in neglect of duty, abuse of position, lack of courtesy, abuse of process, improper use of force, unlawful search or seizure, and unauthorized

⁷The Prior Lake rule on conformance to laws states: “a conviction for the violation of any law shall be prima facie evidence of violation of this section.”

personal use of state computer. As stated above, the list of violation of policy and law should not repetitiously and effectively exaggerate the seriousness of grievant's offences during his fifteen or twenty minute episode. Just case is to be evaluated on the basis of the nature and seriousness of any misconduct, not upon the number of policies that can be used to describe one basic occurrence. At the same time the list of policies offended here does reflect on the nature and seriousness of the misconduct.

Again, the misconduct of the grievant proven by his own testimony and physical evidence such as the condition of the bedroom door after he broke it in is to be evaluated in light of the reciprocal rights and duties of employer and employee with reference to the real interests of the employee with regard to the specific position, here police officer. In this regard the City convincingly argues that the importance of holding police officers to a high standard of conduct to assure the public trust that police will not only enforce, but also obey the law. The City thus has a clear need to establish rigorous policies to prevent police misconduct. Against this background of the City's justifiably rigorous policies and the reason for them the misconduct of Mr. Ficken herein must be regarded as serious.

Of course, if the heresay statements of the other witnesses are credited, Mr. Ficken's misconduct is somewhat more serious than the picture of his actions fairly drawn from his testimony. In that case, he was angrier and perhaps more frightening, but the picture is not substantially greater. The only significant difference might be whether, without the heresay statements, Mr. Ficken can fairly claim residence in the house to generate legal conclusions different than if he was not a resident legally privileged to enter the house and Mr. Urness' bedroom. Without getting into a technical legal argument, I think it is fair to conclude that even if

Mr. Ficken's residency extended beyond the break up of his engagement, his right to enter without permission ended when he was instructed to return the key. Furthermore, he certainly had no legal right to break into Ms. Urness' bedroom. The fact that he did so while on duty, in uniform, constitutes serious misconduct for the reasons stated above. And this conclusion is underscored by the fact that he was convicted of two misdemeanors for doing so.

My conclusion then is that Grievant engaged in serious misconduct justifying discipline. For reasons already stated, the Union's objection to use of the "heresay" interview statement does not negate the conclusion. This is because the major part of the proof establishing this misconduct came from Grievant's testimony and the physical evidence. With regard to the heresay objection itself, the interview statements were admitted by stipulation as joint exhibits, the statements were consistent and in some instances more credible than Mr. Ficken's testimony. In one such case, Chief of Police O'Rourke noted that the damage to the door was more consistent with Ms. Urness' version of events than Mr. Ficken's. In any case, based upon the evidence presented including Grievant's testimony the heresay objection does not prevent the conclusion that Grievant violated policies and laws in the commission of offenses serious enough to justify discipline.⁸

Against the background of the evidence accumulated and the conduct of the investigation

⁸The Union also objected under the Daughtery step of "fair investigation" to the City's failure to provide a signed complaint under PODPA, Minn. Stat. 626.89, Subd. 5. The City responded by arguing that no complaint was requested and that there was no prejudice to Grievant who was represented at all interviews. The City also argued that the objection had been waived because it was not presented prior to the arbitration. Therefore the City claimed the PODPA "defense" was not arbitrable. Because I agree that there was no bad faith by the City in its failure to provide a complaint to Grievant and no prejudice to Grievant, I hold that this objection does not provide a basis to invalidate Grievant's termination.

here, I see no basis to reject the Employer's conclusions rooted in unfairness of the investigation. It seems unremarkable here that the City ran its own internal affairs investigation even as it sent the criminal investigation to Shakopee. The City is responsible for its own employees and there is no appearance of conflict as might appear in the criminal case. Indeed, with two investigations one by Shakopee and the other by Prior Lake, showing very consistent evidence and conclusions there is no basis to conclude the Prior Lake investigation was unfair.

The remaining question is whether the penalty of discharge was unreasonably severe given the nature and seriousness of the misconduct and the Grievant's past record. The nature and seriousness of the misconduct as analyzed above is such that discipline is warranted. It undercuts the mission of and trust in a police department when an officer on duty violates the law and shows bad judgment resulting in abuse of authority and a failure to exercise discretion. Clearly, the City has a strong interest in preventing this sort of behavior. Here there was publicity and public airing of the misconduct and there may well be grounds for a lawsuit against the City.

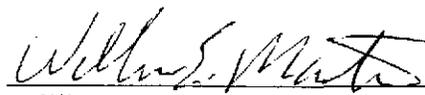
In addition to the serious misconduct for which discipline was warranted, the City argued that Grievant's recent record included similar misconduct for which he had been disciplined. On December 9, 2007, Grievant was involved in an incident in which while off duty he had engaged in a dangerous pursuit resulting in an eventual complaint and allegation of assault. Following its investigation the Department suspended Officer Ficken for ten days without pay for a series of policy violations. The letter of discipline for that incident foreshadowed the incident herein pointing out that Officer Ficken made a series of poor choices reflecting a lack of discretion and judgment resulting in an escalation to a number of policy violations and arguable violations of law. After his ten day suspension, Mr. Ficken did not file a grievance.

The CBA herein reflects a choice by the parties for a disciplinary system including progressive discipline of some kind. The concept here automatically makes previous discipline relevant to the City's choice of penalty, here termination. The Union argued that the prior incidents should be excluded because they were not cited in the Grievant's termination letter. However, the prior incident is not a basis for the present discipline. Rather it is a factor in evaluating the severity of the penalty here. Indeed, any employee's record of past discipline, or lack thereof, is relevant to a just cause issue in terms of the Employer's choice of penalty. The severity of the penalty here is not unreasonable given the seriousness of the misconduct in light of the prior offense.⁹ Since the penalty of termination is not unreasonable given the misconduct here, the grievance of Mr. Ficken is denied.

V. AWARD

Based upon the conclusions stated above, the Grievant committed serious policy and legal violations while on duty. Given his prior record of discipline for a similar offense, I find there was just cause here for his termination. The grievance is therefore denied.

Dated: November 1, 2010



William E. Martin
Arbitrator

⁹The prior evaluations are also relevant but they do not required here a rejection of this termination especially because Mr. Ficken's most recent evaluation was sub par in part because of incidents of misconduct.

APPENDIX

Joint Exhibits

- Exhibit 1: Labor Agreement January 1, 2009
- Exhibit 2: .Three letters September 17, October 8, and October 12, constituting step three grievance submission and reply
- Exhibit 3: Ficken 4-21-03 acknowledgment of reading personnel policies
- Exhibit 4: September 16, 2009 termination letter
- Exhibit 5: September 8, 2009, 5 page letter of Chief of Police O'Rourke reporting on investigation and recommending termination
- Exhibit 6: Pages 141-166 of Prior Lake Police Department Policy and Procedure manual
- Exhibit 7: Pages 167-200 Prior Lake Personnel Policy, as amended through January 2004
- Exhibit 8: Voluntary statement to Prior Lake Police Officer Greg Zollner on 06-18-09 by Lisa Christine Urness, 28 pages
- Exhibit 9: Voluntary statement to Prior Lake Police Sargent Greg Zollner on 06-22-09 by Kari Lea Urness, 28 pages
- Exhibit 10: Voluntary statement to Prior Lake Police Sergeant Greg Zollner on 06-24-09 by Joshua Richard Sitzmann, 15 pages
- Exhibit 11: Voluntary statement to Prior Lake Police Chief William O'Rourke and Lieutenant Randy Hofstad on 08-20-09 by Officer Mike Ficken, 46 pages
- Exhibit 12: Statement to Sergeant Bob Forsberg Shakopee Police Department by Michael Alan Ficken 29 pages
- Exhibit 13: Statement to Sergeant Bob Forsberg Shakopee Police Department by Lisa Christine Urness 11 pages
- Exhibit 14: Follow up statement to Sergeant Bob Forsberg by Lisa Christine Urness 5 pages
- Exhibit 15: Statement to Sergeant Bob Forberg Shakopee Police Department by

Joshua Richard Sitzmann 6 pages

Exhibit 16: Statement to Sergeant Bob Forberg Shakopee Police Department by Kari Lee Urness 4 pages

Exhibit 17: Prior Lake Police Department Supplemental Report of Lt. Randy Hofstad on 06-10-09 3 pages

City of Prior Lake Exhibits

- Exhibit 1: February 8, 2008 ten day disciplinary suspension without pay of Michael A. Ficken
- Exhibit 2: July 2008 annual performance review of Michael Ficken 13 pages
- Exhibit 3: Prior Lake Police Department Data Practices advisory to Michael Ficken 8-20-2009
- Exhibit 4: Garrity warning to Michael Ficken 08-20-09
- Exhibit 5: Four photographs of broken door
- Exhibit 6: June 12, 2009 release order in State of Minnesota v. Michael Allen Ficken
- Exhibit 7: Transcript of Plea of guilty and sentencing in State of Minnesota v. Michael Allen Ficken 28 pages
- Exhibit 8: Star Tribune. Com article reporting charges against Officer Ficken
- Exhibit 9: Shakopee Valley News article reporting charges against Officer Ficken
- Exhibit 10: Star Tribune article reporting charges against Officer Ficken, 13 June 2009
- Exhibit 11: Shakopee Valley News article on proceedings resulting from alleged breach by Officer Ficken of the conditions of his release

Union Exhibits

- Exhibit 1: Lakeville Police Report 10/003
- Exhibit 2: Performance Evaluation July 2007 Michael Ficken 12 pages
- Exhibit 3: Performance Evaluation July 2006 Michael Ficken 12 pages
- Exhibit 4: Performance Evaluation July 2005 Michael Ficken 12 pages
- Exhibit 5: Minn. Stat. 626.89 Police Officer Discipline Procedures Act
- Exhibit 6: Minn. Stat. 609.66 Dangerous Weapons
- Exhibit 7: Minn. Stat. 609.713 Terroristic Threats
- Exhibit 8: Minn. Stat. 609.506 Prohibiting giving police officer false name