

IN THE MATTER OF ARBITRATION BETWEEN

LAW ENFORCEMENT LABOR SERVICES)	OPINION AND AWARD
)	
AND)	BMS NO. 11-PA-1080
)	
CITY OF ROGERS)	Grievance re: Suspension

.....

ARBITRATOR: Charlotte Neigh

HEARINGS: August 10, September 7, October 7, December 8, 2011

POSTHEARING BRIEFS RECEIVED: January 27, 2012

AWARD: February 17, 2012

REPRESENTATIVES

For the Union:

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For the Employer:

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JURISDICTION AND PROCEDURE

Pursuant to the parties' Labor Agreement and the procedures of the Minnesota Bureau of Mediation Services, Charlotte Neigh was appointed to arbitrate this matter. Four hearings were held in Rogers, Minnesota, at which time both parties had a full opportunity to offer evidence. Posthearing briefs were filed by the agreed deadline of January 27, at which time the record was closed.

ISSUES

1. Whether the Employer had just cause to suspend the Grievant.
2. If not, what is the appropriate remedy?

PERTINENT AUTHORITY**STIPULATION**

The parties entered into a formal stipulation regarding the authority of the Arbitrator, as follows:

WHEREAS the City notified the Grievant of her disciplinary suspension for her alleged violation of the Fourth Amendment to the United States Constitution in connection with her conduct on January 3 and 6, 2010 and for her alleged violation of the following provisions of the City's Code of Conduct policy:

“Officers must act within the limits of their authority as defined by law and judicial interpretation, thereby ensuring that constitutional rights of individuals and the public are protected.”

“Officers shall take no action knowing it will violate the constitutional rights of any person.”

“Officers must not make any arrest, search or seizure which they know is not in accordance with the law and department procedures.”

and

WHEREAS the Union has grieved the discipline imposed on the Grievant in accordance with the procedure set forth in the Collective Bargaining Agreement between the Union and the City; and WHEREAS, as the final step in the grievance procedure, an arbitration hearing is scheduled for August 10, 2011 before Arbitrator Charlotte Neigh (hereinafter “Arbitrator Neigh”); and

WHEREAS, pursuant to the Minnesota Supreme Court's holding in *County of Hennepin v. LELS Local #19*, 527 NW2d 821 (Minn. 1995), arbitrators do not have authority to rule on alleged violations of the U.S. Constitution, and

WHEREAS, it is the intent of the parties to this dispute for Arbitrator Neigh to determine whether the City had just cause to discipline the Grievant;

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, as follows:

1. In the arbitration of this matter, Arbitrator Neigh will have the authority to rule on the question of whether the Grievant violated the City Rules and/or Policies enumerated in the letter by which the City notified her of her discipline
2. Arbitrator Neigh will have the authority to address constitutional issues only to the extent necessary for her to determine whether the Grievant violated the City Rules and/or Policies enumerated in the letter by which the City notified her of her discipline.

LABOR AGREEMENT

ARTICLE IX. DISCIPLINE

9.1 The Employer will discipline employees for just cause only. Discipline, which is not progressive, will be in one or more of the following forms:

- A. Oral reprimand;
- B. Written reprimand;
- C. Suspension;
- D. Demotion; or
- E. Discharge.

POLICY AND PROCEDURE MANUAL

ALLEGATIONS OF OFFICER MISCONDUCT

PURPOSE

This policy advises the officer of the procedures that will be used in complaints of officer misconduct.

POLICY

. . . Officers must be free to exercise their best judgment and to initiate enforcement action in a lawful and impartial manner without fear and reprisal. The officers must, at the same time, carefully respect individual rights.

* * *

Any person who believes that an action by a department member is improper is encouraged to bring the complaint to the department’s attention. The department will make every effort to insure that no adverse consequences occur to any person or witness either bringing a complaint forward or providing information in any investigation.

Complaints will be handled in a prompt, just and expeditious manner in accordance with these procedures. . . .

* * *

Major Violations:

* * *

4- Conduct which violates a person’s civil rights;

* * *

Misconduct: Means any infraction or major violation committed by a member which adversely reflects upon the department or the member’s ability to perform his/her duties within the department.

Allegations of Officer Misconduct (continued)

Initiating a complaint

. . . Any member who has personal knowledge of misconduct shall file a complaint according to these procedures. . .

If the person filing the complaint sets forth specific believable facts about the alleged misconduct and the person wishes to remain anonymous, the supervisor receiving the information shall become the complainant. . . .

Complaint investigation

. . . initial determination whether the facts alleged warrant a formal investigation. . . .

. . . The investigation may be assigned to an external agency where there is the potential for criminal charges . . . or in any other situation . . . that an external agency is appropriate.

Conclusion

* * *

The investigation shall be concluded within thirty (30) days of the filing of the complaint, unless for good cause an extension is granted . . .

Review and Disposition

* * *

If the complaint is “sustained”, . . . shall take the appropriate disciplinary action. Such action shall be based on the investigative report and the accused member’s record of service . . .

* * *

When a sustained disposition is final, the accused member may appeal the disposition according to the member’s collective bargaining agreement . . .

The . . . may suspend with pay any accused member any time during the investigation. . . .

CODE OF CONDUCT

. . . All employees . . . are required to maintain a working knowledge of and obey the code of conduct, department rules, policies, procedures and orders, personnel policies, ordinances of the City of Rogers, MN, and laws of the state of Minnesota and the United States.

Violations . . . will subject the violator to disciplinary action . . .

Code of Conduct (continued)

Department employees learning of conduct or observing conduct which is in violation of any law or policy of this department shall take necessary action and report the incident to the employee's immediate supervisor, who shall forward the information to the Chief law enforcement officer. If the misconduct is committed by the employee's immediate supervisor, the employee shall report the incident to the immediate supervisor's supervisor.

* * *

Use of discretion

The police profession . . . requires . . . considerable judgment and discretion . . . Officers have a large body of knowledge . . . training . . . experience to guide them in exercising proper judgment and discretion in situations not specifically addressed by department rules and regulations. In addition, officers must always adhere to the following principles in the course of their employment . . .

Police action - Legally justified

Officers must always act within the limits of their authority as defined by law and judicial interpretation, thereby ensuring that constitutional rights of individuals and the public are protected.

* * *

Rules of conduct

* * *

10. Unsatisfactory performance

Officers shall maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions. . . . Unsatisfactory performance may be demonstrated by a lack of knowledge of the application of laws required to be enforced; . . . the failure to conform to work standards established for the officer's rank, grade or position; . . . failure to take appropriate action on the occasion of a crime . . . deserving police attention . . .

32. Abuse of process

A. Officers shall take no action knowing it will violate the constitutional rights of any person.

* * *

43. Arrest, search and seizure

Officers shall not make any arrest, search or seizure, which they know is not in accordance with the law and department procedures.

* * *

BACKGROUND AND UNDISPUTED FACTS

The Grievant has worked in law enforcement for more than 20 years, and at the Rogers Police Department since March 2005. At the time of the events of January 2010 she was a patrol officer; later in 2010 she was promoted to sergeant.

On January 3, 2010, the Grievant learned of an incident where a woman (hereafter the Driver) had deliberately rammed her car into another car operated by the father of her son, in which the juvenile son was a passenger. Considering this to be a serious felony, the Grievant, together with the then chief of police (Chief) acting as her partner, went to the Driver's residence. After getting no response to knocking and announcing the presence of police officers, they used a master key to enter the Driver's apartment. Their sweep of the apartment showed that the Driver was not present but they found a large sword sitting just inside the entry door, which they took for safekeeping because they considered it to be a dangerous weapon.

Unsuccessful efforts were undertaken to locate the Driver over the following days. On the afternoon of January 6, 2010, the Grievant, together with a probationary trainee officer, again entered the Driver's apartment looking for her. She was not present but a walking stick with a sharp point on the end was found sitting in the same location inside the door where the sword had previously been. Considering it to be a dangerous weapon, the Grievant took it for safekeeping. During the evening of January 6, it was learned that the Driver was in the state of Illinois, where she was eventually arrested.

The Grievant and other officers filed routine reports related to this incident and its aftermath, and criminal charges were eventually filed by the Hennepin County Attorney's office, charging second-degree assault with a deadly weapon, a felony. The criminal case has not yet been concluded due to delays caused by the Driver's lack of competence to participate in her defense due to mental illness.

On January 12, 2011 an employee of the Rogers Police Department filed a complaint with the City Administrator, alleging that the actions of the Grievant and the Chief on January 3, 2010, and of the Grievant on January 6, 2010, constituted a violation of the 4th Amendment's prohibition against unreasonable searches and seizures, and police misconduct as prescribed in the policy manual.

On February 2, 2011 the Administrator referred the complaint for investigation by the Sherburne County Sheriff Department. The assigned Investigator notified the Administrator on February 7, 2011 that an investigation was warranted for the allegedly unlawful entry into the Driver's apartment. On February 9th the Administrator issued an official complaint against the Grievant and requested that the Investigator proceed with the investigation.

The Administrator was named as the complainant to protect the identity of the employee who had made the allegations. On February 10, 2011 the Grievant was notified by telephone and by letter that she was on paid administrative leave until further notice. This was the first notice to the Grievant that her conduct thirteen months earlier was under scrutiny.

Background and Undisputed Facts (continued)

The Investigator requested and received various documents from the Department and advised the Administrator on February 14, 2011 that a successful criminal prosecution for the alleged violations would be difficult. The City subsequently decided not to refer the matter for criminal investigation.

Between February 15 and March 1, 2011 the Investigator continued the internal affairs investigation by interviewing several members of the department and others, and following up on leads. He presented a comprehensive report to the Administrator, concluding that the allegation regarding the Grievant's violation of the 4th Amendment by entering the apartment without a warrant on January 3 and 6, 2010 was sustained.

By letter dated April 18, 2011 the Administrator notified the Grievant that:

- The investigation substantiated that she violated the 4th Amendment by entering the apartment without a warrant on January 3 and 6, 2010.
- This also violated the department's Code of Conduct regarding: legally justified police action; abuse of process; and arrest, search and seizure.
- She was being disciplined by a three-day suspension without pay for misconduct.
- The dates of the suspension were designated as April 14, 15 and 18, 2011.
- She was to return to work on April 19, 2011.

The Union filed a grievance on April 19, 2011, claiming that the discipline was without just cause, and seeking to have it rescinded and removed from the personnel file, and any other remedy necessary to make the Grievant whole. The parties were unable to resolve this matter and it proceeded to arbitration.

SUMMARY OF THE PARTIES' ARGUMENTS

THE EMPLOYER ARGUES THAT:

- The evidence has established a good and sufficient basis for the 3-day suspension.
- The Union did not challenge the reasonableness of the provisions in the Procedure Manual and Code of Conduct, or claim that the Grievant did not know of them and understand the requirements for search and seizure.
- The Grievant testified that she had specific training regarding 4th Amendment search and seizure issues and that she knew that she must have exigent circumstances to conduct a non-consensual entry into a residence without a warrant.
- As the Field Training Coordinator in the Department, the Grievant drafted the Field Training & Evaluation Program manual, which includes a specific reference to the need for exigent circumstances when performing a non-consensual entry. The Grievant was responsible for training probationary officers, including the one who accompanied her during the 1/6/10 entry.

Employer Arguments (continued)

- The investigation report establishes and documents that the Grievant violated the Department's standards with the non-consensual and warrantless entries of January 3 and 6, 2010 without exigent circumstances.
- The investigation report was corroborated by the admissions of the Grievant and the former Chief at the arbitration hearing that they had no probable cause to believe that the Driver was present in her residence and no medical emergency existed.
- It is well established that police reports need to be thorough, complete and accurate, and need to include a reference to a tip if one is received. The Grievant and the Chief testified that the Grievant's reports were thorough and accurate.
- The Grievant's statement at the end of her investigative interview that she had received a tip regarding the Driver's location was an apparent effort to justify her actions on January 6, 2010. The existence of a tip is not referenced in the Grievant's reports or the reports of the probationary officer who accompanied her.
- The Grievant testified that there definitely was a tip and claimed that it must have come from the former manager of the apartment building calling her cell phone. The cell phone records for that period of time reveal no such call. The husband of the since-deceased manager told the Investigator that: he did not believe that his wife had provided a tip; and they were vacationing in North Carolina in early January 2010.
- The Investigator concluded that the Grievant did not receive a tip and that her 11th-hour claim of a tip was not credible.
- The Grievant initially testified that she intentionally did not include the tip in her report out of concern for protecting the informant from possible reprisal, despite the fact that she could have achieved this by referencing it as from a "Confidential Informant" or "C.I.". The Grievant subsequently changed her testimony and claimed that she inadvertently forgot to include the tip in her report. The fact that the Grievant's memory regarding a tip became clearer two years after the incident is suspect.
- The probationary officer testified that when they entered the Driver's apartment on 1/6/10 they had no information that she was there, and that exigent circumstances did not exist.
- A proper credibility presumption is against the Grievant since she has the most to lose or gain from the proceeding, as opposed to other witnesses who have no incentive for distorting the truth.

Employer Arguments (continued)

- During her investigative interview the Grievant repeatedly stated that on 1/3/10 she was acting in conjunction with the Chief as her partner and not under his direction, and the Chief concurred in this during his interview. At the hearing the Grievant testified that: it was the Chief's decision to enter and to seize the sword; the Chief had the authority to do this; and she was acting under his authority. This is a transparent attempt to limit her responsibility for her actions and wrongdoing.
- The other sergeant in the Department testified that the entries and seizures on January 3 and 6, 2010 were contrary to normal Department procedures because there was no probable cause to believe that the Driver was present. He testified that if he had been present with the Chief he would have raised his concerns about the lack of exigent circumstances and the need for a warrant.
- The Union's emphasis on the mental health history of the Driver and her reputation in the Department does not justify the Grievant's actions. There is no mental health exception to the requirement of probable cause to believe that the individual is present in the residence at the time of entry. Standards for legal search and seizure apply equally regardless of mental health status.
- The City has established that the Grievant violated the Department's policies and procedures because exigent circumstances did not exist to allow a warrantless and non-consensual entry into the Driver's residence on January 3 and 6, 2010.
- The Department manual designates the Grievant's conduct as an offense for which discipline may be imposed and the rules have been consistently enforced.
- The Investigator accepted the complaining officer's explanation for why he waited a year before filing the complaint. Having received such a complaint of officer misconduct, the City had an obligation to investigate it.
- The Administrator relied on the investigative report and findings of fact in determining that the Grievant committed serious misconduct. In determining a 3-day suspension he considered the violation of the Driver's rights and the potential liability exposure to the City. He rejected more serious disciplinary action because of the Grievant's length of service and good record.
- Due to a payroll error, the Grievant was inadvertently paid for the three days designated as an unpaid suspension. This should be rectified by reducing her accrued vacation by 24 hours.

THE UNION ARGUES THAT:

- The complaining officer admitted that he knew about the events of 1/3 and 6, 2010 shortly after they took place, and so the complaint filed one year later was untimely. By the time of the investigation, witnesses were unable to remember some of the details. One essential witness, the apartment manager who may have provided the tip about the Driver's presence on 1/6/10, died in October 2010.
- The complaint was based on improper motives. The complaining officer had a strained working relationship with the Chief. He admitted during his testimony that he was motivated to file the complaint because of personnel issues with the Chief. It is clear that his purpose was not to enforce policies or protect constitutional rights, but to retaliate against the Chief, and the Grievant was caught in the crossfire.
- All of the other officers who testified at the arbitration hearing knew of the warrantless searches but none of them followed the policy requiring that violations be reported, or questioned the Grievant, or filed a complaint.
- Rather than recognizing the complaining officer's improper motives or rejecting the complaint as untimely, the City launched a full-fledged investigation. The City did not require the complaining officer to follow the specified chain of command, and it flouted its own rules by taking more than three months to complete its investigation, far more than the 30 days required by Department policy, and without notifying the Grievant of any extension of that deadline. In contrast, the City removed some reprimands from the complaining officer's file because the Chief allegedly had not completed his investigation within the 30-day timeframe.
- The Grievant should be shielded from discipline because she acted "in good faith, in an attempt to prevent (the Driver) from hurting herself or others", as opined by the Investigator. The Grievant's purpose and state of mind are important because the standards she is alleged to have violated require: "*knowing*" that an action will violate the constitutional rights of a person; and not making "any arrest, search or seizure, which they *know* is not in accordance with the law and department procedures". There is no evidence that the Grievant knowingly violated the law. It was only in hindsight more than a year after the fact that the City determined that the warrantless searches were unjustified.
- The Code of Conduct also recognizes that officers are required to use considerable judgment and discretion .
- These factors closely mirror the rationale underlying the doctrine of qualified immunity, which protects public officials when performing discretionary functions from damage suits and civil liability in order not to inhibit effective performance of discretionary functions. An officer may also be inhibited by fear of discipline, which also can include monetary penalties. Imposing discipline on an officer for good-faith performance does not serve the public interest.

Union Arguments (continued)

- The warrantless entry into the Driver's apartment was justified by exigent circumstances. Courts have recognized single-factor exigencies, including "hot pursuit" of a felon and protecting public safety, both of which were present when the Grievant entered the Driver's apartment.
- Alternately, the warrantless searches were objectively reasonable and justified based on the totality of the circumstances. Once inside the apartment, it was proper to seize the weapons found, as they were in plain sight and in all likelihood would be used for future assaults.
- The Hennepin County Attorney's office filed felony assault charges against the Driver without raising any concerns regarding improper searches.
- The "hot pursuit" doctrine applies because on 1/3/10 the Grievant was involved in the required "some sort of chase" as she was taking steps to locate the Driver and take her into custody as quickly as possible, before she could harm herself or others. The seriousness of the underlying offense, which constituted felony second-degree assault, easily satisfies the requirements of "hot pursuit".
- Exigency may be present even when police do not have continuous knowledge of a suspect's whereabouts.
- The California appellate court held that the hot-pursuit doctrine applied to officers who broke down the door of the suspect's apartment 90 minutes after a homicide based on reliable information that he was involved in a felony, even though they were not literally pursuing the suspect. The same reasoning applies in this case.
- Arguing that the absence of the Driver's car in the parking lot meant that the Grievant had no concrete information that the Driver was actually inside her apartment is a red herring. The Grievant's overriding goal was finding a dangerous felon. It was common sense and standard investigative procedure to find out if she had returned to her residence.
- Under the public-safety doctrine officers may conduct a warrantless search if they reasonably believe that securing a warrant may place themselves or the public at risk. The Grievant knew that the Driver had recently fled from the scene of a felony assault; had a history of dangerous and erratic behavior and suicidal threats; and might possess a gun. The Grievant reasonably believed that if she took the time to obtain a warrant, the Driver could leave her apartment and harm the officers on the scene or others. This clearly satisfies the requirements of the public-safety doctrine.
- A warrantless search may be justified by the totality of the circumstances, using a flexible test of whether: a grave or violent offense is involved; the suspect is reasonably believed to be armed; strong probable cause connects the suspect to the offense; there is a strong reason to believe the suspect is on the premises; escape is likely; and the entry was peaceable. The circumstances of the 1/3/10 entry, including a reason to believe that the Driver had returned to her apartment because it was her residence, show that it was objectively reasonable and justified.

Union Arguments (continued)

- The totality of the circumstances includes the role of the Chief in the 1/3/10 entry. He was the Grievant's superior officer and had the authority to make the decision to enter without a warrant, which he did. The Grievant was obligated to comply with the Chief's decision or risk a charge of insubordination, and so should not be disciplined for actions she took under his direct supervision.
- Also to be considered is the history of contacts between the Driver and the Department, including an extended series of complaints where she exhibited bizarre, paranoid and delusional behavior, culminating in multiple threats of suicide. All of the officers questioned during the investigation agreed that she was mentally unstable, violent and dangerous, which the Grievant knew.
- Also to be considered is the nature of the Driver's apartment building and the frequency of police calls there on behalf of physically and/or psychologically disabled residents. This is why the Department had access to a master key for all of the apartments, which was used only a few weeks before January 2010 without a warrant in response to a barking-dog call.
- The City's assertion that the reports of the incidents were embellished to make the threat posed by the Driver more serious is false. The Investigator conceded that the content of the final reports is factually accurate and that he conducted no forensic analysis to determine when they were changed and by whom. The changes between the original and final reports are not unusual or suspicious, as the Chief frequently reviewed drafts and directed that changes be made.
- The 1/6/10 search was justified by the Grievant's receiving a tip that the Driver was there. The failure to document this tip in her report of the incident was an oversight but does not mean that it never happened. Concluding that it never happened would penalize the Grievant for the time that elapsed between the event and when she was questioned about it, and for the death of the apartment manager, an essential witness. Moreover, the Grievant has never been charged with being untruthful in her interview regarding this point. This tip, together with exigent circumstances, made the second warrantless entry into the Driver's apartment objectively reasonable and not in violation of any policy.
- Confiscating the two weapons from the Driver's apartment was justified by the plain-sight doctrine, which allows items to be seized without a warrant if: the police are legitimately in position to see them; the police have a lawful right of access to them; and their incriminating nature is readily apparent.

Union Arguments (continued)

- The incriminating nature may be determined by background information regarding the nature of the property and whether the items are strangely located. The law does not require that the items be related to the crime being investigated but need only be related to some criminal activity. The Investigator agreed that both the sword and the walking stick were potentially deadly weapons. In light of the Driver's psychological problems, her demonstrated capacity for violence, and the reports that she had previously attacked the operator of the other car with a tire iron and a butcher knife, it was reasonable to conclude that these weapons were placed by the door with the intent of inflicting serious bodily harm and it was entirely valid to seize them, which was done by the Chief on 1/3/10. The Grievant cannot be punished for following his lead on 1/6/10.
- The 3-day suspension was inappropriate in light of the Grievant's excellent employment record, including glowing performance reviews, a wide range of additional responsibilities, an outstanding service award, promotion to sergeant, high regard by members of the City Police Commission, and no disciplinary actions. Even if it is determined that her searches violated policy, a 3-day suspension is far too severe a penalty.
- The suspension was without just cause and should be reversed and removed from the Grievant's personnel file, and she should be made whole.

ANALYSIS AND DISCUSSION

The Complaint

This case arose in the context of serious dissension within the Rogers Police Department that created a faction of officers who were at odds with the Chief, and a faction on which he primarily relied. This factionalism extended to union issues, leading to a change of exclusive representative from the Teamsters to LELS, effective December 15, 2010. It was in this context that a disgruntled officer, who felt that he had unfairly received several disciplinary actions by the Chief throughout 2010, filed this complaint of misconduct against the Chief and the Grievant, and other complaints against the Chief in January 2011. His explanation for not filing it sooner was fear of retaliation relating to a grievance he had pending regarding his disciplinary suspension.

Although the Union persuasively argues that the complaining officer was motivated by animosity toward the Chief rather than concern for the constitutional rights of the Driver, his motive did not affect the objectivity of the investigation's findings and conclusions. Although the one-year delay between the events and the complaint is troubling, there is no time limit specified for filing a complaint of misconduct. In response to the Union's argument that the City should not have pursued the complaint because of the motive and the delay, the City persuasively argues that having received such detailed and particularized allegations of such serious misconduct involving a citizen's constitutional rights, it had an obligation to investigate. Although this delay likely affected the ability of those involved to clearly recall all of the particulars, the relevant facts were sufficiently established by the Investigator to enable a reliable analysis on which the City could reasonably base a disciplinary decision.

Filing the complaint directly with the Administrator rather than the complaining officer's immediate supervisor was reasonable considering that the Chief was one of the accused; this did not violate the policy or invalidate the complaint process. The length of time between the filing of the complaint and the disciplinary notice to the Grievant is troubling and not fully explained in the record, although it likely was related to the considerable political turmoil surrounding the investigations and the ultimate resignation of the Chief. Although the Grievant was understandably distressed by being on administrative leave for more than two months during the investigation, the Administrator's failure to formally extend the 30-day deadline for completing the investigation, and to notify the Grievant of the extension, was not consequential. The policy does not specify any penalty for exceeding this time limit, and there is no evidence that the Grievant raised this objection at the time. If she had done so, the Administrator could simply have granted the extension.

Basis for Disciplinary Action

The 4/18/11 notice to the Grievant stated that she was receiving a 3-day (24-hour) disciplinary suspension without pay for misconduct. It specified that the investigation into her actions on January 3 and 6, 2010 had substantiated that: she violated the 4th Amendment by entering the Driver's residence without a warrant; and these actions also violated certain provisions of the Department Code of Conduct. It is noted that this letter is silent regarding the seizure of the sword on January 3 and of the pointed walking stick on January 6, and so these seizures will not be considered as part of the basis for the disciplinary action.

Finding of Violation of 4th Amendment and Department Policies

The City relied on the Investigator's report in determining that a violation had occurred. In sustaining the allegation of the 4th Amendment violation for entering the residence without a warrant, the Investigator applied his knowledge of the law to the established facts.

Regarding the law, he stated that Court interpretations of the 4th Amendment have created rules of search and seizure that protect a private residence by requiring a warrant to force entry into a home. In addition to the warrant, an officer must have probable cause to arrest the person, and probable cause to believe that the person is inside at the time of entry.

He further stated that exigent circumstances allow an officer to enter without a warrant or consent only if:

- Someone is likely to be killed or seriously injured unless immediate warrantless action is taken; or
- A serious and/or dangerous criminal offender is likely to escape apprehension and/or prosecution unless immediate warrantless action is taken; AND
- There is probable cause to arrest the person sought; AND
- There is probable cause to believe that the person to be arrested is physically present in the premises at the time of entry.

In applying the law to the events of January 3, 2010, the Investigator determined that:

- The Grievant was looking for a serious and/or dangerous criminal offender who was likely to escape if she was not apprehended immediately.
- The Grievant did not have probable cause to believe that the Driver was present at the time she entered, because: she admittedly did not know her whereabouts; and she did not see her car in the parking lot.
- The Grievant's stated reason for believing the Driver was present at the time of entry, because she lived there, did not constitute the requisite probable cause.

In applying the law to the events of January 6, 2010, the Investigator noted that three days had passed with no new information regarding the Driver's whereabouts or that she was hurting herself or others. Therefore, exigent circumstances no longer existed and the Grievant did not have authority to enter without a warrant.

The Investigator also sustained the allegation that these entries violated these Code of Conduct provisions:

- Police action - Legally justified

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

- Abuse of process

Officers shall take no action knowing it will violate the constitutional rights of any person.

- Arrest, search and seizure

Officers must not make any arrest, search or seizure which they know is not in accordance with the law and department procedures.

Exigent Circumstances

The Union argues that exigent circumstances made a warrant unnecessary for entering the residence, and so no violation occurred. The Investigator agreed that one of the requirements for exigent circumstances was met on January 3 by the need to apprehend a dangerous criminal offender who was likely to escape. However, the Investigator concluded that another indispensable requirement, probable cause to believe that the person to be arrested is physically present at the time of entry, did not exist. The evidence supports his conclusion: both the Grievant and the Chief testified that the only basis they had for looking for the Driver in her apartment was that she lived there.

The Investigator concluded that under existing state and federal case law, which he cited, this did not constitute the requisite probable cause. A review of current state and federal search and seizure law confirms the Investigator's conclusion. Although the Union cited one 1967 California appellate case that upheld police officers' breaking down the door of an apartment under similar circumstances, that decision is an anomaly and likely would not withstand judicial scrutiny forty-five years later. Moreover, it did not constitute precedential authority in Minnesota even then, and the Union does not claim that the Grievant was relying on it.

Regarding the entry on January 6, the Investigator determined that after three days it was no longer justified by the need to prevent an escape that existed in the immediate aftermath of the ramming incident. The Union has focused on the possibility that the Grievant was acting on a tip that the Driver had returned to her apartment. The Investigator testified that even if such a reliable tip had been received, it would still be necessary to get a warrant to legally enter the apartment without consent and the Union has not effectively challenged this analysis. It is concluded that the existence of a reliable tip would not have excused the warrantless entry on January 6, 2010, and so it is not necessary to address whether or not such a tip occurred.

It is concluded that the City reasonably relied on the Investigator's determination that the Grievant violated the 4th Amendment on January 3 and 6, 2010, by entering the Driver's apartment without a warrant or sufficient exigent circumstances.

Obligation to Comply

The Union also argues that the Grievant was obligated to comply with the Chief's decision to enter the apartment on January 3 and should not be disciplined for actions she took under his direct supervision. Although subordinates can be disciplined for unjustifiably refusing to follow a direct order, that is not what occurred on January 3. The record clearly shows that both the Grievant and the Chief considered themselves to be acting in conjunction with each other as partners on January 3, 2010. They admittedly had no discussion regarding whether a warrant was needed to enter the apartment. They both continued to take the position at the arbitration hearing that no warrant was needed, and the Grievant testified that she would have acted the same way if the Chief had not been present. Moreover, the Department Code of Conduct requires an officer to refuse to obey an order that the officer knows would require committing an illegal act, and advises requesting clarification of a doubtful order.

It is concluded that the Grievant was not acting under an obligation to comply with the Chief's decision and was responsible for her actions.

Good Faith and Unknowing Violation

The Union also argues that The Grievant acted in good faith and did not knowingly violate the law, and so should not be disciplined. The Investigator, in explaining to the Administrator why a criminal investigation was probably not warranted, opined that “the officers were acting in good faith, in an attempt to prevent (the Driver) from hurting herself or others”. The City has not differed from this opinion, and chose not to pursue a criminal investigation.

Two of the alleged policy violations require “knowing”: that an action will violate constitutional rights; and that a search and seizure is not in accordance with the law and department procedures. However, the Grievant has never deviated from her position that she had exigent circumstances on January 3. She did concede at the hearing that the entry on January 6 would not be proper without the claimed tip as to the Driver’s presence, but did not concede that exigent circumstances had ceased to exist three days after the incident. This indicates that she did not know that her actions violated the Driver’s constitutional rights or that the search was not in accordance with the law and department procedures.

The Chief testified that among the training gaps he had been wanting to address in the Department was search and seizure training, which was still lacking. The nature, amount and timing of training received by the Grievant is not clear: during her investigative interview, when asked whether she had received such training in her years as a police officer, she replied, “It would (sic) reasonable, I believe I have”. In her testimony, when asked whether she had received such training, she responded, “I believe so”. This lack of certainty and precision fails to establish that the Grievant knew the analysis necessary to determine whether a warrantless entry is justified.

The Employer points out that the Grievant was responsible for training probationary officers and that she redid the written field training program, which includes sections on needing exigent circumstances for: non-consensual entry in response to a 911 call; and forced entry in conducting a welfare check. However, merely including these words on a checklist does not demonstrate the kind of knowledge needed for a proper 4th Amendment analysis. Although the Grievant’s responsibilities suggested that she should have known the requisite factors, the standard required by the policies is actual knowing, which has not been proven.

The Grievant and the Chief likely were lulled into complacency regarding entering the Driver’s apartment on January 3 because of the circumstances, and the Department’s experience with this building and with the Grievant. The Department received frequent calls from this building and, because of the vulnerability of the residents, the officers had been given access to enter the building and to a master key to enter the apartments. As recently as December 2009 the Grievant had been involved in an undisputedly proper non-consensual entry using the master key into one of the apartments in response to a neighbor’s concern about the welfare of the resident, who turned out not to be present at the time. Both the Chief and the Grievant were familiar with the Driver’s history and reputation for acting erratically due to her mental illness, and were caught up in the excitement of pursuing her shortly after she committed a serious assault that endangered her son, whose distress they had witnessed. Perhaps if they had not had access to the master key and had to deliberate whether to force an entry, they would have considered the situation in a different light and made a different decision.

Good Faith and Unknowing Violation (continued)

Having entered the apartment on January 3 with the concurrence of the Chief that it was proper, it was easier for the Grievant to do it again on January 6 without considering whether circumstances had changed.

It is concluded that the Grievant did not knowingly violate the Driver's constitutional rights or knowingly conduct an improper search on January 3 and 6, 2010.

Third Violation

The third Code of Conduct policy cited as a basis for disciplinary action does not expressly require that a violation be knowing: "Officers must act within the limits of their authority as defined by law and judicial interpretation, thereby ensuring that constitutional rights of individuals and the public are protected".

The Code of Conduct also requires that all employees "maintain a working knowledge of and obey . . . laws of the state of Minnesota and the United States". The Union has not claimed that the Grievant's lack of understanding of the requirements for a warrantless entry into a residence is the fault of the City. To the contrary, it has not admitted that her actions were improper.

The City has established that the Grievant's entries into the Driver's apartment on January 3 and 6, 2010 were not within the limits of her authority and violated the Driver's constitutional rights. It is concluded that this alone is sufficient to support the City's determination of misconduct and its stated reason for disciplinary action: violating the 4th Amendment of the U.S. Constitution by entering the apartment without a warrant.

Penalty

The Policy and Procedure Manual defines "Major Violations" as including "Conduct which violates a person's civil rights", and defines "Misconduct" as "any infraction or major violation". It provides for "appropriate disciplinary action" if an investigation sustains a complaint of a violation, and that "the action shall be based on the investigative report and the accused member's record of service" and may include suspension without pay.

The Administrator testified that in arriving at the penalty of a 3-day suspension he considered: the seriousness of the violation; the Grievant's good work record; and her position as a training officer. He was concerned about protecting the rights of citizens, the standing of the Department in the community and possible liability for the illegal actions. He concluded that her good record mitigated against a more severe penalty.

The City has established that it acted in good faith after a fair investigation in fixing the penalty and the Union has not provided any compelling basis for modifying it.

Remedy

Due to a payroll error, the Grievant's pay was not reduced in April 2011 to reflect the 24-hour unpaid suspension. This error needs to be corrected, either by reducing the Grievant's accrued vacation time by 24 hours, as suggested by the City, or in whatever other manner is mutually acceptable.

SUMMARY OF CONCLUSIONS

1. The Grievant's warrantless entries into the Driver's apartment on January 3 and January 6, 2010 violated the 4th Amendment of the U.S. Constitution's guarantee against unreasonable searches and seizures.
2. The Grievant acted outside the limits of her authority as defined by law and judicial interpretation, which is a violation of Department policy.
3. The Grievant did not commit this violation knowingly.
4. The Grievant's actions constituted misconduct.
5. The Employer had just cause to discipline the Grievant with a 3-day suspension without pay for her misconduct.
6. The Grievant must reimburse the City for the 24-hours of pay she received for the days that were supposed to constitute the unpaid suspension.

AWARD

1. The grievance is denied.
2. The City shall be reimbursed for the 24-hours erroneously paid when the Grievant was supposed to be on a 24-hour unpaid suspension, either by reducing the Grievant's accumulated vacation time by that amount or by whatever other method is mutually agreeable.

February 17, 2012

Charlotte Neigh, Arbitrator