

**IN THE MATTER OF ARBITRATION BETWEEN**

**Law Enforcement Labor Services, Inc.**

**[Kevin Coffey]**

**And**

**Opinion and Award**

**BMS Case No. 13-PA-0418**

**City of Maplewood, Minnesota**

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**ARBITRATOR**

Joseph L. Daly

**APPEARANCES**

On behalf of Law Enforcement Labor Services, Inc., Local 153

Isaac Kaufman, Esq.

St. Paul, Minnesota

On behalf of City of Maplewood, Minnesota

Chuck Bethel, Esq.

Maplewood, Minnesota

**JURISDICTION**

In accordance with the labor agreement between the City of Maplewood and the Law Enforcement Labor Services, Inc., Local 153; and under the jurisdiction of the State of Minnesota Bureau of Mediation Services, the above grievance arbitration was submitted to Joseph L. Daly, Arbitrator, on May 14, May 15 and May 28, 2013, in Maplewood, Minnesota. Post-hearing briefs were filed by the parties on June 21, 2013. The decision was rendered by the arbitrator on July 11, 2013.

**ISSUES AT IMPASSE**

The union states the issues as:

1. Did the City of Maplewood violate the Collective Bargaining Agreement by terminating Kevin Coffey without just cause?
2. If so, what is the appropriate remedy?

The City of Maplewood states the issue as:

Did the employer have just cause to terminate the employee under these circumstances?

**RELEVANT CONTRACT LANGUAGE**

ARTICLE 10: DISCIPLINE

10.1 The EMPLOYER will discipline employees for just cause only. Discipline will be in one or more of the following forms.

- a) Oral reprimand;
- b) Written reprimand;
- c) Suspension;
- d) Demotion; or
- e) Discharge.

ARTICLE 11: CONSTITUTIONAL PROTECTION

Employees shall have the rights granted to all citizens by the United States and Minnesota State Constitutions.

[Joint Exhibit #1]

**RELEVANT POLICY PROVISIONS**

Citywide Work Rules Code of Conduct, Conduct as a City Employee

City of Maplewood Personnel Policy Work Rules Code of Conduct, Sexual Harassment

Maplewood Police Department Policy and Procedures Code of Conduct 101.20.001 Principal # 4 exemplary conduct (4)

Maplewood Police Department Policy and Procedures Mobile Audio/Video Recording Equipment 201.30.004, General Use 1.(a)

Maplewood Police Department Policy and Procedures Code of Conduct 101.20.001, Principal # 7 Conflict of Interest. “Intimate interactions of any kind with persons with whom the officer has had contact while on duty.”

Tape recording Policy: “In order to protect the regulation and dissemination of confidential, private, and non-public data as defined in the Minnesota Government Data Practices Act; promote harmony in the workplace; diminish the impediment of each employee’s ability to perform his or her duties; and promote an environment with a free-flow exchange of ideas; inter-staff communication shall not be taped-recorded in any form unless *all* parties to the communication consent. [emphasis in original]

### **FINDINGS OF FACT**

1. By letter dated November 6, 2012, Officer Kevin Coffey was terminated from his employment as a police officer with the city of Maplewood, Minnesota. The letter stated in applicable part “Please be advised that the City of Maplewood is hereby terminating your employment at this time for just cause for violation of city and police department policies, procedures, and codes of conduct.” [Joint exhibit #4]
2. By letter dated October 15, 2012, Officer Kevin Coffey was informed of the alleged misconduct which formed the bases of the November 6, 2012, termination. The letter in full stated:

Officer Kevin Coffey:

The investigation into your alleged misconduct has been completed. This investigation stems from a series of events following your initial contact with a citizen on August 27, 2012. In the course of the investigation, it has been determined you violated numerous City and Department policies.

During the course of this investigation, you were read the Tennessen/Garrity Advisory, which you signed after consulting with your Union Attorney. With this advisory having been read, you then falsified the response to at least one question to Lieutenant Richard Doblak and City of Maplewood Human Resources Attorney Charles Bethel in the course of their questioning.

Giving false testimony to the events related to this case, or any other testimony related to your position as a police officer, strikes at the very core of the oath an officer is expected to uphold.

The allegations that have been made in regards to this investigation have been examined and the following has been found.

**1. Violated Citywide Work Rules Code of Conduct, Conduct as a City Employee: Sustained**

You did not exhibit conduct that was ethical, professional, or of high standards becoming of a City employee. You participated in immoral, indecent, and offensive conduct towards the public while on duty. You admitted to conversing with a citizen with whom you were supposed to be conducting official city business, about going on a date to a casino and discussing with the citizen whether she would be OK if anything sexual arose out of the encounter. Additionally, your requests to meet the citizen behind a closed and dark area of Hill-Murray High School are not the types of conduct that portray a high standard of professional behavior that is expected of city employees.

The statements you made during your last contact (again while on-duty and in uniform) with the citizen, about providing alcohol and getting a vibrator for her, constitutes immoral, indecent, and offensive conduct. You conspired to commit a gross-misdemeanor by offering to provide alcohol to an underage citizen and then acted deceptively and untruthfully under Garrity by alleging you did not recall this conversation. This type of conduct violates city professional conduct rules, police department code of conduct rules, and constitutes insubordination for being untruthful.

Your indecent conduct brings negative public opinion upon the Department and the City.

**2. Violated City of Maplewood Personnel Policy regarding Work Rules Code of Conduct, Sexual Harassment: Sustained**

On two separate occasions, while on duty and in uniform, you initiated conversations with a citizen expressing your desire to get a vibrator for the citizen in question, if the two of you went to a casino. When questioned, you were evasive in your answers concerning sexual conversations that are alleged in the citizen's statement.

In the citizen's original statement, she wrote about the casinos and about your inquisition about a vibrator and going shopping with her for one. These are two points that you again spoke about on September 12 [2012] that, when questioned,

you allegedly could not re-call. The citizen has nothing to gain by coming forward with this complaint.

Based on your sexual advances and verbal communication of a sexual nature that interferes with Citizen's right to harassment free public services from the city, you engaged in sexual harassment.

It should be noted that you received in-service sexual harassment training on November 18, 2011.

**3. Violated Maplewood Police Department Policy and Procedures Code of Conduct 101.20.001, Principle #4 Exemplary Conduct (4): Sustained**

While on Duty, you committed an act which, as defined under Minnesota Law, constitutes sexual harassment, including but not limited to, making unwelcome sexual advances, requesting sexual favors, and engaging in sexually motivated verbal communication of a sexual nature.

**4. Violated Maplewood Police Department Policy and Procedures Mobile Audio/Video Recording Equipment 201.30.004, General Use 1. (a). Sustained**

On September 4, 2012, you conducted a traffic stop on the citizen's vehicle. Prior to the stop, you claim you activated the audio/video system to record the failure to use a turn signal violation as your probable cause for a traffic stop. The video clearly shows turn signal use by the citizen. You then activated your emergency lights to conduct a traffic stop of the citizen's vehicle. The video shows only a one second recording before the recording is stopped. The department squad video policy is quite specific in that all traffic stops, pursuits, or emergency vehicle operation and transport of prisoners are recorded. You made inconsistent statement about your initial recording to capture the violation and then stopping it to review it before initiating the stop. It has been demonstrated that this is not possible to do in the time allowed for in the video.

You stated you did not know how the squad video recording was turned off prior to your contact with the citizen. The only way possible was for you to manually turn off the recording via the stop record button.

**5. Violated Maplewood Police Department Policy and Procedures Code of Conduct 101-20-001, Principle #7: Conflict of Interest. "Intimate interactions of any kind with persons with whom the officer has had contact while on duty." Sustained**

This Maplewood Police Department Policy violation is sustained due to your actions of "flirting", and texting to entice the citizen to meet in an out of the way discreet location behind Hill-Murray High School. You also sent numerous

personal texts to the citizen about going to casino's and about her being too young to legally drink. You indicated how you would "think it would be awesome and would guarantee her that she would have fun". Your obvious conflict of interest is clearly evident in the connotations of your text messages to the citizen by referring to the male suspect who threw a rock at her vehicle as "Pussy Boy."

Lastly, your conversation on September 12<sup>th</sup> of shopping for a vibrator for the citizen is clearly an intimate interaction the citizen did not ask for.

Conclusion:

In addition to the allegations investigated, it appears you violated the citizen's constitutional rights by seizing her and her vehicle in the course of the traffic stop without probable cause.

Based on your action and the findings of this investigation, I am recommending to the City Manager that your employment with the Maplewood Police Department be terminated.

You will remain on administrative leave until the City Manager reviews this case.

Sincerely, David J. Thomalla, Chief of Police  
Maplewood Police Department

Cc: City Manager James Antonen  
Human Resource Attorney Charles Bethel  
L.E.L.S. Attorney Isaac Kaufman  
L.E.L.S. Local #153 Steward Officer Jay Wenzel  
[Joint Exhibit #2]

3. On August 27, 2012, a 19 year-old woman called the Maplewood Police Department because a man threw a rock at her car. At approximately 8 p.m. the Maplewood Police Department dispatched Officer Kevin Coffey to take her criminal damage to property report. The complainant had never met Officer Coffey. While Officer Coffey was taking the report, the complainant referred to the male who had thrown rock as "Pussy Boy". While Officer Coffey continued to take the complaint, Officer Coffey contends, the complainant told him that she thought he was good looking. By Officer Coffey's own testimony, "the conversation became flirtatious". [Post-hearing brief of union at 7]. "The two discussed the possibility of going on a date to a casino, and [the complainant] volunteered that she could arrange to get a free hotel room at the Grand Casino in Hinckley." [Id.] "Mr. Coffey and [the complainant] also talked about [the] possibility [of] having sex." [Id.]

“Mr. Coffey contends that [the complainant] was an active participant throughout this conversation—she never appeared uncomfortable or threatened, and she never gave Mr. Coffey any reason to think she did not like the attention he was giving her.” [Id.] “[The complainant] expressed an interest in meeting with Mr. Coffey later that night.” [Id.] “Mr. Coffey cleared the call at about 9:15 p.m.” [Id.]

4. The City of Maplewood and the complainant contend that Mr. Coffey “began talking to complainant about matters of a personal sexual nature. [Mr. Coffey] told complainant that with her body and attitude she should become a stripper and he would like the first dance. Complainant had no interest in [Mr. Coffey] and his advances had upset her and made her feel uncomfortable.” [Post-hearing brief of City of Maplewood at 1].

5. Later that same evening of August 27, 2012, Mr. Coffey began calling and texting complainant saying that she should meet him after he/she was done working. Mr. Coffey suggested that the complainant meet him behind Hill-Murray High School, which is a dark and secluded location.

The complainant testified that she thought that she and Mr. Coffey were going to talk about her case. However the complainant testified that Mr. Coffey started talking about going to casinos and again asked pointed and sexually charged questions. The complainant testified at the arbitration hearing:

He started asking me questions that I didn't know—I didn't feel comfortable answering so I lied. He asked me what my favorite sexual position was. I said I didn't know. He asked me if there was anything sexually I wouldn't do or hadn't done. I said I didn't know. He asked me if I enjoyed giving or receiving oral sex. I said no. He asked me if I had ever had anal sex, and if I would be open to it, and I said no. He asked me if I came easily. I said I didn't know. He asked me if I had a vibrator. I said no. And he said that we would have to go shopping for that, but I would have to let him see me use it. He said – well, after that I started gearing towards trying to leave because it was awkward and uncomfortable and scary. [Transcript at 31-32]

Mr. Coffey admits that he met with the complainant behind Hill-Murray High School. He admits that if the complainant had suggested an alternative location he would have gone to that alternative location. Mr. Coffey testified that he had gone to Hill-Murray on numerous other

occasions while on duty to catch up on reports and to socialize with other officers. Mr. Coffey contends that in selecting this location, “[it] was not [his] intent to keep his meeting with [the complainant] secret or to avoid being noticed, nor was it his intent to have sex with her that night.” [Post-hearing brief of union at 8].

The August 27 conversation behind Hill-Murray lasted about 30 minutes. According to the Union Post-Hearing Brief, “Mr. Coffey and [the complainant] talked about the property damage complaint, and also continued to discuss the possibility of going on a date at a casino. Again, [the complainant] was an active participant and appeared neither uncomfortable nor threatened.” [Id.] “Mr. Coffey had no physical contact whatsoever with [the complainant]. At the end of the conversation the two agreed to stay in touch.” [Id.]

The complainant testified, “After that I started gearing towards trying to leave because it was awkward and uncomfortable and scary. And I was in my car going to leave and he came up to my window and tickled my knee and told me that he was excited and intrigued. And then I went home that night.” [Transcript at 32.]

The complainant testified at the arbitration hearing she felt “[s]urreal. It was just uncomfortable, and I didn’t know—I didn’t know how to feel. I didn’t, you know, how to react.” [Transcript at 32.]

6. The next day, the complainant told two of her friends. She testified

Well, the next day I had messaged him and told him that I was uncomfortable with everything and I didn’t want anything to do with it, and not – I was terrified to send that message because he was an officer, and could have gotten mad. I told him he was attractive because I didn’t want him to be mad, but I was too young and I didn’t want anything to do with it. And he messaged me back, “just one time, we will go to the casino.” I didn’t reply. He messaged me again saying he had talked to the person who threw the rock at my car and that I owed him. I didn’t reply. He messaged me again saying that I owed him because he talked to that person for over 10 minutes, and I didn’t reply. He messaged me the next day, on Wednesday, asking if we were ever going to meet so he could tell me about what happened with the case, and I didn’t reply. Two days later, on Friday, he messaged me again asking if we were ever going to meet so he could tell me about it, and I didn’t reply. [Transcript at 33-34]

7. On Monday September 3, 2012, the complainant was working at Party Time Liquor Store in Maplewood. She left work at approximately 10 p.m. Mr. Coffey was working his regular patrol

shift that evening. At approximately 10 p.m. he was in his squad car. Mr. Coffey testified that he saw a non-descript looking car pull out of the Party Liquor Store on to the Van Dyke Street Exit. Officer Coffey testified he could not identify the driver of the vehicle, but that he did observe that the vehicle had pulled on to Van Dyke Street without its turn signal. Because of where he was located and the time of night, he decided to pursue the vehicle and make a stop for failure to use a turn signal when turning from a parking lot onto a roadway. There was testimony during the arbitration hearing whether pulling from a private parking lot onto a roadway without use of a turn signal is a violation of the law in Minnesota. Several officers testified it was and several officers testified it was not. Mr. Coffey testified that he has stopped other motorists and had written citations for just this type of violation.

Mr. Coffey followed the vehicle south on Van Dyke Street and then west on Larpenteur Avenue. Before reaching the intersection of Larpenteur Avenue and White Bear Avenue, Mr. Coffey pressed the record button on his squad camera. By pressing record, he was creating a video. After turning south on White Bear Avenue, Mr. Coffey activated his emergency lights to initiate the traffic stop, which automatically reactivated the squad camera. There was discussion during the arbitration hearing as to how much time elapsed between the end of the first video and the beginning of the second video. Nevertheless, the second video lasted only one or two seconds after he made the stop. Officer Coffey testified he did not deliberately turn off the recording, and is unsure how it was turned off. [Post-hearing brief of union at 13].

The complainant testified that at the time of the stop on September 3, 2012, she was talking to her father on the phone. She testified that she knew it was Officer Coffey and she “was terrified when he pulled her over.” [Post-hearing brief of the City of Maplewood at 2.] She further testified that her father told her to leave the phone on. Her father testified at the arbitration hearing that he was also “terrified”. He asked her to remain on the line. She put the phone under leg so that Mr. Coffey could not see the phone.

Mr. Coffey testified he approached her car and told her not to look so scared, he didn’t care about the blinker. [Id. at 2]. She testified she told Mr. Coffey at that time she did not want him to text her.

Mr. Coffey did not notify dispatch of this traffic stop. The Maplewood Police Department does not have a policy requiring patrol officers to notify dispatch of all stops. Testimony was that conducting stops without contacting Dispatch is a fairly common practice

around the department. Mr. Coffey did include this stop on his daily log for his September 3, 2012 shift, noting the location of the violation and the license of the complainant's vehicle. No citation was issued.

For nine days between September 3 and September 12, 2012, Mr. Coffey had no contact with the complainant and made no attempt to contact her. During that time, Mr. Coffey testified he had no intent to see the complainant again.

8. On September 5, 2012, complainant came to the Police Station with her father and made a complaint to the Maplewood Chief of Police. The chief assigned the complaint to his lieutenant in charge of patrol, Lieutenant Richard Doblak, and ordered him to follow up on the complaint. During this meeting of September 5, 2012, Lieutenant Doblak took photographs of four text messages that Mr. Coffey had sent the complainant between August 28<sup>th</sup> and September 3, 2012. She had erased the other text messages.

After taking complainant's statement, Lieutenant Doblak notified the chief about the serious nature of the complaint and suggested using a recording device to determine whether there was merit to the complaint. "Because there were no other witnesses to the alleged sexual harassment, Lieutenant Doblak believed that he should attempt to gather additional evidence to support one or the other's account of what happened." [Post-hearing brief of the City of Maplewood at 3]. The chief agreed with Lieutenant Doblak. The complainant agreed to wear a recording device and allow Lieutenant Doblak to listen to her conversation with Mr. Coffey.

9. On September 12, 2012, at the request of Lieutenant Doblak, complainant sent Mr. Coffey a text asking if she could get a copy of the police report from her criminal damage to property complaint. Mr. Coffey asked her if she wanted to meet him and he would give her a copy. With the assistance of Sergeant Michael Nye and Sergeant Michael Dugas, Lieutenant Doblak placed a GPS device and an audio/video recorder in Mr. Coffey's squad car. Mr. Coffey's supervisor was not informed of this being done.

Mr. Coffey was "very surprised" [Testimony of Mr. Coffey Transcript at 579-580] to be contacted by the complainant. Mr. Coffey and the complainant agreed by text to meet at the same place they had met the last time, i.e., behind Hill-Murray School. The complainant had suggested that location. Mr. Coffey arrived at Hill-Murray about 9:40 p.m. on the evening of

September 12, 2012. The complainant arrived a short time later. The meeting lasted about 25 minutes. It had been the intent of Lieutenant Doblar to tape record the meeting through the Orion LETS Audio surveillance system. However, because of a mistake setting up the system, no tape recording was rendered, but the conversation could be overheard by the listening parties. Lieutenant Doblar, Sergeant Dugas and Sergeant Nye monitored the conversation between Mr. Coffey and the complainant from a nearby, remote location. “The two met behind Hill-Murray again, where [Mr. Coffey] began talking about going to the casinos, buying complainant a vibrator, and providing her alcohol. [Mr. Coffey] warned complainant that they would have to be careful, as he was a police officer and he could get into trouble since she was a minor. Lieutenant Doblar, Sergeant Michael Dugas and Sergeant Michael Nye were all listening to this conversation through the city cell phone the complainant was carrying. The complainant and all three of these officers said both in the written statements and testified under oath that they heard [Mr. Coffey] make these statements.” [Post-hearing brief of City of Maplewood at 3].

*Testimony of Complainant:* “He said he would buy me beer to go there but we would have to be careful because if anybody saw him with me, it could be trouble because he was a cop. He brought up buying a vibrator again, and I said no. He asked why, and I said I didn’t know.” [Transcript at 62].

*Testimony of Lieutenant Doblar:* “Then I heard Mr. Coffey offer up that we need to go the casino and get a room together, and while we are there, that we would get alcohol, we would drink while we are there, and then while we are there I would help you buy a vibrator.” [Transcript at 107-108].

*Testimony of Sergeant Dugas:* “At the beginning of the conversation Officer Coffey was advising the complainant that she, quote, owed him for helping her out, and stuff like that. Then there was a significant amount of small talk with Officer Coffey continuing the conversation. About 40 minutes into the conversation, he began casino trips and winning \$4,000 and recommended that they should go to the casino together and that he would provide her money and alcohol and stuff like that. And that if she was to be caught drinking under age, that they would have to say that he didn’t know because he was a police officer and he could get into a lot of trouble.” [Transcript at 264].

*Testimony of Sergeant Nye:*

After a few minutes he became more verbally relaxed. He began to tell her – started talking about gambling. He liked to talk about the casinos he liked to go to, big wins that he had made, games he liked to play, and the success that he had had previously with gambling at the casino. He stated that he would be willing to take her to the casino, he would give her money, he would teach her how to play. He also stated at that point that he would be willing to provide her with alcohol, but they had to be careful because she was only 19 at the time. They continued on talking a while further just casually about gambling and things of that nature. At that point Officer Coffey began to steer the conversation towards more that of sexual nature. At one point he offered that he would still be willing to buy her a vibrator to use.... After he had made the statement about still being able to purchase her a vibrator, you know, he had stated to her that, you know, she knew how he felt about him [sic]...or she knew how he felt about her, and that he didn't have to be afraid of her. She didn't have to be afraid of him, yes. And I remember that really stuck out in my mind, as a quote, like I said, when I heard that, it was like an alarm bell going off in my head when he specifically told her that, you know, as a reassurance of you don't have to be afraid of me. Because its language that I have heard before. As a police officer, like I said, for almost nine years coming here, I have had that come up in previous investigations that we have dealt with harassment and stalking in terms of where the suspect has attempted to overcome the victim's resistance and placate her into cooperating with his activity. They have used that exact language as a key word of "you don't have to be afraid of me." You know, like I said, so when I heard that, I mean, it was like an instant alarm bell. It wasn't, you know, a casual conversation, it was a predatory statement.... When I heard that, like I said, it was an immediate alarm in my mind. It scared me. Like I said, that—police officers make mistakes. We have to, a lot of times, make split-second decisions, decisions that people can come back after the fact and Monday morning quarterback and say that we did things wrong, and like I said, everybody makes mistakes. This wasn't a mistake. This wasn't an error in judgment. This was calculated, this was ongoing, and this was predatory. Like I said, this wasn't a lapse in judgment. He wasn't bashfully trying to get a date with [the complainant]. He was harassing her, he was stalking her.... This was a person that we had entrusted, as a police officer, to protect the citizenry and this was absolutely flying in the face of what we would expect these officers to do, and it scared me. It scared me that we had this person out there acting in this behavior on our behalf. It would scare me—if he had done these things as just an average citizen, I would be scared for [the complainant], but the fact that he was put in the position of police officer and that he was out there doing these things, it scared me.... Demoralizing, detrimental, dangerous. We as a department, expect the best and the most professional behavior out of our officers. This flies in the face of everything that we expect. You know, the citizens, you know, demand better of our police department. The citizens deserve better than the services that Officer Coffey was providing.... This showed someone that is dangerous, that has gone out of their way to show that they are stalking these people. This isn't a bashful date. This was dangerous, this was predatory behavior and like I said, it's unconscionable. It is unconscionable that

we put this person back in a position of authority over our citizens, over ourselves, over our children. It cannot be allowed. [Transcript at 673-678].

9. The basic contentions of the City of Maplewood are:
  - a) The standard of proof is by a preponderance of evidence. This standard should be used because it involves a police officer who has engaged in sexual harassment of a citizen in violation of public policy. This is not a private employee working for a private organization. It places citizens and officers who are trying to do their job at a higher risk. But even if the higher standard of clear and convincing evidence is used, the evidence amounts to a clear and convincing quantum of proof in this case.
  - b) The employer has shown just cause to terminate Mr. Coffey's employment. Mr. Coffey's version of the events is not credible. The complainant had no reason to lie. She is a young woman who did not commit any crime, who had nothing to gain by making this complaint, who was reluctant to make the complaint, but did so even though it was so embarrassing for her that she could not have her parents in the room when Lieutenant Doblak interviewed her on September 5, 2012. On the other hand, Mr. Coffey has a clear motivation to lie-he wants his job back.
  - c) Mr. Coffey has never actually denied making the outrageous sexual comments attributed to him. All he said in his testimony is he "could not remember", "could not recall", "don't remember saying these things."
  - d) The first incident of sexual harassment took place during the report on August 27, 2012. While Mr. Coffey admits he was "flirting" with the complainant while taking the report, he does admit that flirting is inappropriate. He "could not remember" saying complainant could become a stripper.
  - e) The second incident of sexual harassment on August 27 behind Hill-Murray High School took place when Mr. Coffey asked the complainant a series of explicit sexual questions. He asked her favorite sexual position; he asked her if there was anything sexually she would not do or had not done; he asked her if she enjoyed giving or receiving oral sex; he asked her if she ever had anal sex and if she would be open to it; he asked her if she came easily; he asked her if she had a vibrator; he told her he would go shopping for one if she would let him see her use it. On cross-examination in response to questions whether he made such comments Mr. Coffey answered "well, I don't remember".

- f) Mr. Coffey sent a series of text messages including “I’ll let u know what happens with Pussy Boy & maybe meet u later tonight to tell ya.” “U owe me now! I just talked to him for 10 plus min”
- g) Officer Coffey made a traffic stop without probable cause.
- h) The third incident of sexual harassment took place behind Hill-Murray High School on September 12, 2012. Lieutenant Doblak, Sergeant Dugas, and Sergeant Nye all testified they heard him make various comments about either vibrator, or “sex toy”, “alcohol”. The complainant and three police officers testified they heard Mr. Coffey offer to provide alcohol to the complainant and offer to buy her a vibrator. All that Officer Coffey testified to is that he “could not remember.”
- i) Mr. Coffey lied under *Garrity* when he was interviewed related to this situation.
- j) The employer terminated Mr. Coffey for just cause. Mr. Coffey violated City Personnel Policy §2 b and d requiring the rendering of prompt and courteous service to the public at all times and police officers need to conduct themselves with decorum toward both residents and staff and respond to inquiries and information requests with patience and every possible courtesy. Mr. Coffey also violated City Work Rules i.e. major offenses in that his dealings with the complainant were immoral and indecent conduct while on duty; his communications with complainant were abusive and were done while on duty; he indulged in offensive conduct and used offensive language toward the public; his off-duty conduct is potentially damaging to the reputation of the city; and he has brought negative public opinion upon the city by his conduct. He has also violated the Minnesota Human Rights Act and the City Policy on Sexual Harassment by his communications to the complainant, by his verbal and written communication sexually harassing the complainant during her attempt to receive public services and he created an offensive environment in which she received those public services. Further, Mr. Coffey violated the 4<sup>th</sup> Amendment by detaining her in a traffic stop for personal reasons without a reasonable suspicion that she was conducting some criminal activity. And finally, he violated the Maplewood Police Codes of Conduct by his illegal traffic stop, the sexual harassment of her, turning off the squad video and audio recording equipment.

- k) While Mr. Coffey had a “relatively unblemished record” [Post-hearing brief of City of Maplewood at 17] and good performance evaluations, “some acts are so egregious that termination can be proper even in a situation in which there has been no prior discipline.” Police Chief Thomalla and Deputy Chief Kvam both testified to the detrimental effect Mr. Coffey’s reinstatement would have on the department and the community. Chief Thomalla testified that Mr. Coffey’s misconduct impairs the confidence and trust that citizens have in the Maplewood Police Department. The retention of officers who engage in this conduct could result in the reluctance to report crimes and to pull over for police officers.
- l) With respect to the anti-taping policy that the City has, the policy prohibits the taping of inter-staff communications, not communications between staff and a member of the public. In this case, the complainant is not a member of the city staff. The anti-taping policy “was never intended to protect an officer engaged in sexual harassment of a citizen from investigation. The complainant is not and was not an employee or an informant for the city and the policy does not apply to her.” [Post-hearing brief of City of Maplewood at 20].
- m) Attempts to discredit Lieutenant Doblar for his “alleged bias” toward Mr. Coffey and for his decision to use the recording device cannot exonerate Mr. Coffey. Lieutenant Doblar did not treat Mr. Coffey differently than he would any other officer in such a situation. The Chief approved the use of the device. Neither Lieutenant Doblar nor the Chief harbored any animosity towards Mr. Coffey. Lieutenant Doblar’s comments about Mr. Coffey being a “cancer on the department” were made after Mr. Coffey’s actions had been uncovered and after the city had terminated his employment. While Lieutenant Doblar may have formed a strong negative opinion of Mr. Coffey as a result of his investigation, this is not evidence of bias.
- n) As noted in the City of Brooklyn Center v. LELS, 635 N.W.2d 236 (Minn Ct App 2001) rev. denied Dec 11, 2001, the city has an affirmative duty to protect its citizens from future acts of sexual harassment. The city may well become liable to a victim in the future if it fails to take appropriate action with regard to complaints of sexual harassment. Lieutenant Doblar had a duty to conduct a thorough investigation to protect the city for liability if the officer sexually harassed other women in the

future. Even if Lieutenant Doblak disliked Mr. Coffey or had a bias against, that does not invalidate the thorough investigation. Lieutenant Doblak consulted with the police chief about his investigation methods and his testimony about what Mr. Coffey said is corroborated by the complainant and by two sergeants.

- o) Any officer who flaunts society's legal norms of conduct by engaging in serious illegal behavior can no longer effectively perform safety sensitive task. A discharge is proper. Mr. Coffey's behavior flaunted these norms. The department cannot expect officers to strive each day to exemplify lawful conduct if one of its members has engaged in such activity. While a number of officers have testified that Mr. Coffey has been a good police officer who they would be more than willing to continue working with, several other officers testified they did not want to work with Mr. Coffey, again based on the actions and based on what he was fired for. One of these officers testified "we are police officers, we wear a Maplewood Police uniform, based on his actions what he did, we don't want to be associated with him as law enforcement officers." [Testimony of an 11 year veteran of the Maplewood Police Department].

10. The basic contentions of the Law Enforcement Labor Services and Mr. Coffey are:

- a) Mr. Coffey's termination is not supported by just cause. Why?
- b) The investigation was not fair or objective. Lieutenant Doblak's investigation was biased. Evidence shows an animus towards Mr. Coffey. Lieutenant Doblak made statements such as "the majority of the department doesn't want to work with you", "cancer on the department", "needs to be gotten rid of". This animus was a matter of general knowledge around the department. At least three other officers testified they were concerned about Lieutenant Doblak's attitude towards Mr. Coffey and that they warned Mr. Coffey that Lieutenant Doblak was targeting him.

Further, the complainant was acting as an agent of the city by covertly participating in an investigation. By being an agent of the city, the City was violating the anti-taping policy. This had never been done before in an internal affairs investigation. Mr. Coffey's termination was unfair and deeply corrupted by Lieutenant Doblak's personal animus toward Mr. Coffey. The investigation violated Mr. Coffey's due process

rights. The fact that they had a poor working relationship and that Lieutenant Doblar was assigned to be the investigator in this matter sets a very troubling precedent.

- c) The City has not proven all the charges against Mr. Coffey. Mr. Coffey is accused of committing sexual harassment against a citizen while on duty, as well as being untruthful during his formal statement regarding his conduct. These are highly stigmatizing allegations, particularly for a law enforcement officer. As a consequence, the employer must be held to a clear and convincing evidence standard rather than a preponderance of evidence standard applicable to ordinary discipline cases. This is simply a he said/she said situation. The city contends that by selecting Hill-Murray as a location for the meeting with the complainant it was Mr. Coffey's intent to get her alone in a dark secluded area. But this is misleading. This was a common place for Mr. Coffey and other officers to go during down time on their shifts. The complainant never objected to meeting Mr. Coffey at the back of Hill-Murray, nor did she propose any other location.

Regarding Mr. Coffey's conduct during his meeting with the complainant on September 12, 2012, the City's evidence is highly questionable. The City's explanation for the lack of a recording, i.e. that Sergeant Nye neglected to check off a box on the Orion LETS software. Maplewood Police Department have previously used the same software practically 30 times in criminal investigations and acknowledged the critical importance of recording for evidentiary purposes.

- d) The September 3, 2012, traffic stop was not a fabricated traffic stop being used as a pretext to make contact with the complainant. The evidence shows that the City misidentified Mr. Coffey's squad car location prior to the traffic stop relative to the exit of Party Time Liquor. The City also misconstrued Mr. Coffey's stated purpose for being parked at that location. His purpose for being there was not to catch speeders; rather, he was monitoring foot and vehicle traffic in the area because of the issue of break-ins and vandalism at several nearby businesses. He was also monitoring traffic in and out of the car wash with the intent of pulling over drivers for moving violations that might lead to uncovering more serious violations. The exit from the Party Time Liquor parking lot onto Larpenteur Avenue, was the usual exit the complainant would reasonably be expected to use if she was driving home to St. Paul after work. Officer Coffey would not have been parked where he was if he actually was trying to stop the complainant. Mr.

Coffey's reason for the traffic stop i.e. failure to use a turn signal, was not fabricated. Other officers testified had made such stops before and had never been instructed that is not illegal not to use a turn signal coming out of a private lot. Mr. Coffey did not deliberately turn off his squad camera after executing the traffic stop in order to prevent the department from finding out about the stop. Although he does not recall how the camera was shut off, he has provided a plausible alternative explanation: that he hit the stop button to end the playback on the first video and accidentally ended the recording on the second video. Further, Mr. Coffey's decision not to notify dispatch of the traffic stop does not violate any policy. Several officers testified at the hearing that they sometimes or often conduct traffic stops without notifying dispatch. Lieutenant Doblak concedes this is a fairly common practice. Mr. Coffey indeed included this traffic stop on his daily log with both location of the violation and the license plate number on the complainant vehicle. This is inconsistent with trying to cover up the stop or to avoid detection of any improper conduct. Where the stop took place is also inconsistent with a cover up of the stop. It took place on White Bear Avenue a few blocks south of Larpenteur Avenue, in St. Paul, a place where regular police traffic from several departments patrol. There is also the Super America nearby where officers, including supervisors, often congregate.

The City has not offered clear and convincing evidence that Mr. Coffey was deliberately untruthful during his formal statement. Many witnesses testified on Mr. Coffey's behalf during the arbitration hearing. Officers from inside and outside the Maplewood Police Department testified as to his abilities and his honesty. His direct supervisor, Sergeant Thienes, testified that he had never caught Officer Coffey in a lie in all the years he's been his supervisor. When it came to police work, he had never been untruthful.

- e) The City has not applied its policy and penalties even handedly. Another officer on the Maplewood Police Department in 2007 was convicted by a jury of two criminal charges resulting from an on-duty incident with an individual in custody, including misconduct of a public official and 5<sup>th</sup> degree assault. While the chief determined to terminate that officer, the city manager overruled the chief and returned that officer to his job. There was news coverage about the incident. By contrast, Mr. Coffey has not been charged criminally nor has there been any media coverage of the proceedings against him.

- f) Termination is not the appropriate level of discipline. In this case, Mr. Coffey has a ten year employment history without any prior discipline, has experience training other officers as a use of force/firearms instructor, has numerous positive evaluations, and has the testimony of numerous officers, including his supervisor, who praise his character and service to the department. Further, in the city of *Hastings and Law Enforcement Labor Services, Inc.*, BMS case number 12-PA-002, Arbitrator Frank Kapsch dealt with a case involving allegations similar to the present case. He found that the grievant officer had sent multiple text messages to a female acquaintance while on duty and offered the female federally regulated prescription drugs and failed to report the female's suspected marijuana use to Child Protection. Arbitrator Kapsch held that these violations did not merit discharge; nevertheless, Arbitrator Kapsch denied the grievance and sustained the termination. The "trump card" in Arbitrator Kapsch's opinion was a 2010 incident in which the grievant had fled from the scene of an accident and filed a false report, and for which the grievant had received a 15-day unpaid suspension and entered into a "last chance" agreement. In Mr. Coffey's case, there is no "trump card" – no prior discipline, no evidence of history of bad judgment or bad decision making.
- g) Returning Mr. Coffey to his job will not automatically cause finding of untruthfulness under the Grady/Giglio rule. See *Grady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) where a criminal prosecutor must disclose exculpatory evidence to the defendant including evidence bearing on the credibility of prosecution witnesses. Mr. Coffey was not untruthful during his interview with Lieutenant Doblar. Further, the impact of Brady/Giglio on employment matters has not yet been taken up by the Minnesota Supreme Court.

### **DECISION AND RATIONALE**

*What are the facts which the complainant and Mr. Coffey agree?*

Both agree that Officer Coffey took her report on August 27, 2012, at approximately 8 p.m. Both agree they discussed a casino. Both agree that there was some discussion about sex while she was giving her report.

Later that same evening of August 27, 2012, both agree that Mr. Coffey texted the complainant and asked if “u still wanna meet up for a bit right?” The complainant responded “sure”.

Both agree that that same evening, Mr. Coffey called the complainant to ask her to meet him in the area behind Hill-Murray High School. Besides talking about the property damage complaint, both agree that Mr. Coffey started talking about going on a date to a casino.

Both agree that on August 28, 2012, the complainant sent a text message that morning saying that she was too young, that she was uncomfortable, and she did not want anything to do with him. Mr. Coffey texted her back asking why the complainant had changed her mind and saying that he would respect her decision.

Both agree that Mr. Coffey acknowledged in another text that if the complainant came to a casino with him, she would not be allowed to drink alcohol.

Later that day, both agree that Mr. Coffey texted the complainant that he had gone to talk to the mother of the suspect in the property damage case. Both agree that he referred to the suspect as “Pussy” and “Pussy Boy”. Further both agree that after meeting the suspect’s mother, Mr. Coffey testified the complainant “u’ll owe me!” and “u owe me now!”

Both agree that on August 29, Mr. Coffey sent the complainant a text stating “we’ll have to meet up sometime i can tell u what he said about u & about what happened.”

Both agree that he had no other contact with the complainant between August 29 and September 2, 2012.

Both Mr. Coffey and the complainant agree that on September 3, 2012, Officer Coffey stopped her at approximately 10 p.m. with his squad car. Both agree that Mr. Coffey advised her that she had failed to use her turn signal when leaving the Party Time Liquor parking lot and both agree he gave her a warning instead of a citation. Both agree he updated the complainant on his contact with the suspect in the property damage case.

Finally, both Mr. Coffey and the complainant agree that on the night of September 12, 2012, the complainant sent Mr. Coffey a text requesting a copy of the report from the property damage incident. Both agree that after a brief exchange of texts, Mr. Coffey agreed to meet with the complainant behind the Hill-Murray School at about 9:40 p.m.

*But it is what Mr. Coffey and the complainant, Lieutenant Doblak, Sergeant Dugas, and Sergeant Nye do not agree upon which determines this case.*

The complainant, a 19-year-old woman, had never met Mr. Coffey when he showed up on August 27, 2012, to take her complaint about a man who threw a rock at her car. She testified that he began talking to her about matters of a personal, sexual nature. She testified he told her that with her body and attitude she should become a stripper and he would like the first dance. She testified that his advances upset her and made her feel uncomfortable. Later that same evening, the complainant testified that Mr. Coffey began calling and texting her saying that she should meet him after she was done working. She testified that Mr. Coffey suggested that she meet him behind the Hill-Murray School late that same night. She testified that she thought he was going to talk about her case. But, instead Mr. Coffey started talking about going to casinos and then began asking her pointed and sexually charged questions. She testified:

He started asking me questions that I didn't know—I didn't feel comfortable answering so I lied. He asked me what my favorite sexual position was. I said I didn't know. He asked me if there was anything sexually I wouldn't do or hadn't done. I said I didn't know. He asked me if I enjoyed giving or receiving oral sex. I said no. He asked me if I had ever had anal sex, and if I would be open to it, and I said no. He asked me if I came easily. I said I didn't know. He asked me if I had a vibrator. I said no. And he said that we would have to go shopping for that, but I would have to let him see me use it. He said – well, after that I started gearing towards trying to leave because it was awkward and uncomfortable and scary. [Transcript at 31-32].

Mr. Coffey testified:

Q. Did you talk more about the possibility of going out on a date?

A. Yes. We talked about—we talked, you know, about the case, different aspects about that, and then, you know, more about the casino and possibly going to one.

Regarding other questions, Mr. Coffey testified:

Q. In her complaint she alleges that at this time you asked her what her favorite sexual position was. Is that true? Did you say anything like that?

A. I do not recall saying that to her at all.

Q. She alleges you asking her if she liked anal sex or was open to it. Did you say that?

A. No, I do not remember saying that to her at all, talking like anything like that.

Q. She alleges that you asked her if she like giving or receiving oral sex. Is that true?

A. No, I don't remember saying that to her at all.

Q. She alleges that you asked her if cums easily. Is that true?

A. No, like I said I don't remember saying anything like that to her.

Q. She alleges that you asked if she had a vibrator and that you hoped to buy her one. Is that accurate?

A. No, like I said, I don't remember saying or talking anything like that with her.

On September 12, 2012, at approximately 9:40 p.m., at the request of Lieutenant Doblak, the complainant [wired for sound] met with Mr. Coffey for purposes of obtaining a copy of the police report from her criminal damage to property complaint. At the request of Lieutenant Doblak she had sent a text earlier asking for such a copy. The two again met behind Hill-Murray. The complainant, Lieutenant Doblak, Sergeant Dugas, and Sergeant Nye all testified that they specifically heard discussions about casinos, buying a vibrator [sex toy], and providing her alcohol. While this was not recorded because of a mistake in the set up procedure of the Orion LETS system, each of the above witnesses heard variations of the discussions related to casinos, vibrators, and alcohol. Mr. Coffey testified in essence, he "did not remember", "did not recall" such discussions.

Mr. Coffey and the union contend that because of Lieutenant Doblak's bias the investigation was not done in a fair or objective manner. As a result just cause cannot be found. Further, they contend that because the complainant was wired [this had never been done before in an internal affairs investigation], in violation of the Anti-taping Policy, the complainant should be considered an agent of the city and the city should not be permitted to use any evidence obtained as a result of the violation of its own policy. The union and Mr. Coffey also contend that the stop on September 3, 2012, was a valid, reasonable suspicion stop because the complainant did not have her traffic signal on. They contend that because another officer had been returned to his job even though he had been convicted of misconduct of a public official and 5<sup>th</sup> degree assault, the termination of Mr. Coffey was not proper because the policies and penalties were not administered in an even-handed manner. Finally, Mr. Coffey and the union contend that because of his good work record over the last ten years and good performance evaluations and his high regard among some of his fellow officers, termination is not the appropriate level of discipline. If there is to be any discipline for his admitted unprofessional conduct, it should be reduced to a more appropriate level of discipline.

First, in regards to Lieutenant Doblar's investigation, whether or not he was biased against Officer Coffey, the facts indicate that the investigation in this matter was done in a fair and proper manner. His negative comments about Mr. Coffey came after the investigation was completed. There is no evidence to indicate that the investigation was conducted in an unfair or biased manner.

Second, there are times when progressive discipline may move to immediate termination when the behavior is egregious. If egregious behavior is proven, then termination is justified without following the usual steps of progressive discipline.

Third, typically the standard of proof in discipline cases, including termination cases, is preponderance of evidence. But in this case because it involves the termination of a ten-year police officer who has a good disciplinary history, good performance evaluations, and the respect of a number of fellow police officers in the department and outside the Maplewood Police Department, this arbitrator is applying the higher "clear and convincing standard of proof." Because of his history and because a termination in this matter has such major consequences to Mr. Coffey, I am applying the "clear and convincing standard for proof" of just cause.

Some of the evidence comes down to "he said/she said". But the preponderance of evidence for the evening of the September 12, 2012, is not "he said/she said". The complainant, Lieutenant Doblar, Sergeant Dugas, and Sergeant Nye all heard the entire or parts of the conversation through the city cell phone the complainant was carrying. The complainant and each of the three police officers said, in their written statements and in their testimony under oath at the arbitration hearing, that they heard the grievant make statements related to a vibrator, alcohol, and sex.

These discussions are utterly improper. Even if the initial meeting of August 27, 2012, was simply "flirtatious", as Mr. Coffey describes, by September 12, 2012, Mr. Coffey knew or should have known that any further sexual advances were unwelcomed. He had already received a text message after the initial meeting. The complainant's testimony was:

Well, the next day I had messaged him and told him that I was uncomfortable with everything and I didn't want anything to do with it, and not – I was terrified to send that message because he was an officer, and could have gotten mad. I told him he was attractive because I didn't want him to be mad, but I was too young and I didn't want anything to do with it. And he messaged me back, "just one time, we will go to the casino." I didn't reply. He messaged me again saying he had talked to the person who threw the rock at my car and that I owed him. I

didn't reply. He messaged me again saying that I owed him because he talked to that person for over 10 minutes, and I didn't reply. He messaged me the next day, on Wednesday, asking if we were ever going to meet so he could tell me about what happened with the case, and I didn't reply. Two days later, on Friday, he messaged me again asking if we were ever going to meet so he could tell me about it, and I didn't reply. And then the following Monday, when I was leaving Party Time at 10:00, that's when he pulled me over. [Transcript at 33-34].

Mr. Coffey, a ten-year police officer, knew or should have known by September 12, 2012, that any sexual advances, requests for sexual favors, sexually motivated physical contact, or other verbal or physical contact or communication of a sexual nature was unwelcomed. This is the definition of sexual harassment under the Minnesota Human Rights Act, Minn. Stat §363A.03, subd. 43.

The September 12 meeting is not "he said/she said". It is "he said/they said"; and, Mr. Coffey, rather than absolutely denying that he spoke about sex, vibrator, and alcohol on September 12, 2012, testified "I do not recall", "I do not remember". The sworn testimonies of the complainant, of Lieutenant Doblar, of Sergeant Dugas, and of Sergeant Nye are credible. The complainant is not an employee of the City of Maplewood nor an agent of the city, so the Policy on the prohibition of secretly taping fellow employees was not violated. Even if the City of Maplewood Anti-Taping Policy was violated, this is not a criminal case where the Exclusionary Rule might be applied. This is a civil matter under the Collective Bargaining Agreement in which the City of Maplewood carries the burden of proof to show by clear and convincing evidence that it has just cause to terminate Mr. Coffey. The testimony of each of the Officers is relevant and material. However, if only the complainant's testimony is taken into account, the case of just cause by clear and convincing evidence is still proven. The conversation between complainant and Mr. Coffey on September 12, 2012 proves sexual harassment; violation of City Personnel Policy §2, City Work Rule offenses, i.e. major offenses in communications with the complainant were abusive and done on duty; indulging in offensive conduct; conduct very damaging to the City, which brings negative public opinion upon the City by one's conduct. Mr. Coffey violated the Minnesota Human Rights Act and the City Policy on Sexual Harassment in his September 12, 2012, meeting with the complainant. Just cause by clear and convincing evidence has been proven. On September 12, 2012 Mr. Coffey violated the law, policy and procedures and the City of Maplewood has been shown by clear and convincing evidence just

cause to uphold his termination. The proof is bolstered by the fact that Lieutenant Doblak, Sergeant Dugas and Sergeant Nye heard him discuss “vibrator”, “alcohol”, “sex” and “casino”.

It is not necessary to analyze the facts of August 27, 2012, the stop on September 3, 2012, or all of the text messages. To be sure, in some of those cases, it is “he said/she said”. Even it was necessary to analyze those specifics, this arbitrator believes that the complainant is credible.

Based on the above reasoning, it is held that City of Maplewood by clear and convincing evidence has shown just cause for the termination of Mr. Coffey. The Grievance is denied. The termination of Mr. Coffey by the City of Maplewood is upheld.

July 12, 2013

Date

Joseph L. Daly, Arbitrator