

IN THE MATTER OF ARBITRATION BETWEEN

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Law Enforcement Labor Services, Inc., Local No. 44,  
Union,

and

City of Crystal, Minnesota,  
Employer or City.

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OPINION AND AWARD

Grievance of Officer AW  
BMS Case No. 12-PA-1239

ARBITRATOR:

Gerald E. Wallin, Esq.

DATE OF AWARD:

October 3, 2013

HEARING SITE:

Minnetonka, Minnesota

HEARING DATES:

August 22, 2013

RECORD CLOSED/BRIEFS RECEIVED:

September 12, 2013

REPRESENTING THE UNION:

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## **JURISDICTION**

The hearing in this matter was held on August 22, 2013. The undersigned was selected to serve as grievance arbitrator pursuant to the procedures of the Minnesota Bureau of Mediation Services and the parties' collective bargaining agreement ("Agreement"). Both parties were afforded a full and fair opportunity to present their evidence pertaining to the grievance issues. Witnesses were sworn and their testimony was subject to cross-examination. The parties submitted post-hearing briefs that were duly received on or before September 12, 2013, which closed the record, and the matter was taken under advisement.

## **ISSUES**

The parties stipulated to the following statement of the issues to be determined:

Was the one day (12-hour) disciplinary suspension of the Grievant AW<sup>1</sup> for just cause? If not, what is the appropriate remedy?

## **BACKGROUND SYNOPSIS**

As previously noted, the parties expressed their interest in respecting Grievant's privacy interests in this arbitration. In furtherance of that objective, the information in this section is intentionally brief and general. The parties have all the pertinent details.

Grievant AW was hired in 1996 and was a patrol officer with the Employer's Police Department at all times relevant to the grievance. His work record was free of any prior discipline before the filing of the instant grievance.

Marital difficulties arose between Grievant and his wife, APW, in 2011. The difficulties related to the parentage of a child that Grievant had raised as his son for many years. Grievant's wife began re-kindling a relationship with TF, who was the biological father of the child. Grievant became aware of his wife's activities and objected to them. The marital difficulties eventually resulted in Grievant's divorce from APW.

During late 2011 and early 2012, Grievant used his police equipment while on duty to access

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<sup>1</sup>The parties requested that only initials of persons be used to respect privacy interests.

TF's driver license information in the DVS<sup>2</sup> database maintained by the Minnesota Department of Public Safety. TF's information in the DVS database is protected by both federal and Minnesota law. The law essentially prohibits police officers from accessing such information without a legitimate law enforcement purpose. To that end, Minnesota Statutes §13.09 provides as follows:

**13.09 PENALTIES**

Any person who willfully violates the provisions of this chapter or any rules adopted under this chapter is guilty of a misdemeanor. Willful violation of this chapter by any public employee constitutes just cause for suspension without pay or dismissal of the public employee.

According to the website of the Revisor of Statutes, the wording of Section 13.09 has remained unchanged since at least 1985.

On September 9, 2011, Grievant accessed TF's record in the DVS database. His stated reason for doing so was to see what TF looked like. According to the evidence, a neighbor had reported seeing an unrecognized vehicle parked in Grievant's driveway at his residence while Grievant was at work. Grievant lived in a different city from where he worked. He suspected that the vehicle belonged to TF. Among the information displayed to Grievant was TF's photo as well as the address of his residence. Grievant admitted during the taking of his investigative statement that he did not have a legitimate law enforcement purpose for accessing TF's record on this date. Grievant maintained that he only looked at the photo to find out what TF looked like.

Inappropriate accessing of the DVS database by some 18 law enforcement agencies became the subject of media attention in early October 2011. As a result, the Employer's Chief of Police issued a memorandum to all officers to remind them that accessing the DVS database was limited to legitimate law enforcement purposes only. The memorandum attached a printout of the PowerPoint slides used by the Minnesota Department of Public Safety to provide training on the use of the DVS database. Grievant signed for receipt of the reminder memorandum and PowerPoint slides on October 9, 2011. Prior to the reminder memorandum, Grievant underwent training for accessing the DVS database in February of 2009. He correctly answered all seventeen of the

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<sup>2</sup>Driver and Vehicle Services

questions on the test at the end of that training. Question 5 on the test posed this question:

Driver's license or motor vehicle registration information can be accessed only for the performance of official duties.

Grievant correctly answered, "True."

The Employer's evidence also includes its policies applicable to the use of computer equipment. Use of the equipment for personal purposes is not authorized.

On October 31, 2011, Grievant accessed TF's record in the DVS database a second time. Grievant's investigative statement said he wanted to show the photo of TF to other officers on his team because he wanted them to know "... if you see this guy ... this is what's going on." Grievant thought he showed the photo to three other team members. Two of the members did not recall seeing the photo in October and the third recalled seeing a photo but could not remember the month. Grievant contended he had a legitimate law enforcement purpose for this access.

Grievant later made a visit to TF's residence while off duty to talk with his then wife. There is a large discrepancy on the date of this visit in the accounts of Grievant and TF. Grievant says it was just after midnight on December 24, 2001. TF's statement says it happened on January 20, 2012. Regardless of which date is correct, according to his investigative statement, Grievant did enter TF's residence where he and TF had a conversation that lasted just over an hour. Grievant said there were a couple of minor verbal insults but no physical altercations.

According to Grievant's statement and testimony, he did not obtain TF's address from the DVS database. Instead, he said his wife told him the address. According to TF's statement, Grievant's wife would not have provided Grievant with TF's address information because they had not been speaking to one another for some time. According to his statement, Grievant admitted that his ex-wife probably would say she did not provide him with TF's address information.

In any event, Grievant accessed TF's DVS record for a third time on January 15, 2012. According to Grievant, he did so because he was filling out an application for a Harassment Restraining Order to keep TF away from him and his children. Grievant admitted that this third access was not for law enforcement purposes. Grievant did not actually submit the application.

Grievant accessed TF's DVS record for the fourth time on February 4, 2012. This followed

an encounter with TF at Grievant's residence. Grievant had police officers from his residence jurisdiction issue a No Trespass Order to TF. According to Grievant, he felt the situation was "getting ugly" and he wanted his team members to know what TF looked like in case they saw him around the workplace. He said he showed the photo again to some team members.

Grievant's access of TF's DVS record came to light on February 6, 2012 when TF filed a Citizen Complaint Form against Grievant. TF's complaint alleged suspected use of "police intel" by Grievant to track his address and visit his residence. The Employer's investigation ensued and led to the discipline challenged by the grievance.

The evidentiary record also contains information about lawsuits filed by citizens claiming that their personal data was improperly accessed in the DVS database. One lawsuit contends that several of the Employer's unnamed police officers engaged in the improper searches. In addition, the Union introduced evidence pertaining to other situations where the DVS database was used to access the data on individuals that either resided or were present within the city limits of the City.

## **OPINION AND FINDINGS**

At issue in this dispute is the question of whether the Employer had just cause to discipline the Grievant in the manner it did. The Employer contends that its discipline of Grievant was for just cause and should be upheld.

The Union and Grievant, to the contrary, maintain that the discipline was not for just cause. They contend that Grievant's actions did not constitute willful violations of the applicable law. In addition, the Union notes that Grievant's first access of TF's records occurred before the Chief of Police issued his reminder memorandum dated October 5, 2011. Moreover, the Union contends that Grievant did not use the DVS database for the purpose of going to TF's residence. Finally, the Union argues that the Employer has been arbitrary and inconsistent in past enforcement of its policies regarding access to DVS data. Accordingly, the Union and Grievant ask that the grievance be sustained and that Grievant be made whole. In the alternative, the Union contends that Grievant's suspension should be reduced to a reprimand.

Although just cause is not explicitly defined in the parties' Agreement, Minnesota law cited previously provides that a willful violation of the Government Data Practices Act constitutes just

cause for a disciplinary suspension without pay or dismissal from public employment.

The character of Grievant's accessing of the DVS database is readily determined from undisputed facts. Grievant admitted he accessed TF's information on the four occasions under review. He admitted he fulfilled the log-in requirements to access the data. He admitted he did so intentionally and not by accident. Thus, it is clear that his actions were willful.

The next question for analysis is whether Grievant knew or should have known that accessing DVS records without a legitimate law enforcement purpose constituted a violation of the applicable law and policy. The memorandum issued by the Chief of Police dated October 5, 2011 was a clear reminder that an improper access did constitute a violation. Indeed, the PowerPoint slides that accompanied the memorandum explicitly informed the viewer that unauthorized record searches did constitute a policy violation that could lead to disciplinary suspension as well as referral to criminal prosecution resulting in jail time of 1-3 years along with fines ranging from \$2,500 to \$5,000.

Grievant admitted he accessed TF's DVS information on January 15, 2012 without an official law enforcement purpose. This was *after* he had been provided the reminder memorandum.

As to Grievant's first accessing of TF's data in September of 2011, the Union notes that this occurred *before* the reminder memorandum was issued. As a result, the Union contends that Grievant had not been properly notified about misuse of the DVS database and the potential consequences of a violation. While true as far as it goes, this contention ignores, or at least overlooks, the fact that Grievant had received initial training in February of 2009 about the permissible access of the DVS database via mobile data computer ("MDC") equipment. Grievant scored a perfect 100% on the test associated with that training. As noted previously in the Synopsis Section, Grievant correctly responded to Question No. 5 to show that he knew that DVS information could be accessed only for the performance of official duties.

Examination of Union Exhibit No. 1 yields additional interesting facts that bear on the state of Grievant's knowledge on this facet of the just cause analysis. The exhibit is the federal court complaint that alleges as many as 340 law enforcement officers illegally accessed the plaintiff's DVS information in excess of 750 times over several years. The lawsuit names the City's Police Department among the many other law enforcement agencies named as co-defendants. Exhibit A to the complaint contains a 13-page listing of the alleged illegal accesses by the various agencies.

Page 3 of the listing shows fourteen alleged illegal searches by one or more unidentified members of the City's police force. The alleged illegal searches were made in 2007 and 2008. Interestingly, all of the alleged illegal searches were made *before* the City's officers underwent the MDC training in February of 2009. None occurred after that training. These circumstances strongly suggest that all of the City's officers, including Grievant, were duly informed by that training that a DVS access without a legitimate law enforcement purpose did constitute a violation of the law and associated policies.

Finally, it is well known that, "Ignorance of the law is no defense to a violation of it." This is especially true for a police officer.

Taken together, the foregoing considerations compel the conclusion that at least two of the four times Grievant accessed TF's DVS information constituted willful violations of the applicable law. These were the two times Grievant actually admitted he did not have a legitimate law enforcement purpose for doing so.

For the other two times he accessed TF's data, Grievant maintains he had personal safety concerns and wanted the other officers on his team to know what TF looked like in case he came around. Unfortunately for Grievant, the other evidence bearing on this explanation effectively undermines it. For example, the record does not establish any significant connection between TF and the City of Crystal's policing jurisdiction where they might encounter one another. TF lived in a different city. Grievant lived in yet another different city well across the metro area from where TF lived. The record in this dispute simply does not contain any evidence that links TF to any activity of significance within the City's jurisdiction. In addition, while TF did have a criminal record that included a conviction involving felony physical violence, this occurred in 2005 and none of the entries involved the City. His record was free of any similar conduct since then. Moreover, the record does not establish that TF made any threats against Grievant. Indeed, according to Grievant, they conversed for over an hour at TF's residence without any altercations. The trespass incident at Grievant's residence in February of 2012 did not involve any altercations; there was just verbal discussions. In short, there is simply no objective evidence to corroborate Grievant's subjective explanation that he had concerns for his safety. For another example, while Grievant claims he accessed TF's information the second time on October 31, 2011 to show TF's photo to three of his co-workers, two of them did not recall it and the third could not corroborate the month

of October. Taking this example one step further, if Grievant thought it was an official function for him to show TF's photo to other officers, why did he, by his own admission, limit the distribution to only three officers? According to the evidence, the City's Police Department has at least 15 other patrol officers and 10 higher ranking officers. Furthermore, if Grievant truly considered TF to be a threat to his safety, one would have expected Grievant to report the matter through his formal chain of command within the City's Police Department as well as make an appropriate report to the police of TF's city of residence or his own city of residence. He did not do so. Instead, Grievant maintained that showing TF's photo to another patrol officer on his team, who happened to be serving as Officer-in-Charge of the office at the time, constituted a chain of command report.

The foregoing factors compel the finding that the Employer had a proper foundation for concluding that Grievant's professed concerns about his personal safety lacked credibility and were a self-serving fabrication. It follows, therefore, that the Employer did have a proper basis, consistent with the just cause standard, to conclude that Grievant had willfully violated the applicable law and policy on the four occasions under review.

It remains for determination whether the penalty of a one-day suspension without pay is offensive to the just cause standard. On this point, several key considerations exist in the evidentiary record.

The one-day suspension is consistent with the parties' Agreement. Article 10 of the Agreement lists "suspension" as one of the five forms of permissible discipline that may be assessed. The Agreement does not require that any of the five forms be assessed in any particular order.

Minnesota law, cited previously, also constitutes notice to Grievant that a disciplinary suspension without pay would be for just cause for a single willful violation.

The PowerPoint training Grievant received notified him that a disciplinary suspension, and worse, could be an assessed sanction for a single violation as well.

Accordingly, Grievant had ample due process notice of the consequences for a single willful violation.

Although it used different wording, the Union also essentially contended that Grievant's discipline is disparately harsh in light of similar incidents of DVS access contained in the evidentiary record. This contention is not supported by the weight of the evidence of record. In this regard, the

training received in 2009 and the reminder memorandum issued in October of 2011 have significant importance. The record does not contain any evidence that the Employer has failed to discipline officers for repeated inappropriate DVS access occurring after that training was received and/or the memorandum was issued. Moreover, the few other instances in the record involve significantly different factual circumstances. They simply do not involve kind of substantially similar conduct or operative circumstances that are indispensable to the support of a disparate discipline contention.

For the reasons discussed herein, the overall finding is that the Employer's discipline of Grievant was for just cause.

### **AWARD**

The one day (12 hour) disciplinary suspension of Grievant AW was for just cause. Therefore, the grievance is denied.



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Gerald E. Wallin, Esq.  
Arbitrator

October 3, 2013