

**IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN**

<b>LAW ENFORCEMENT LABOR SERVICES, INC.</b>	)	
	)	
<b>Union,</b>	)	
	)	<b>GRIEVANCE AWARD</b>
	)	
<b>and</b>	)	
	)	
<b>CITY OF MENDOTA HEIGHTS, MINNESOTA</b>	)	<b>BMS CASE No. 12-PA-0659</b>
	)	
	)	
<b>Employer.</b>	)	

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<b>Arbitrator:</b>	<b>Richard J. Dunn</b>
Hearing Dates:	August 13, 2013, September 3, 4, 5, 2013
Place of hearing:	Mendota Heights City Hall
Post Hearing Briefs submitted:	October 4, 2013
Date of Decision:	October 22, 2013

Representing the Union

Mr. Scott Higbee, Attorney,  
Law Enforcement Labor Services, Inc.

Representing the City:

Mr. Kevin J. Rupp, Attorney  
Mr. John P. Edison, Attorney  
Rupp, Anderson, Squires and Waldspurgen, PA

**JURISDICTION:**

Pursuant to the relevant provisions in the parties' January 1, 2010 through December 31, 2011 Master Labor Agreement between the City of Mendota Heights, Minnesota and Law Enforcement Labor Services, Inc. Local Number 76, this grievance was heard at an arbitration hearing conducted on August 13, 2013, and September 3, 4, and 5, 2013. Article VII, Employee Rights Grievance Procedure, of the Agreement provides for compulsory binding arbitration proceedings as the final step in the grievance procedure.

The undersigned arbitrator of the Bureau of Mediation Services roster was notified by e-mail letter of my selection as a neutral arbitrator in the case. The parties were afforded a full and fair opportunity to present their case during three and one-half days of testimony at a hearing conducted in the Mendota Heights City Hall. Exhibits were introduced and received into the record.

The parties agreed that there were no jurisdictional issues in the case, and that this is a final and binding arbitration regarding this grievance, where the decision is based solely on the arbitrator interpretation or application of the express terms of the agreement and on the facts of the grievance presented.

The parties have requested that the names of the grievant and those testifying at the hearing be redacted from the published arbitration decision. It was agreed that they would be referenced by letter rather than name in this published decision.

**RELEVANT CONTRACT LANGUAGE:**

The relevant contract language for this case is referenced in Article X - Discipline of the Labor Agreement. The following provisions are in Article X.

- 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
- 10.2 Suspension, demotions and discharges will be in written form.
- 10.3 Written reprimands, notices of suspension, and notices of discharge which are to become part of an employee personnel files shall be read and acknowledged by signature of the employee. Employees and the UNION will receive a copy of such reprimands and/or notices.
- 10.4 Employees may examine their own individual personnel files at reasonable times under the direct supervision of the EMPLOYER.
- 10.5 Employees will not be questioned concerning an investigation of disciplinary action unless the employee has been given an opportunity to have a UNION representative present at such questioning.
- 10.6 Grievance relating to this ARTICLE shall be initiated by the UNION in Step 3 of the grievance procedure under ARTICLE VII.

**BACKGROUND:**

The City of Mendota, Heights, Minnesota ("City" or "Employer") and Law Enforcement Labor Services, Inc ("LELS" or "Union") were engaged in this grievance arbitration brought by the Union on behalf of the Grievant Police Officer in the City Police Department.

The City of Mendota Heights is a suburban community of the Twin Cities managed by a City Administrator. The population is about 12,000 residents. Reporting to the City Administrator, among others, is the Police Chief. The full time Police Department consists of 18 sworn Officers, three civilian employees in support roles, six reserve officers and some contracted positions. Three Sergeants report to the Chief of Police. (Testimony of the Police Chief) The non-supervisory Officers are represented by Law Enforcement Labor Services, Inc.

The City of Mendota Heights and Law Enforcement Labor Services had a labor agreement covering Police Officers that was effective January 1, 2010 and expired on December 31, 2011 and was applicable in this grievance. (Employer Exhibit One, Tab One)

This grievance resulted from a disciplinary action against the Grievant during the period of the contract. The action was issued on November 15, 2011 following a complaint by Police Officer A on July 23, 2011. (Employer Exhibit One, Tab Three) The Police Chief was informed by phone on July 23, 2011 of the complaint. (Testimony of the Police Chief) The Chief looked into the issues presented by the complaint and discussed them with the City Administrator.

Both the Grievant and Police Officer A were hired by the Police Chief as officers in the City Police Department, and have worked the same shift. (Testimony of the Police Chief)

The City's disciplinary action was a four-day suspension without pay of the Grievant pursuant to the City's determination that he had committed several acts of misconduct related to treatment of Police Officer A, as well as his treatment of Officer B in an alleged violation of the anti-retaliation provision of the City Harassment and Discrimination in the Workplace Policy 111 with an effective date of January 1, 2000 (Employer Exhibit One, Tab Six) The Grievant has challenged the suspension.

Police Officer A filed a complaint with the Mendota Heights Police Department ("the Department") regarding her treatment by the Grievant after two incidents while conducting work with the Grievant. Officer A wrote a letter dated July 23, 2011 requesting an investigation into the alleged harassment she was subjected to by the Grievant. (Employer Exhibit One, Tab Three) On July 25, 2011 the Department Police Chief contacted Mr. Kevin J. Rupp, Attorney representing the City, to discuss the complaint. An investigation was then undertaken and a report completed by Ms. Erin E. Ische for the law firm Ratwik, Roszak and Maloney, P.A. ("Investigator Ische") containing exhibits, findings, conclusions and interview summaries. The 80 page report, signed effective September 15, 2011 by the Investigator, confirmed that the Grievant had engaged in misconduct and violations of City Harassment and Discrimination Policy. (Employer Exhibit One, Tab Five)

On November 15, 2011 the Chief of Police delivered a letter to the Grievant notifying him of an unpaid four day suspension with findings of fact regarding the allegations made against him. (Employer Exhibit One, Tab Six) The suspension was specified to begin at 2200 hours on November 15, 2011 and end at 0730 hours on November 19, 2011. (Id.) The letter also indicated the Grievant would be required to attend a meeting with the Department supervisors on November 23, 2011 for the purpose of laying out the expectations for which he would be held accountable in the future. The Chief in his letter also indicated that the Grievant would be required to attend one or more trainings related to workplace behavior and etiquette, as well as personal development. The Grievant was directed by the Chief to complete and turn in a written report to his supervisor. (Id.)

The discipline against the grievant was thereafter grieved and duly processed to arbitration.<sup>1</sup>

The complaint by Police Officer A was that, since the Grievant's employment with the Department, she has felt ridiculed, mocked, and belittled by him. (Employer Exhibit One, Tab Three) This has caused her undue stress and anxiety and a fear for her personal safety. (Testimony of Officer A) Police Officer A discussed in her letter two incidents, including an armed robbery call where she and the Grievant responded, and a dispatch to an alarm at 2370 Waters Drive, where again both responded to the dispatch. (Employer Exhibit One, Tab Three) During the armed robbery call, Officer A alleged that the Grievant screamed condescendingly at her through their squad car windows, using an expletive, and later talked behind her back to fellow officers regarding her performance on this call, as well as other calls. (Testimony of Officer A) This incident was captured on video from the Grievant's car, and was viewed at the hearing. Officer A testified that her work relationship with the Grievant was "horrible", and that he said to others that she was "a bad cop" and "an idiot".

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<sup>1</sup> Note that there is some discrepancy between the date of the grievance exhibit, dated September 9, 2011, and the date of the discipline exhibit, dated November 15, 2011. As noted by the LELS brief, there is not an issue with this; it was not addressed at the hearing and the matter is properly before the arbitrator. (See LELS Post-hearing Brief, p. 19)

The second incident with regard to the Waters Drive dispatch involved an alleged snide remark by the Grievant about Officer A who was having difficulty finding the correct address. It was alleged that the Grievant, who found the correct address, later bragged about burning Officer A on the air to other officers.

Police Officer A also claimed that the Grievant bragged to other officers about his treatment of her. Additionally she claimed he had created a hostile work environment that makes her feel unsafe working with him, that he may not back her up in an emergency situation, and that he might retaliate because of this complaint. (Id.) Police Officer A requested that she not work together with the Grievant until the matter has been resolved. Officer A cited the Department Policy 111.02A(1) violated by the Grievant because of his overall attitude and treatment of her. (Id.) She claimed constant harassment on every shift. (Testimony of Officer A)

Much of Officer A's information about others talking behind her back came from Officer B, who told her there was "stuff you need to know about". (Testimony of Officer A) Officer B told her that the Grievant was bragging about his performance contrasting with her being an "idiot", that the Grievant was playing the video of the Inver Grove Heights incident to other officers, that he was burning her on the air, and that in general the Grievant "was not doing right, and she should know about this." (Id.)

Officer A also testified that Officer B told her he did not want to see the Grievant hired. (Testimony of Officer A)

A second allegation involved in this case had to do with an alleged violation of the anti retaliation provision of the Harassment and Discrimination Policy when the Grievant allegedly cornered Officer B in the locker room of the Department and called him "a rat or a mole". This comment was made allegedly because Officer B supported Officer A in her complaint. (Employer Post hearing Brief, page 27) The Grievant denied this allegation, and testified to this effect.

There was sworn testimony at the hearing by 18 witnesses, some called by the City representative, and some called by the LELS representative.

**ISSUE:**

The issue in this case is: Did just cause exist for the four-day suspension of the Grievant on November 15, 2011? If not, what is the appropriate remedy? There was agreement on this issue by both parties.

**EMPLOYER POSITION:**

The Employer argued the grievance should be denied, and the suspension affirmed because the disciplinary action is both consistent with progressive discipline and supported by just cause. (Employer Post hearing Brief, page 2) The case was made that the Grievant had an extensive disciplinary record, needed to improve his relationship with his colleagues, and received adequate warnings of his treatment of Officer A in a disparaging and disrespectful manner. Furthermore the Employer referred to the Grievant's involving other Department officers who did not need to be involved in these problems. The second part of the Employer case related to the Grievant's alleged retaliation against Police Officer B after he had provided Police Officer A and a Sergeant with information about Officer A's complaint.

The City claimed that the Grievant treated Officer A in a disparaging and disrespectful manner, which prompted the filing of a written harassment complaint in July 2011. This was particularly aggravated by the armed robbery episode, when the Grievant vocally criticized Officer A's response as the presumed robbery was in progress, and when the Grievant subsequently showed a video of the situation to numerous others in the Department.

Officer A began employment in 2005 when the Grievant was still seeking employment with the City as a Police Officer. (Testimony of the Police Chief) The Grievant attended the swearing in

ceremony of Officer A. The Grievant was hired in 2006. (Id.) The Employer called witnesses to attest as to how the Grievant's work relationship with Officer A began in a friendly way, but deteriorated through their working on the same "C" shift, which runs from 10 o'clock p.m. to 7:30 a.m. Officer A testified that the Grievant criticized her on a weekly basis, causing her to feel like she continually did things the wrong way. The Grievant accused Officer A of cheating on her time sheets. Officer A learned from a colleague that the Grievant was using GPS tracking data to monitor her location during shifts. Officer A also in her testimony recounted being humiliated by the Grievant in front of other police officers and citizens during a drug warrant raid in West St. Paul. (Testimony of Officer A) VC S and VC T as well as Officer A testified about a situation where the Grievant set his taser on a table in the Squad Room and pointed it at VC S, who caused him some irritation during an impersonation of a "church lady".

VC T testified that the Grievant disparaged Officer A during ride alongs in the Department, saying at one point that Officer A was stupid and did not know what she was doing. The Grievant asked VC T to investigate a problem with a Patrol Officer, who turned out to be Officer A. VC T witnessed the Grievant mock Officer A by impersonating her voice. There was testimony at the hearing by other officers as to the Grievant speaking negatively about Officer A.

The Grievant went on medical leave due to contracting Lyme disease. This leave began on October 29, 2010 and ended on April 7, 2011. (Testimony of the Grievant) The Investigator's report documented that upon his return, the Grievant apologized to Officer A and "said that he felt better than he used to and that he wanted to get along with everyone and have a good work environment." (Employer Exhibit One, Tab 5, p. 27, 1.16) The Investigator reported that this lasted about two weeks before his general attitude of arrogance came back. (Id.)

After this medical leave, the Grievant's conduct was alleged by Officer A to make her physically ill, frequently crying and questioning her decision to become a police officer. (Testimony of Officer A) When she learned that the Grievant was complaining behind her back to colleagues, she decided to file a formal complaint. (Employer Exhibit One, Tab Three)

There was extensive testimony about the incidents occurring while the two were working together in the summer of 2011. The first incident involved Officer A who testified that she mistakenly reported on her radio that she was traveling eastbound, when in fact she was traveling westbound while pursuing a stolen vehicle. The Grievant also responded to the call, mistakenly following a squad car that he thought was Officer A, but turned out to be another patrol car. Officers C, V, E, and G testified that the Grievant complained about this incident of Officer A calling out the wrong direction of travel. The Employer claimed that when telling several officers about this situation, along with the Waters Drive incident, the Grievant wrongly mocked Officer A, and ridiculed, derided and belittled her. (Employer Post-hearing Brief, page 25)

There was also a call about an ejected motorist where the Grievant told Officer D that Officer A failed to back the Grievant up, when a Sergeant O had instructed Officer A not to respond to the call. The Grievant knew about this but did not tell Officer D. (Employer Exhibit One, Tab Five, page 29)

In addition, there was the AmericInn situation in Inver Grove Heights on July 17, 2011 that the Employer described as the most significant incident. (Employer Post-hearing Brief, page 9) This was the armed robbery where the Grievant first appeared on the scene followed shortly by Officer A. The Grievant shouted to Officer A when she parked alongside his patrol car, telling her she should have silenced her siren during a call to a robbery in progress. (Testimony of Officer A, Testimony of the Grievant) Officer A was offended by the yelling comments. The Employer cites this as particularly illustrative of harassment and belittling on its face.

During the same shift, the Grievant and Officer A responded to the Waters Drive area of Mendota Heights where Officer A could not find the address reported by dispatch and told dispatch that it was a bad address. The Grievant located the reported address and radioed dispatch that he was in fact at the reported address. Officer A regarded the Grievant's tone as snide and "smarty pants", and that he could have reported that she was wrong about the address through another medium.

After the July 17, 2011 shift concluded, the Grievant returned to the Department and reported to Police Sergeant N that he was upset about the armed robbery incident, whereupon the Sergeant indicated they would discuss it the next week. (Employer Post-hearing Brief, page 12) The Grievant had earlier also sent a computer message to the Sergeant indicating the Department needed to conduct remedial training on how to respond to an armed robbery in progress.

The Grievant on July 19, 2011 showed a video of the armed robbery response to Officer C, and they then critiqued Officer A's response to the armed robbery incident. The Employer cited that the Grievant incorrectly told Officer C that Officer A drove off after he shouted at her, which was a factor in Officer C's conclusion of an inappropriate response by Officer A to the call. The Employer claimed that the Grievant knew his choice of words could be interpreted as being offensive and inappropriate. (Employer Post-hearing Brief, page 22)

Also the Employer claimed the City had directed the Grievant not to unnecessarily involve other officers in his problems at least three separate times prior to July 2011. (Employer Post-hearing Brief, p.12 referring to performance evaluations dated with three previous dates)

While watching the video together in the patrol officers' writing area, , the Grievant and Officer C were listening when the volume also attracted other officers including Sergeant M. After watching the video, the Sergeant directed the Grievant to speak directly to Officer A about his concerns. According to testimony of the Sergeant, the Grievant responded that he may not be able to talk with Officer A in a calm manner. Officer I also heard the video sound and was quizzed by the Grievant about whether his decision to shout at Officer A was appropriate. (Testimony of Officer I) Subsequently the video was shown by the Grievant to Officer D and Officer B, again asking officers if his comments were appropriate. (Testimony of Officer D) The Grievant again made critical comments to Officer D about Officer A's performance during the incident. Officer B interpreted the Grievant's comments as though the Grievant was proud of the yelling at the Grievant. (Employer Exhibit One, Tab Five, page 46) The Employer stated that the Grievant chose to spread what happened in Inver Grove Heights before the meeting that Sergeant N indicated would take place the next week.

The video was then shown to a Sergeant and four officers that day, and the Grievant testified that he told Sergeant N and Officer F about his concerns with Officer A's performance on the armed robbery call. But the City claims that he really wanted to know if he acted appropriately when he yelled at Officer A. (Employer Post-hearing Brief, page 22) He also made a comment to the Investigator that he had said "stupidity seems to be the theme of the week". (Employer Exhibit One, Tab 5, p. 78) Furthermore the Grievant told other officers about the Waters Drive alarm call. (Testimony of Officers D, C, E, B, J and G) He did not talk with Officer A about being upset with her. The City claims there was no legitimate reason for the Grievant to review squad video with other officers. (Employer Post-hearing Brief, page 22) This also was in violation of prior directives in performance evaluations that he refrain from unnecessarily involving colleagues in his workplace issues. (Employer Exhibit One, Tab Nine)

The Chief indicated that squad videos are reviewed generally only for the purpose of writing police reports, and that Department policy states that squad videos are to be used for job-related purposes. (Employer Exhibit One, Tab G) There was testimony from three officers indicating they had never before reviewed another officer's squad video for the purpose of critiquing job performance in Mendota Heights. Officer A learned about these video showings and discussions about the armed robbery incident and saying negative comments about her performance. She then expressed concerns to Officer B and Officer F about the Grievant's conduct. (Testimony of Officer A, Officer B, and Officer F) She filed a complaint dated July 23, 2011 claiming harassment in violation of the City's Harassment and Discrimination Policy. (Employer Exhibit One, Tab 3)

With regard to the second allegation regarding the "rat or mole" comment by the Grievant to Officer B, the Employer claimed this comment was made because the Grievant believed that Officer B had provided information to Officer A and a Sergeant before she filed her complaint. (Testimony of Officer B) Officer B subsequently told Officer G about the comment. (Testimony of Officer G) He also told Officer A about the comment. (Testimony of Officer A)

The Employer argued that the retaliation provision of the Department's Harassment and Discrimination Policy was violated by these comments. This was regarded by the Employer as a separate policy violation. The Policy states:

Retaliation against any department member or other employee of the City of Mendota Heights for filing a harassment or discrimination complaint, or for assisting, testifying, or participating in the investigation of such a complaint is illegal and is prohibited by this police department and by federal statutes.

The City further argued that Officer B had no motivation to lie in this case, and had no interest in the outcome of this investigation. (Employer Post-hearing Brief, p. 28) He told Officer A and Officer G about the comments. Furthermore the City claimed that the Grievant had a motive to deny the comments because he would be admitting there was an appropriate basis to discipline him if he acknowledged these comments in the locker room.

The City then proceeded to investigate the complaint and hired the outside Investigator. The Investigator interviewed 18 witnesses. Based on the report, the City issued the four-day suspension without pay. (Testimony of the Chief)

The Employer claimed the Grievant had a history of not being able to interact in a professional and respectful manner with his colleagues, as documented in his several performance evaluations. (Employer Post-hearing brief, page 17) The claim was that the Grievant was fixated on his belief that Officer A was a bad cop, as manifested by his condescending and belittling treatment of Officer A and his complaints to other officers about her shortcomings.

The Employer claimed the Grievant's treatment of Officer A and Officer B violated the Department's harassment Policy. He violated the anti-retaliation provisions when Officer B claimed the Grievant cornered him in the locker room and made the comment of being a "rat" and a "mole" in the Department. The Employer argued its discipline action was supported by the thorough investigation, was based on statements of 18 witnesses. (Employer Post-hearing Brief, page 18)

The Policy stated that members of the Department shall not "explicitly or implicitly ridicule, mock, deride, or belittle any person". (Employer Exhibit One, Tab Five, Item F) The City cited that the Grievant had previously received training on how to conduct himself appropriately in the workplace. (Employer Exhibit One, Tab Five, Item E, and Tab 10) The Department regarded harassment and discrimination as serious employee misconduct, and that even "minor" repeated violations warranted discipline.

The Employer did not contend that the Grievant engaged in harassment according to the legal definition, but rather violated the harassment Policy which bans forms of discrimination and harassment that are not prohibited by law, e.g. status as a protected class member. It was the ridiculing, mocking, deriding or belittling aspects of the Policy that were alleged to be violated.

With regard to these bad behaviors, the Employer presented evidence that there was a pattern of such misconduct, and particularly cited witnesses who testified about incidents where the Grievant talked about Officer A as a bad cop. (Employer Post-hearing Brief, page 20) The Employer again cited the Grievant's comment about Officer A as stupid and not knowing what she was doing, and his request for an investigation of Officer A because the Grievant did not like something she was doing. (Id., page 20) The Employer cited the testimony of the Grievant to the effect that the City is committing negligent retention in employing Officer A as evidence of his inflammatory commentary and conduct that was ridiculing deriding, and belittling.

The Employer defended Officer A's field training and six years of performance, and refuted the references to field training as a red herring, and alleged civil rights violations as lacking any substantiation. (Employer Post-hearing Brief, page 25) There was "little evidence" to support the Union's contention that she was a bad cop, and that testimony from Officer C and Officer D that she demonstrated poor officer safety skills amounted to gossip that must be given no weight. (Id., page 26)

When Officer A gave permission to the Grievant to "call her out" when she struggled performing the job, the City noted that she did not give the Grievant "unbridled authority" to harass or disparage her character with others. (Id., page 26) The Employer contended that the Grievant

"cannot insulate himself from discipline by saying he is incapable of providing feedback to others without using offensive and profane language", expletives and coarse language, and that "he cannot gossip about her behind her back, spread rumors about her or otherwise treat her poorly without facing any consequences for his actions". (Id., page 27) Officer A should not be subjected to a hostile work environment.

The Employer also argued that the Grievant was not accurate in his assertion that he was being unfairly singled out for discipline. He had received a written reprimand previously for insubordination where he claimed he was treated differently. (Testimony of the Grievant) He also received a one-day suspension for another case where he did not complete a directed patrol assignment, in which arbitration the arbitrator rejected the Grievant's claim that he was held to a different standard than applied to other officers. (Employer Post hearing Brief, page 29 footnote) The Employer argued that the Grievant had not identified any similarly situated officer who had been treated differently, and that no other officers have been specifically directed to improve their relationship and not to involve unnecessarily other officers in their work-related problems.

The Employer cited performance evaluations on February 5, 2009 which gave notice to the Grievant that his poor relationship with co-workers adversely affected morale, and an August 4, 2010 performance evaluation warning the Grievant that it would not tolerate his negative behavior. The City had directed him to work on not sharing issues that should be kept between him and his co-workers or supervisors, and should not speak negatively about the Department to his co-workers and individuals outside the Department. This included a communication to the Grievant that he would be disciplined for failure to improve his relationship with co-workers. The Employer cited the cases described above as evidence that the Grievant failed to follow these directives.

The City further contended that the Grievant's conduct toward Officer A exceeded the customary griping that takes place within law enforcement. There was testimony from two officers to the effect that it is not productive for police officers to talk behind each others' back, that such talk was "not productive" and "not right", "back-biting and "immature". (Testimony of Officer E and Officer H) Officer J indicated to the Investigator that the Grievant's comments about Officer A

were more negative and of the nature of a personal attack. Officer G stated to the Investigator that the Grievant placed Officer A in a "constant theme" for discussion not for learning purposes but as ridiculing in nature. Therefore the Employer concluded that the Grievant's behavior was indicative of an unhealthy obsession perceiving Officer A as a bad cop. (Employer Post-hearing Brief, page 32)

The City refuted the idea that Officer B and Officer J are similarly situated to the Grievant. The City argued they made amends with Officer A and apologized for their hard treatment of her early in her employment with the Department, and that Officer A did not file a written harassment complaint against them. No one focused on showing a video of an incident. The video of the Inver Grove Heights case "pushed Officer A over the edge and prompted the filing of a harassment complaint, according to the City. (Id., page 33) Officer B and Officer J developed a positive relationship with Officer A after acknowledging they were critical about her performance. Therefore they were not similarly situated with respect to Officer A, according to the City's argument. ( Id., page 34)

The Employer argued that a four-day suspension was an appropriate level of discipline considering the Grievant's extensive disciplinary record. The Employer defended this four day suspension as consistent with progressive discipline, and followed a previous one-day suspension without pay for insubordination.

The previous employment with the Anoka County Sheriff's Office was cited by the Employer, where job performance and attitude issues resulted in the end of the Grievant's employment. (Employer Post-hearing Brief, page 34.) Five incidents were summarized in the Employer Post-hearing Brief from this employer in 2002, which the City argued demonstrated poor judgment, a "cocky" attitude, a lack of respect for policies, and an inability to work effectively with his colleagues. It was argued that this pattern of employment misconduct had carried over to his employment with the Department, and that his disciplinary record was extensive in light of his seven years of employment. (Id., page 36)

The disciplinary history also included a written reprimand and warning on September 17, 2010 after a complaint regarding the Grievant driving a squad car in excess of 100 miles per hour near Chaska, where the Grievant acknowledged driving in excess of 80 miles per hour when in the area to attend a funeral. On August 3, 2011 The City issued a one-day suspension without pay for insubordination when the Grievant did not comply with a directive to complete a directed patrol assignment, which again was arbitrated, and the arbitrator ruled for the City. (Employer Exhibit One, Tab Eight) The Grievant was again warned that further misconduct could lead to progressive discipline. (Id., page 36)

The City argued further that the medical condition of the Grievant having been diagnosed with chronic neurologic Lyme disease in 2010 and babesiosis in 2012 did not excuse his behavior. (Id., page 37) He had been treated for Lyme disease and had received clearance to return to full time duty prior to the complaint by Officer A. He had not requested any accommodation for his disease. The babesiosis diagnosis was in 2012, but the City argued there was no medical evidence to suggest that he was impeded because of his diagnosis, either in his work or his ability to conduct himself appropriately in the workplace.

Finally the Employer argued that it is in bad faith for the Grievant and the Union to have challenged the directive for the Grievant to undergo remedial training related to respectful workplace behavior and provide written reports on his progress. After the harassment complaint was filed, but before this arbitration hearing, the Union and the Grievant sued the City to challenge this directive, which resulted in a settlement agreement whereby the Grievant dropped his challenge to the City's training directive. The City argued that any interpretation of this training directive as disciplinary should be dismissed because of the Settlement A greement. (Id., page 39.)

#### **THE POSITION OF THE UNION:**

The Union contended that the Grievant's conduct did not satisfy the definition of Prohibited Activity under the City's Harassment and Discrimination in the Workplace Policy, and therefore

was not just cause for discipline. (Union Post hearing Brief, page 2) Furthermore the Union argued that serious deficiencies occurred in the City's investigation into this case, which precludes any discipline. It was therefore concluded by the Union that the grievance should be sustained, the disciplinary action removed from the Grievant's personnel file, and the Grievant made whole with four day's pay and direct other appropriate relief. Furthermore the Union requested the arbitrator to direct the City to remove the directive to the Grievant to complete "training sessions", as well as the requirement for submission of training-associated written reports.

The Union made a case that Officer A during her field training sessions had concerns about the potential hire of the Grievant as a Police Officer in Mendota Heights, and endeavored with various comments to her training officer, who was Officer B, to disrupt the possibility of the Grievant's hire. Officer B testified as to her comments and concern which she expressed every couple of days during her training, and he alerted the Chief about her concerns. (Testimony of Officer B) The Chief in his testimony did not mention this.

The Grievant believed he had a good relationship with Officer A before his hire, but he testified that Officer A before his hire disparaged the Department and training Officer B and Officer J. She struggled during training and had difficulties getting along with these training officers. Officer A acknowledged difficulties in her training and apprehension about job security. She also reported to the training officers that she had not invited the Grievant to her swearing in ceremony, and did not know him. Eventually the Grievant confronted Officer A about these claims, believed his friendship was ended with Officer A because, the Union argues, she had attempted to sabotage his hiring.

During the Grievant's training after his hire, the same Field Training Officers as were assigned to Officer A trained the Grievant. Officer B and Officer J both disparaged Officer A, acknowledged they did not get along with her, were mean to her and criticized her performance. ( Investigator Report, 9.32 and 10.33) (Union Post-hearing Brief, page 8) The Grievant recalled Officer B exhibiting contempt for Officer A, having called her vulgar names and "flipping her off". (Id., page 18)

The Union recited numerous performance issues which created dangers for himself and others when they worked the same shift. These included Officer A's poor handling of guns, aiming a gun in a way that jeopardized other officers' safety, failing to back up a call, inappropriate jailing, significant failure in following a tactical plan while assisting West St. Paul police in a drug warrant, and the calling out of a wrong direction of travel when pursuing a stolen car. (Union Post hearing Brief, page 9) These caused concerns by the Grievant for his own safety. Other officers raised concerns to the Investigator about Officer A's performance and the failure of the Department to take remedial action. (Investigator interviews with Sergeant O, Officer C, Officer J, Officer I, Officer E) The Union complained that despite these concerns that were expressed to the Chief and to Sergeant M and Sergeant N, none of them testified as to having addressed those concerns. Union Post hearing Brief, page 10)

The concerns about Officer A's performance were raised again to Sergeant M in connection with the West St. Paul drug warrant situation. Sergeant M arranged for a meeting with the Grievant and Officer A during which Officer A admitted that her performance was not at the level it should be. She told the Grievant to "call her out" on her performance issues, whereupon he responded that he was not an eloquent person, had not been trained in this regard, and his response could be abrupt, using expletives. Officer A indicated she was okay with that. (Investigator Report 18.18) (Testimony of the Grievant)

The Union described the AmericInn Inver Grove Heights armed robbery dispatch where both the Grievant and Officer A responded. The Grievant discussed the location of this incident with dispatch so as to confirm the location, and killed his lights and sirens before arriving at the scene. In contrast, Officer A did not attempt to confirm the location with dispatch, and arrived at the scene with lights and sirens activated in close proximity to the AmericInn. The Police Chief testified that this activation of lights and siren was not appropriate. (Testimony of the Police Chief) The Union pointed out this error and danger to the safety of responding officers and potential hostages. The Grievant called Officer A out, saying "Really, a siren to a fucking robbery in progress?" The Police Chief also testified that " a raised voice could be necessary" for the Grievant to communicate with Officer A after arriving on the scene. (Id., page 12)

The Union described the Grievant as using a raised voice necessary to communicate from one squad car to another. Officer A claimed the Grievant screamed at her through the window, pulling away before she could respond. (Testimony of Officer A)

With regard to the Waters Drive incident, when the Grievant was called as back-up and located the correct address while Officer A had difficulty locating it, the Union claimed that Officer A had an exaggerated reaction to the Grievant when she claimed that he was "burning her over the air and used a snide tone in his call to dispatch. (Employer Post hearing Brief, page 11)

With regard to the showing of the video of the Inver Grove Heights incident, the Union contended that the Grievant only showed this to one officer, namely Officer C, who was an instructor in the use of force and firearms, as well as the Mutual Aid Assistance Group team leader. (Id. page 15) Despite Officer A indicating the Grievant was bragging about the incident to others, the Union contended he was debriefing with this officer, who did not think he was bragging. Officer C indicated the Grievant expressed interest in other aspects of the call unrelated to Officer A's response. Officer C also believed that Officer A's response jeopardized the lives of the hostage and officers associated with the incident. The other officers who saw the video were asking to see it when the Grievant was watching it by himself. Officer I also watched the video and indicated he did not believe the Grievant was bragging. (Investigator Report 13.24, 13.28) Sergeant M also joined the video watching and said he had no reason to think the Grievant was playing the tape for a bad purpose. (Investigator Report 3.7)

The Union also cited Officer B's reporting that he had heard from a West St. Paul police officer who the Grievant said had described the video to him. But during Officer B's interview with the Investigator two weeks after hearing from this cop, he could not recall his name, which the Union cited as a convenient lapse of memory. ( Investigator Report, 9.24)(Union Post-hearing Brief, page 17)

The Union also referred to other claims by Officer A that it regarded as exaggerations. Officer A claimed that the Grievant had "manipulated" the Department's GPS system to locate her,

although the Investigator did not fully investigate this claim. Officer J had told Officer A that he had seen the Grievant manipulating the GPS. (Investigator Report, 1.18) But Officer J testified that he had not seen this. (Testimony of Officer J) Also the claim was made that the Grievant attempted to get her into trouble regarding her time sheets.

With regard to the allegation that the Grievant called Officer "a rat or mole" in retaliation for his support of Officer A in her complaint, the Grievant during testimony flatly denied using this epithet. (Testimony of the Grievant) The Union pointed out that numerous witnesses during the hearing testified that Officer B was known to exaggerate and make up stories. Furthermore the Union contended that the Investigator lacked a credible assessment of Officer B because of his denial that the Grievant had been involved in the Carlos Avery wildfire in 2000, where the Grievant had provided a letter of commendation regarding his service, giving a detailed explanation of his involvement. Officer B falsely claimed involvement in this fire, according to the Union.

Thus the Union claimed the record did not establish just cause for the discipline against the Grievant, and cited this arbitrator's application of Arbitrator Carroll Daugherty's seven tests for just cause in *The Matter of the Arbitration Between the City of Plymouth and AFCSME Council 5, Local 3839*, BMS No. 11 PA 0315 (2010). (Union Post hearing Brief, page 20) The Union contended that the application of that analysis established that just cause for the discipline of the Grievant was not present. The Daugherty case in *Enterprise Wire Company and Enterprise Independent Union*, 46 LA 359 (1996) contained a set of test questions cited by the Union in its Post-hearing Brief as follows Union Post hearing Brief, pages 20-21):

1. NOTICE: Did the Employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?

2 REASONABLE RULE OF ORDER: Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business, and (b) the performance that the Employer might properly expect of the employee?

3. INVESTIGATION: Did the Employer, before administering the discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. FAIR INVESTIGATION: Was the Employer's investigation conducted fairly and objectively?
5. PROOF: At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. EQUAL TREATMENT: Has the Employer applied its rules, order and penalties even-handedly and without discrimination to all employees?
7. PENALTY: Was the degree of discipline administered by the Employer in a particular case reasonably related to a) the seriousness of the employee's *proven* offense, and (b) the record of the employee in his service with the Employer?

LELS stated in its brief that all seven questions would be answered in the negative, where any one negative response to the test questions establishes the absence of just cause. (Union Post hearing Brief, page 21)

With regard to test question one, the Union argued that the Grievant was not given fair notice that he was facing potential discipline for his perceived treatment of Officer A. (Id. page 24) He had not received any prior discipline regarding interactions with her. Secondly, she consented in the meeting with Sergeant M and the Grievant to being called out in this manner. Therefore the Union concluded that the Grievant cannot be claimed on notice that he was subject to discipline in responding to Officer A in a manner to which Officer A had consented.

Furthermore the Union argued that other officers have not been disciplined for similar treatment of Officer A, and that the Grievant cannot be found notice of potential discipline for this similar treatment. (Id., page 28) The point was made that other officers, most notably Officer B, treated her worse because they made personal attacks, whereas the Grievant critiqued Officer A's work performance. (Id., page 24)

With regard to questions three and four, the Union criticized the sufficiency and fairness of the investigation, particularly with regard to the Inver Grove Heights armed robbery call. (Union Post-hearing Brief, page 22) LELS contended that the Grievant's "what the fuck" epithet was consistent with what Officer A had previously agreed to when she agreed to be called out, and that it could not be deemed inappropriate. The Union also criticized the Investigator's report for not following up with second interviews of relevant parties, which then affected her conclusions to the Grievant's detriment.

With regard to Factor 5, Proof, the Union argued that Officer A's failing to ascertain the location in the Inver Grove Heights incident was the real performance issue. (Id. page 25) The Grievant correctly determined the location by contacting dispatch so as to learn when to shut down his lights and sirens, whereas Officer A did not do so. This was an error that could have had severe ramifications. The Union argued that the Investigator found the Grievant was properly attempting to communicate with Officer A that a Code 3 response by her was inappropriate. (Id., page 25) In the Waters Drive incident, the Investigator also concluded that the Grievant acted appropriately, and there was no evidence of harassing or disparaging language, nor the snide tone alleged by Officer A. (Id., page 26)

The record does not support that the Grievant played the video of the Inver Grove Heights incident for the purpose of disparaging or belittling Officer A, according to the Union argument. Except for Officer C who the Grievant invited to see the video, other officers who looked at the video had requested to see it. (Id., page 26) Additionally, Officer C testified that the entire video was focused on by the Grievant. The Union concludes that it was not used to disparage Officer A. (Id., page 26) (Testimony of Officer C)

The Union criticized the Investigator report for containing confusing, inconsistent and contradictory findings, which illustrated that the report did not articulate how the harassment policy was violated. The Union cited the conclusion of the report where the Investigator explained that "by yelling at Officer A in a condescending manner...the Grievant did not treat Officer A with respect". (Union Post hearing Brief, page 27) This contradicted an earlier characterization that the Grievant "loudly stated" the comment, rather than having yelled or screamed. (Investigator Report p. 23 and Finding 5.0)

The Union built on this case for no harassment Policy violation by citing the Investigator's report finding that many officers talk behind other officers' backs about work performance issues, not just the Grievant doing so. No other officer has been disciplined for this. (Union Post hearing Brief, page 28)

The Union contended that the Grievant's tone during the Inver Grove Heights incident should be characterized as "frustrated" or "exasperated", rather than condescending, and that moreover, the Investigator did not comment on whether speaking in a condescending manner constituted ridiculing, mocking, deriding or belittling another person. (Id., page 28) It is not fair, the Union concluded, to characterize this as ridiculing, mocking, deriding or belittling, as was clear from the audio of Officer A's squad. LELS also cited Officer A's response to the Grievant with the phrase: "I don't know where the fuck you want me?" as more condescending than the Grievant's comments, additionally showing that she was comfortable using that word. Thus how can she be offended when others use the term? (Id., page 29)

With regard to Factor 6, the Union described the Grievant's concern of unequal treatment in this discipline. (Id. page 29-33) He raised issues with supervisors in the effort to correct Officer A's deficient responses in the West St. Paul drug warrant situation and the Inver Grove Heights armed robbery matter, where her actions either compromised the operation and/or jeopardized the safety of others. (Investigator Report 4.5 and 18.33) There also was cited an incident reported by Sergeant N regarding Officer A driving through a crime scene and being called back. The Union argued that it appeared the City did not investigate or consider corrective action against her in these additional incidents with performance issues. (Id., page 30)

Other complaints of harassment and retaliation have been made by three officers where it appeared no investigation was conducted. This raised the question as to why the City chose to investigate this complaint of Officer A and not the others, and whether the City was looking for a justification to take action against the Grievant. (Id., page 30) The Union contended that because the Grievant worked more regularly with Officer A, he had the most opportunity to witness these performances errors. (Id., page 31))

The Union also rejected the comment in the Grievant's performance evaluation that complained about him meeting outside the building, where it was claimed that he spoke negatively about co-workers, supervisors and the Department. There was no evidence presented about this, no witness testimony was offered, and the Grievant denied making such comments. He was, according to the Union, treating himself for Lyme's disease with self injections through a PICC line at a picnic table outside. (Id., pages 31-32)

The argument was advanced that numerous other officers have complained about Officer A and treated her poorly, including her two PTOs in their testimony at the hearing. (Testimony of Office B and Officer J) Officer B admitted that he had stated that he would like to see both Officer A and the Grievant die in a firey crash. (Id., page 32) There was testimony that Officer B had called Officer A vulgar names. Both officers acknowledged they were "kind of mean" to her. (Investigator Report 9.32 and 10.33) It therefore seemed to the Grievant in his subsequent training with these two officers, that the Department tolerated such conduct without discipline.

Another incident cited by the Union as evidence of disparate treatment of the Grievant had to do with a prank by Officer B on Officer I. Officer B parked Officer I's squad car in extremely tight proximity to other squad cars for the purpose of making it very difficult for Officer I to enter his squad car. (Testimony of Officer I, and Union Post-hearing Brief, page 33) Officer B originally denied doing this when he was confronted. But Officer I was able to verify his suspicion that it was Officer B who moved the squad car through a video review showing Officer B moving the squad car into an inconvenient position, which the Union claims was for the purpose of harassing

Officer I. (Id., page 23) The Department did not discipline Officer B, although it told him to "knock it off".

The Union generally concluded there are serious, unexplained deficiencies in the Investigator's report. This included the City not calling the Investigator to testify, and failing to conduct any follow-up interviews to revisit issues raised in the original interviews. The Union cited Adolph and Smith's "Just Cause: The Seven Tests" (2nd Ed. 1992) with the following reference: "The requirement that an investigation be reasonably complete means that the employer needs to take necessary follow-up measures, especially if its initial investigation leaves unsettled questions or produces contradictory versions of what took place." (Id., page 34) Various matters were cited as to reasons for a follow-up with second interviews, including matters and incidents that raised questions about the credibility of Officer A.

#### **OPINION AND DECISIONS:**

The first charge concerns the Grievant's alleged treatment of Officer A in a disparaging and disrespectful manner, violating the City's Harassment and Discrimination Policy and publicizing his problems with Officer A to other officers.

There was not sufficient evidence that the Grievant belittled Officer A on the scene of incidents while on duty.

The transmission of the correct address in the Waters Street address did not constitute "burning" on the air.

The Grievant did not appear to be bragging about any of these incidents.

But he was sarcastic and mocked the Grievant as indicated in witness testimony and his interview with the Investigator. The Grievant acknowledged to the Investigator of his telling stories with voices and sound effects impersonating multiple people, including Officer A. There was witness testimony confirming this mocking of Officer A. The Investigator concluded that

he mocked Officer A. The Investigator's interview notes with the Grievant read as follows (Interview Report, 18.28):

"When asked whether he mocks or imitates Officer A, the Grievant responded by saying that he tells stories with voices and with sound effects. When he tells stories, for every different person he is talking about, he uses a different voice to imitate them. When asked whether he has impersonated Officer A as an absent-minded or bad cop, the Grievant responded by saying that any impersonation would be based on the facts of an incident."

While the Grievant did not specifically say he had mocked Officer A, or that he had not done so, his impersonations and imitations were interpreted within the Department as mocking-type behavior toward Officer A. The Grievant's frustration and exasperation regarding the incidents where Officer A made mistakes were very apparent to many officers who testified in the Department. There was testimony about numerous conversations regarding these incidents, including watching and discussing the Inver Grove Heights video, Officer A's calling out of a wrong direction of travel when pursuing a stolen car, the meeting called by Sergeant N to discuss the situation concerning the robbery, the incident involving Officer A's failure in following a tactical plan in the West St. Paul drug warrant, and other discussions.

Mocking behavior constituted a violation of the Department's Harassment and Discrimination in the Workplace Policy No 111, Part 111.02, A, 1 regarding Prohibited Activity which reads "No department member shall ridicule, mock, deride, or belittle any person." It is this violation of the harassment policy that the Employer charged the Grievant committed.

The Grievant indicated that he imitates different persons in the Department, which seems to stem from an arrogant attitude where he is very critical of others' behavior, particularly where incidents occur with others' mistakes that upset him. This arrogance, sarcasm and "cocky" attitude was particularly displayed when the Grievant was listening to the radio with a group in the Squad Room, and giving play-by-play of a fatal domestic disturbance and heard that a Reserve Officer showed up on the scene of the incident. The Grievant got very upset, and

acknowledged in testimony that he turned to a Reserve Officer and said something to the effect of, "If you ever do anything like that, I will personally pull out my gun and shoot you." The Grievant testified that he meant no threat intention. (Testimony of the Grievant) He later apologized to VC S. This kind of behavior resulted when the Grievant became very upset about mistakes or his different take on matters.

A second incident occurred when the Grievant placed his taser on a table in the Squad Room and pointed it at VC S, who irritated him during an impersonation of a "church lady". This kind of serious misconduct sometimes made others uncomfortable, and sometimes humiliated and threatened others. They testified that it needed to be remedied beyond an apology (which was required to be rendered by the Grievant to the Reserve Officer and was made after a few weeks). Such behavior serves no purpose, and more importantly, is inconsistent with a Police Officer's responsibilities and expectations to perform professionally. The previous training on how to conduct himself appropriately in the workplace apparently did not take for the Grievant.

There was testimony that the conflict went on too long between the Grievant and Officer A, and there needed to be a resolution for the good of the Department. The testimony was to the effect that the Grievant would get animated and irritated, and impersonated Officer A's voice, mocking her "slightly". There was other testimony that the Grievant seemed frustrated and angry with her mistakes, and was critical of her for putting everyone at risk. (Testimony of Officer C)

Officer A admitted to numerous mistakes in the course of her work. These incidents provoked and frustrated the Grievant. He then exhibited unacceptable behavior as a Police Officer, particularly in mocking her. Officer A asked the Grievant to "call out" her mistakes. But in the course of doing so, the Employer is correct in its contention that the Grievant "cannot insulate himself from discipline by saying that he is incapable of providing feedback to others without using offensive and profane language", expletives and coarse language. Officer A did not consent to be mocked. Her consent to being called out by the Grievant did not give consent to mocking her before other officers. This cannot be accepted as a reason for not disciplining the Grievant with adequate notice.

During seven years of employment, there has been an extensive disciplinary history of the Grievant. This history includes: a written reprimand in January 2010 regarding his refusal to comply with a directive to stop using a plastic cup holder; a written reprimand and warning on September 17, 2010 regarding a speeding matter, a one-day suspension without pay; a warning on August 3, 2011 for insubordination for failing to comply with a directed patrol assignment; and a July 2013 arbitration award denying a grievance related to the one day suspension where the arbitrator found no merit to his argument, and a warning from the City regarding further acts of misconduct that would warrant steps according to the scale of progressive discipline. Additionally the Grievant had been adequately warned in performance evaluations on February 5, 2009 and August 4, 2010 regarding the need to improve his relationship with others in the Department.

With regard to Arbitrator Carroll Daugherty's seven tests for just cause, there is evidence to answer each of the test questions positively.

First, with regard to the City giving notice of possible or probable consequences of the Grievant's disciplinary conduct, there were the various notices cited above. There clearly was adequate forewarning of the consequences of the Grievant's disciplinary conduct. This occurred in connection with prior disciplinary actions, the performance evaluations including the evaluations he signed and dated on August 5, 2010 and October 16, 2011, as well as reprimands, training, and communications to improve relationships with other officers.

Second, with regard to the test question regarding reasonable rule of order by the Employer, the Department had a strong interest in the orderly, efficient and safe operation of the Police Department, and sought to improve the performance of the Grievant with specific directives. The Policy on Harassment and Discrimination in the Workplace of January 1, 2000 is a reasonable and necessary policy, although the City Administrator testified to a need to update this particular Policy. The purpose of the Policy "is to maintain a healthy work environment in which all individuals are treated with respect and dignity and to provide procedures for reporting, investigating, and resolving complaints of harassment and discrimination." Federal law requires

protection of classes of persons based on race, color, sex, religion, age, disability and national origin, as stated in the Policy.

The third and fourth test questions concern whether the Employer made an effort to discover if the Grievant violated or disobeyed a rule or order of management, and whether the Employer conducted a fair and objective investigation. The Employer commissioned an investigation before administering the discipline of the Grievant. This was a reasonable effort to discover whether the Grievant did in fact violate the policy on harassment and discrimination, and whether there was a violation of the anti-retaliation provision of the Policy. Investigator Ische conducted 18 interviews with relevant parties, and produced an 80 page report with exhibits, findings, conclusions, and documentation of interview summaries. This was a reasonable effort to discover whether the Grievant did in fact violate or disobey the Policy and Department directives to improve his relationship with other officers in the Department. The Investigation was a fair and objective effort by the Investigator despite the lack of follow up with second interviews to pursue matters where parties made contradictory statements. This is one improvement to the investigative process, but the overall investigation met the test of fairness and objectivity. The Investigator concluded that the Grievant had not committed some acts of misconduct, sustained other misconduct charges, and exonerated him of still others.

The undersigned did not reach some of the same conclusions as the Investigator, because of the benefit of subsequent sworn testimony from 18 witnesses during the four days of the hearing, the introduction of further evidence, questioning of each witness and follow-up testimony, and the post-hearing briefs prepared by attorneys representing each party. All of this supplemented information from the Investigation Report and compensated for the lack of follow-up, second interviews. There was sufficient evidence and acknowledgements, some from the Grievant himself, that he had committed acts of misconduct in violation of the City's Harassment and Discrimination Policy.

With regard to the fifth question as to whether the "judge" obtained substantial evidence that the employee was guilty of violating the Harassment and Discrimination Policy, this was detailed in the Investigation Report. The Investigator concluded the Grievant had mocked Officer A, and

had committed other misconduct that violated the Department's Harassment and Discrimination in the Workplace Policy No. 111. The Investigator obtained sufficient substantial evidence through the 18 interviews that the Grievant had violated the Policy on Harassment and Discrimination. She sustained some charges, and did not sustain others, and exonerated the Grievant of some charges because of inadequate evidence, or evidence to the contrary of the charge. And importantly, there was witness testimony that the Grievant mocked Officer A.

The sixth test question was met with regard to the equal treatment and support for the Employer applying its rules, order and penalties evenhandedly and without discrimination. There was not sufficient evidence of discriminatory or unequal treatment of the Grievant.

The seventh question asks if the discipline administered by the Employer was reasonably related to the seriousness of the Grievant's *proven* offense and the record of the Grievant in his service to the Employer. There was sufficient proof in the forms of documentation and testimony by other interviewees and witnesses that he mocked her, and committed acts of misconduct and poor behavior in his performance as a Police Officer. The discipline was also related to the record of his prior discipline, but there are circumstances in this case that will modify the award.

There are attenuating circumstances relevant to this grievance. First, Officer A acknowledged committing numerous mistakes in the performance of her police responsibilities. These numerous errors in judgment and performance aggravated, provoked and at times exasperated the Grievant, who then sometimes reacted with a short temper, expletives aimed her way, and post-incident discussions with other officers in the Department. Some of Officer A's mistakes endangered Department officers and others. Other officers testified to Officer A's mistakes, putting others at risk, and that this is widely known. (Testimony of Officer C) Examples included Officer A forgetting spot lights at night when stopping a vehicle, her performance during the St. Paul drug warrant incident, the Inver Grove Heights incident at the AmericInn, going to a domestic call alone to avoid embarrassment of the party who called her on her cell phone when she should not have taken that risk, the times when she pointed a gun toward the Grievant when on calls, and tensions with other officers.

Second, typically these mistakes by Officer A were reported by the Grievant to Department Sergeants, who did not immediately respond to the report, and did not effectively remedy the situation. Five Police Officers and two Sergeants testified about the failure to take remedial action after the Department was notified of mistakes and performance issues committed by Officer A. The Police Chief testified that concerns were raised to him about Officer A's safety skills. He also testified that some of Officer A's allegations were unfounded. (Testimony of the Police Chief) Officer A acknowledged her need to improve performance. Tensions built, further aggravating the situation. The Grievant, as well as Officer A, reported feeling unsafe. Officer A testified that she was suspicious that the Grievant would not back her up on calls during the shifts where they worked together. The Grievant testified that he feared that during certain incidents his life was in danger. In two incidents Officer A made mistakes in pointing her gun in the direction of the Grievant.

Third, multiple officers testified that the culture of the Department included officers talking regularly behind each others' backs. This included other officers in addition to the Grievant criticizing Officer A's work performance. It is unclear to the undersigned if the Department management communicated directives to all Department personnel about constraints on this practice.

These relevant circumstances warrant some consideration as a factor in the award, reducing some amount of suspension time.

The second major charge concerned the alleged violation of the City's anti-retaliation language in the Harassment and Discrimination in the Workplace Policy 111.. This Policy language reads as follows (Employer Exhibit One, page five):

Retaliation against any department member or other employee of the City of Mendota Heights for filing a harassment or discrimination complaint, or for assisting, testifying, or participating in the investigation of such a complaint is illegal and is prohibited by this police department and by federal statutes.

Retaliation is a form of department member misconduct. Any evidence of retaliation shall be considered a separate violation of this policy and shall be handled by the same complaint procedures established for harassment and discrimination complaints.

Monitoring to ensure that retaliation does not occur is the responsibility of the Chief of Police, supervisors, and the appropriate internal investigative authority.

With regard to the alleged retaliation against Officer B by the Grievant, there is not any evidence except for Officer B's own comments to two other Department officers, including the complainant, that the Grievant cornered him in the locker room and called him a "rat and a mole". The Grievant denies ever making such a comment. No other testimony or evidence was presented by the City regarding this comment. The Police Chief indicated in his testimony that he had no other evidence of retaliation than what Officer B offered. The Investigator finally ascribes this retaliation was committed by the Grievant based on the Investigator's assessment of motives of the Grievant and Officer B.

The hearing brought out further evidence to supplement the Investigator Report, leading to a different assessment of the credibility of the witness. Six Department officer witnesses in the four days of hearing testified that Officer B had a history of telling stories and exaggerating about matters in the Department. One officer testified that Officer B sometimes "stirs the pot", "makes up stories", and "lies". Another testified that he "stirred the pot" and exaggerated about matters regularly. A third Officer testified that he "stirs conflict". A fourth Officer testified that he "exaggerates, causes trouble, and talks negatively about Officer A as well". A fifth Officer testified that Officer B "exaggerates, stirs up trouble". A sixth officer testified that Officer B was "upset about this" and "animated" when he told this witness about the Grievant's alleged comment. The officer also testified that he knows that Officer B exaggerates, but he thought he told the truth with regard to this comment, although he was surprised that the Grievant would confront Officer B and use the term "rat".

Officer B also had denied allegations regarding his own past conduct that in fact have been proven differently by credible evidence. Officer B denied that the Grievant had been involved in the Carlos Avery wildfire in 2000, yet the Grievant provided a letter of commendation dated

October 10, 2000 from Officer Ronald Rollins of the Lindstrom, Minnesota Police Department to the Grievant and the Mendota Heights Police Chief regarding the Grievant's service during that fire. (Testimony of the Grievant) This letter gave a detailed explanation of his involvement on October 23, 2000. (Union Exhibit Five)

Another early 2013 incident regarding Officer B is relevant to his credibility. Officer B denied parking a squad car in tight proximity to another squad car so that the officer assigned to that vehicle could not access it. The Police Chief moved the car assigned to the officer, after the latter reported this incident to the Chief. A video was later produced showing Officer B inconveniently parking this car. He was later told to stop doing this prank. As Sgt. Bilko proved in many episodes petty pranks invariably backfire on the perpetrator!

The accuracy of Officer B's allegations about the "rat and mole" comment that he attributed to the Grievant is in question in light of both the prank incident, and the numerous officers testifying about his story-telling, made up stories, and frequent exaggerations. There is no other evidence to corroborate his retaliation allegation, other than that Officer B repeated the allegations to others. Thus, there is insufficient evidence of any violation by the Grievant of the anti-retaliation provision of the Harassment and Discrimination Policy relative to comments made to Officer B.

The Employer has not indicated the extent to which the four-day disciplinary suspension without pay is attributable to this retaliation allegation by Officer B. Therefore the arbitrator will assign a reversal of some part of the four-day suspension after giving this matter its due weight in the award.

#### **THE AWARD:**

For the reasons specified above, the undersigned is persuaded that the Grievant was disciplined for just cause with regard to the violation of the City Policy on Harassment and Discrimination in

the Workplace, as provided in Article VII and Article X of the 2010-2011 Master Labor Agreement. There was no violation of the anti-retaliation provision of the Policy by the Grievant. In consideration of this, and the circumstances surrounding the violation of the Policy, the four day suspension without pay is reduced to two and one-half days, and the City is to make the Grievant whole for the remaining one and one-half days.

It is assumed that the Grievant will complete the training sessions and reports specified in the May 17, 2012 Settlement Agreement dismissing the lawsuit by the Grievant and LELS against the City and Chief Aschenbrener over the training sessions. This arbitration decision does not affect that Settlement Agreement.

Issued and ordered on this 22nd day of October 2013

Richard J. Dunn  
Arbitrator

Note: I shall retain jurisdiction in this matter for a period of fourteen (14) calendar days from the date of the Decisions to address any questions or problems regarding these decisions.