

IN THE MATTER OF ARBITRATION BETWEEN

Minneapolis Police Officers Federation
Minneapolis, Minnesota
Union/Federation

and

City of Minneapolis, Minnesota
Police Department
Employer/City/Department

OPINION AND AWARD

██████████ Grievance
Officer Mukhtar Abdulkadir, Grievant

Award Dated: May 18, 2012

Date and Place of Hearing:

April 24-25, 2012
Offices of the City
Minneapolis, Minnesota

Date of Receipt of Post Hearing Briefs:

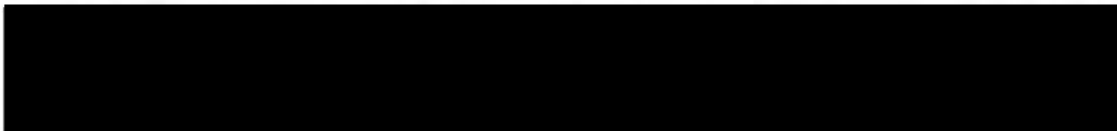
May 7, 2012

APPEARANCES

For the Federation: Brooke N. Bass, Esq.
Bruno Law Offices
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Minneapolis, MN 55416

For the Employer: Trina R. Chernos, Esq.
Assistant City Attorney
Minneapolis City Attorney's Office
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ISSUE



WITNESSES TESTIFYING

Called by the Employer

Scott Gerlicher, Deputy Chief
Minneapolis Police Department

Timothy J. Dolan, Chief
Minneapolis Police Department

Called by the Federation

Lt. Robert Kroll,
Vice President
Police Officers Federation of Minneapolis

Mukhtar Abdulkadir,
Police Officer 13.43 - Personnel Data
Minneapolis Police Department

JURISDICTION

The issue in grievance was submitted to the Arbitrator for a final and binding resolution under the terms set forth in Article 5, Section 5.4, Subd. 3 – Step Three – Regular Arbitration. The Arbitrator was selected by direct appointment of the parties.

The parties mutually stipulated at the hearing that the grievance had been properly processed through the required steps of the grievance procedure without resolution, and that it was properly before the Arbitrator for a decision.

At the hearing the parties were given full and complete opportunity to examine and cross-examine witnesses and present their proofs. Final argument was provided through post hearing briefs which were received by the agreed upon deadline. With the receipt of the post hearing briefs by the Arbitrator, the record in this matter was closed. The issue is now ready for determination.

ARTICLE 4 - DISCIPLINE

Section 4.1 The City, through the Chief of the Minneapolis Police Department or his/her designee, will discipline employees who have completed the required probationary period only for just cause. ...

* * * *

Section 4.4 – Investigatory Interviews

(a) Before taking a formal statement from any employee, the City shall provide to the employee from whom the formal statement is sought a written summary of the events to which the statement relates. To the extent known to the City, such summary shall include: the date and time (or period of time if relating to multiple events) and the locations(s) of the alleged events; a summary of the alleged acts or omissions at issue; and the policies, rules or regulations allegedly violated. Except where impractical due to the immediacy of the investigation, the summary shall be provided to the employee not less than two (2) days prior to the taking of his/her statement. If the summary is provided to the employee just prior to the taking of the statement, shall be given a reasonable opportunity to consult with a Federation representative before proceeding with the scheduled statement. [sic]

* * * *

(c) Nothing herein shall preclude an investigator, whether during or subsequent to the taking of a formal statement, from soliciting information which is beyond the scope of the pre-statement summary but which relates to information provided during the taking of the statement and which could form the basis of a disciplinary action.

* * * *

ARTICLE 5 – SETTLEMENT OF DISPUTES

* * * *

Section 5.4 – Grievance Procedure. Grievances shall be resolved in the manner set out below. The City will cooperate with the Federation to expedite the grievance procedures to maximum extent practical.

* * * *

Subd. 3 – Step Three – Regular Arbitration.

* * * *

The arbitrator shall render a written decision and the reasons, therefore resolving the grievance, and order any appropriate relief within thirty (30) days following the close of the hearing or the submission of briefs by the parties. The decision and award of the arbitrator shall be final and binding upon the City, the Federation and the employee(s) affected.

The arbitrator shall have no authority to amend, modify, nullify, ignore, add to, or subtract from the provisions of this agreement. The arbitrator is also prohibited from making any decision that is contrary to law or to public policy.

* * * *

Section 5.11 – Past Practices. Evidence of custom and past practice may be introduced for the following purposes:

- (a) to provide the basis of rules governing matters not included in the written contract;
- (b) to indicate the proper interpretation of ambiguous contract language; or
- (c) to support allegations that clear language of the written contract has been amended by mutual action or agreement.

The extent to which such evidence of custom and past practice shall be considered to bind the parties is governed by generally accepted principles of labor relations applicable to the purpose for which the evidence is offered.

In addition the above contract language the City has promulgated certain Rules, Regulations and Policies that bear on the issue as follows:

Civil Service Commission Rule 11.03 (B)18.
City of Minneapolis Police Department Code of Conduct Section 5-102.01
Minnesota Law Enforcement Code of Ethics (08/01/91).
Minneapolis Police Department Discipline Matrix (Rev. October 2009)

They read in relevant part as follows:

CIVIL SERVICE COMMISSION RULE 11.03 (B) 18

The two primary causes for disciplinary action and removal are substandard performance and misconduct.

* * * *

(B) Misconduct

The following activities are examples of misconduct which may be cause for disciplinary action.

* * * *

18. Violation of department rules, policies, procedures or City ordinance.

CITY OF MINNEAPOLIS POLICE DEPARTMENT CODE OF CONDUCT
SECTION 5-102.01
MINNESOTA LAW ENFORCEMENT CODE OF ETHICS (08/01/91).

"As a Minnesota Law Enforcement Officer, my fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional rights of all to liberty, equality and justice.

I will keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn, or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in

my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

I will never act officiously or permit personal feelings, prejudices, animosities or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear of favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of the police service. I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession...law enforcement.

MINNEAPOLIS POLICE DEPARTMENT

Discipline Matrix

Rev. October 2009

Minneapolis Police Department
Discipline Matrix
Rev. October 2009

Code of Ethics		Range	Mitigating	Baseline	Aggravating
5-102	DWI: First offense	C	10 hours	30 hours	50 hours
	Criminal activity, domestic assault, interfere with 911 call, sex crimes, theft, discharge weapon in populated area, narcotics, steroids, repeat DWI or any felony crime	D		Termination	
5-102	Identify self as officer with intent to gain special consideration	D	30 hours	40 hours	Termination
5-102	Misuse of police powers: search warrants, administrative subpoenas, credit checks, etc	D		Termination	
5-102, 3-811	Working off-duty while still on city time	D		Termination	
Discretion		Range	Mitigating	Baseline	Aggravating
5-103, 7-701	Inappropriate pat frisks, improper towing of vehicles	B	WR	10 hours	20 hours
5-103, 9-201, 9-205	Inappropriate search of person or car	C	WR	20 hours	30 hours
5-103	Inappropriate search of house	D	10 hours	30 hours	40 hours
5-103	Inappropriate/aggressive arrest	D	10 hours	40 hours	Termination
Code of Conduct/Professional Code of Conduct		Range	Mitigating	Baseline	Aggravating
5-105.10	Unprofessional conduct, indecorous language (not protected class)	B	WR	10 hours	20 hours
5-106, 3-302	Remain on duty until relieved, put self on detail without supervisor permission	B	WR	10 hours	20 hours
5-105.3	Accidental Firearm Discharge on Duty with no resulting injuries (excluding malfunction)	B	WR	10 hours	20 hours
5-105.18	Association with known criminals	C	20 hours	40 hours	50 hours
5-105.1	Failure to take appropriate police action	C-D	20 hours	40 hours	Termination
5-105.15	Language: biased based on protected class	D	30 hours	40 hours	Termination
5-105.20	Possession of duty weapon or other firearm while consuming alcohol, no criminal action	D	20 hours	40 hours	50 hours
5-105, 5-102	Referral to outside business with personal benefit to employee	D		Termination	
5-101.02	Failure to meet minimum job qualifications (some discretion on OFP with Leutenberg Amendment)	D		Termination	
Reports		Range	Mitigating	Baseline	Aggravating
5-306	Failure to complete CAPRS force screen	B	WR	10 hours	20 hours
5-307	Failure of supervisors to complete force review report in compliance with policy	C	WR	10 hours	20 hours
5-306	Failure to report use of force in CAPRS	D	30 hours	40 hours	Termination
News Media		Range	Mitigating	Baseline	Aggravating
6-202	Responsibility of MPD employees regarding news media	B-D	10 hours	20 hours	Termination

FACTUAL BACKGROUND

Involved herein is a grievance [REDACTED]

[REDACTED] for violation of Minneapolis Civil Service Commission Rule 11.03 (B)18

and Minneapolis Police Department Rule 5-102 – Code of Ethics. The Employer

conducted an Internal Affairs investigation, and a review by a Discipline Panel. The Discipline Panel recommended that a violation of MPD 5-102 Code of Ethics, [REDACTED] be sustained. A Loudermill hearing was conducted by the Discipline Panel with the Grievant and his Union Representative present. At the Loudermill hearing the Grievant was provided the opportunity to present his side of the story, and describe any mitigating factors that he believed should be considered. Following the Loudermill hearing the Discipline Panel affirmed its finding to Chief Dolan that the Grievant had violated MPD 5-102 Code of Ethics [REDACTED]

13.43 - Personnel Data

The Employer is a municipal corporation chartered under the laws of the State of Minnesota. The Federation is the exclusive bargaining representative of all sworn law enforcement personnel in the City except those appointed to serve in the positions of Chief of Police, Assistant Chief of Police, Deputy Chief and Inspector. At all times relevant to this grievance the Grievant was a member of the Federation and covered by the terms of the Collective Bargaining Agreement. The Collective Bargaining Agreement became effective on January 1, 2009 and continued in full force and effect through December 31, 2011.

13.43 - Personnel Data

[REDACTED] the Grievant [REDACTED] a Patrol Officer assigned to [REDACTED]. He was hired on February 4, 2008 by the City as a part time Community Service Officer. On January 18, 2009 he was hired as a full time Police Officer. During his approximately two year tenure as a Police Officer

the Grievant was the subject of three complaints [REDACTED]
[REDACTED], and
he incurred no discipline for them. The third complaint underlies the Grievant's
[REDACTED] and the instant grievance. The record of this hearing does not show any
discipline on the Grievant's record prior to [REDACTED] the subject of the
instant grievance.

The matter that gave rise to the Grievant's [REDACTED] 13.43 - Personnel Data relates to his arrest on charges of
felony assault in the second degree, felony terroristic threats and misdemeanor domestic
assault. Those charges arose out of an incident that occurred on January 20, 2011. In that
incident the Grievant is charged with assaulting [REDACTED]

The Grievant and [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED]. The Grievant and [REDACTED]
are both of Somali descent, although from different tribal backgrounds. He is
approximately 13 years older than [REDACTED]. At the time of the incident they lived in a
home in [REDACTED].

At the time of the January 20, 2011 incident the Grievant was working nights, and [REDACTED]
[REDACTED] was taking classes during the day [REDACTED]
[REDACTED]. She also was working [REDACTED] but quit that job on January 7, 2011. In
this schedule they shared duties of taking care of their children. Occasional help was also
provided by [REDACTED] mother.

The evening of January 19, 2011 the Grievant and [REDACTED] were discussing her need for cosmetic dental work that would cost approximately \$7,000. Initially the Grievant agreed that she could go ahead with that work, but later that evening determined that they could not afford it at that time. [REDACTED] protested, and testified that she felt "total betrayal". An argument between them ensued. At the hearing [REDACTED] testified that she was depressed, and that the Grievant suggested that she see a doctor for help, but that she denied she had any problem. She went on to testify that she was using illegal drugs at the time. After the argument they both went to bed.

The record presents conflicting stories about what happened the next morning. It is not disputed, however, that the Grievant awoke first, and was in the process of packing his things in preparation for leaving when he was approached by [REDACTED]. According to a statement [REDACTED] subsequently gave to the Anoka County Sheriff's Office, she reported that the Grievant announced that he was leaving and taking the children. In her testimony at the arbitration hearing, however, she testified that she told the Grievant that she was leaving and was taking the children to her mother's home. In any event, it is not disputed that another argument ensued. In a report prepared by the Anoka County Sheriff's Office [City Exhibit 15] [REDACTED] stated that the Grievant was upset, grabbed her by the shoulders and threw her to the couch. That report then continues by stating that she then went to the bedroom upstairs and sat on the edge of the bed. The Grievant then was reported to have entered the room and punched her in the left side of her abdomen by her ribs. He then was reported to have gotten on top of [REDACTED] and put a pillow over her head while she was screaming. The report continued by stating that one

of the couple's children had come to the room and was screaming at the Grievant to stop.

13.43 - Personnel Data reported that she was able to get free and ran to closet as she was followed by the Grievant. The report further states that while inside the closet the Grievant took a holstered hand gun that was on a shelf, removed it from the holster and hit her with the butt of the gun causing bruises. The report states that 13.43 - Personnel Data then left the closet and went to bathroom. The report continues by stating that about 12:30 PM 13.43 - Personnel Data left the home and went to the Columbia Heights Police Station. She went there because she knew of that location inasmuch as her mother lived a block or so away. She requested to see an officer, but left before that was done. No evidence confirming that visit to the Columbia Heights Police Department was found in the record.

13.43 - Personnel Data is then reported to have gone to her classes. She was not able to concentrate, however, and went to a McDonald's where she ate. She is then reported to have called home, received no answer, and drove herself there. Upon arriving at the home she went to bed at approximately 1:30 PM. She testified at the arbitration hearing that she took some illegal drugs she kept in a Tylenol bottle before going to bed. Subsequently, at about 4:00 PM the Grievant awakened her. The Anoka Sheriff's Department report continues by stating that an argument resumed with the Grievant stating that he was leaving her. 13.43 - Personnel Data testified at the hearing that she thought she needed to have something incriminating on the Grievant in order to have an advantage in a subsequent divorce proceeding should that occur. She accused him of seeing other women. In her report subsequently made to the Anoka County Sheriff's Office 13.43 - Personnel Data stated that she was assaulted with kicking and slapping by the Grievant. She described their

relationship as violent. She stated that the Grievant had previously assaulted her and pointed his gun at her.

After being awakened by the Grievant [REDACTED] then left the home and went to her parents' home, where her 18 year old sister also lived. [REDACTED] testified that her sister opined that if she and the Grievant were divorced that he [the Grievant] would gain custody of the children. [REDACTED] and her sister then returned to the Columbia Heights Police Station. Upon discussing that matter with police officers there, it was determined by them that the incident occurred outside of the jurisdiction of the Columbia Heights Police Department. The Anoka County Sheriff's Office was notified, and [REDACTED] and her sister were subsequently transported there by Sheriff's deputies.

A Detective at the Anoka County Sheriff's Office took a statement from [REDACTED] and photographed the injuries to the right side of her face. The Detective's report of the interview with [REDACTED] stated that she was "quite visibly upset, emotional, crying and stated that the incidents were her fault".

[REDACTED] signed a "consent to search" form and the Anoka County Sheriff's Office conducted a search of the residence of [REDACTED] and the Grievant in order to locate the gun that was purportedly used in the assault. The gun was located in the residence, but in a duffel bag in the laundry and not in the closet where the alleged assault is reported to have taken place.

Shortly after making her statement to the Anoka County Sheriff's Office [REDACTED] significantly changed her recollections of what had happened. She testified that she had been high on drugs when she made the first statement, and had subsequently realized that she had made a serious mistake. She went to the Sheriff's Office and the Anoka County Attorney's Office and recanted all the accusations she had previously made against the Grievant. She also went to the Minneapolis Police Department First Precinct and attempted to advise them that she had lied. Personnel there told her that Internal Affairs would contact her, but they did not. There is no evidence in the record of this case supporting her testimony that she recanted her statement made to the Anoka County Sheriff's Department or that she went to the Minneapolis Police Department First Precinct and stated that she had made false charges against the Grievant. On September 9, 2011, after having engaged legal counsel, she prepared and signed an affidavit recanting her accusations. In the affidavit she stated that on the date of the incident she was high on drugs, and after the confrontation with the Grievant she went into the bedroom and "hit myself in the head with [an] alarm clock".

In April, 2011 [REDACTED] saw a doctor who advised that she was depressed. In May 2011 she attempted suicide. Following her attempted suicide she completed a 30-day residential drug rehabilitation program. She testified at the arbitration hearing that she is now clean and attending two Narcotics Anonymous and one Alcoholics Anonymous meetings each week and has a sponsor. In her affidavit she went on to state "To be clear, as you can see from my statement today as I am clean and sober, Mukhtar never hit me;

he never threatened to kill me nor said anything threatening; he never pointed a gun at me or hit me with a gun; he never assaulted me in any way”.

On January 21, 2011 the Anoka County Attorney's Office charged the Grievant with felony assault in the second degree, terroristic threats, and misdemeanor domestic assault. The Grievant was taken into custody on that same date. He was released on bond and issued a Domestic Abuse No Contact Order to not contact [REDACTED] or children or possess a firearm. That order was modified on February 16, 2011 to eliminate the non possession of a firearm requirement in view of his job as a Police Officer with the City of Minneapolis, and also modified to permit limited visitation with his children.

On January 25, 2011 the Anoka County Sheriff's Office received an anonymous tip that if they went to an apartment building where [REDACTED] and the Grievant had previously lived they could locate a neighbor who would inform them that the Grievant had previously accosted [REDACTED]. Detectives went to that location and located the neighbor, who confirmed that she had seen the Grievant physically force [REDACTED] back into the apartment when she attempted to leave. The neighbor did not testify at the hearing, but a written statement from the neighbor was taken by the Anoka County Sheriff's Office Detective who investigated and was entered into the record of this hearing. The anonymous informant also supplied Anoka County Sheriff's Detectives with an email dated January 22, 2011 that indicated the sender, likely [REDACTED] [REDACTED] feared for [REDACTED] safety. Attached to the email were seven photos of [REDACTED] that purported to show injuries she suffered at the hand of the Grievant. The Detectives

were not able to confirm that the injuries shown in the photos were actually on [REDACTED] body. [REDACTED] sister did not testify at the hearing, nor did any other member of her family.

Upon learning of the Grievant's arrest by Anoka County the Minneapolis Police Department [REDACTED]. He was charged with violating MPD Policy 5-102 Code of Ethics at level D. Level D is the highest level of the four disciplinary categories utilized by the City. An Internal Affairs investigation was conducted and completed while the criminal charges against the Grievant were pending. The Grievant's [REDACTED] was not interviewed in the course of that investigation.

A Discipline Panel reviewed the Internal Affairs Investigation and found the Grievant had violated MPD Policy 5-102 Code of Ethics. A Loudermill hearing was held [REDACTED]

[REDACTED] 13.43 - Personnel Data The Union filed the instant grievance on March 31, 2011. It proceeded through the steps of the grievance procedure without resolution, and was heard in arbitration on April 24 and 25, 2012.

On October 17, 2011 the Assault -2nd Degree-Dangerous Weapon charge and the Terroristic Threats-Reckless Disregard Risk charges were dismissed by the Court. The Grievant pled guilty to the misdemeanor Disorderly Conduct-Offensive/Abusive/Noisy/Obscene charge on October 17, 2011, but adjudication was stayed conditioned on one year of probation, domestic abuse counseling, no same or similar offenses, community service in lieu of court costs, confinement for time served,

and following the conditions of his probation. That period of probation and stay of adjudication will end on October 16, 2012. The no contact order that was issued on February 16, 2011 was vacated on October 17, 2011.

POSITION OF THE PARTIES

Position of the Employer

The City claims that it had just cause [REDACTED] 13.43 - Personnel Data [REDACTED]. It seeks an order that the Arbitrator [REDACTED] deny the grievance. In support of this position the City offers the following arguments:

1. The Minneapolis Police Department has just cause [REDACTED]. [REDACTED] The violation of policy [REDACTED] is reasonable and related to maintaining the public trust in the Department. The Grievant was aware of the rules and the consequences for violating them.
2. Progressive discipline is not required by the labor agreement or The Civil Service Commission Rules. [REDACTED]
3. The Grievant violated MPD P/P 5-102, Code of Ethics. The City presented extensive proof that the Grievant committed misconduct [REDACTED]. As a result of the physical assault on [REDACTED] the Grievant was criminally charged and ultimately pled guilty to the crime of disorderly conduct. His conduct is clearly unprofessional and offends the ethical standards of the MPD.
4. The Grievant's conduct was egregious. [REDACTED] reported that the Grievant punched her in the ribs, struck her in the face with his gun, threw her on the couch, held a pillow over her face, kicked her, and slapped her.
5. [REDACTED] had several opportunities during the period she was reporting the incident to Anoka County Deputies to change her statement, but did not. No law enforcement professionals or Alexandra House noted any signs of alcohol or drug use. Chief Dolan testified that his service in the Narcotics Unit caused him to believe that [REDACTED] could not have been functioning at work with the amount of drugs she claims to have