

**MINNEAPOLIS POLICE DEPARTMENT
INTERNAL AFFAIRS COMPLAINT FORM #3401**

COMPLAINT INFORMATION

INTERNAL AFFAIRS CASE NUMBER: 14-22453	CCN: 14-038257	DATE OF INCIDENT: 8-13-14	TIME OF INCIDENT: 1132
LOCATION OF INCIDENT: Hennepin County District Court	DATE OF COMPLAINT 8-15-2014	REFERRAL METHOD: Internal	
COMPLAINANT'S NAME (LAST, FIRST, MIDDLE) 13.43 - Personnel Data	SEX M <input type="checkbox"/> F <input type="checkbox"/>	RACE:	DATE OF BIRTH:
HOME ADDRESS:	CITY / STATE / ZIP:	TELEPHONE:	

POLICY INFORMATION

POLICIES ALLEGED TO BE VIOLATED:
3-706, Failure to appear in court or standby violations, any criminal case.

ACCUSED EMPLOYEE(S)

NAME/BADGE:
Officer Christopher Cushenbery, Badge #1375

COMPLAINT ALLEGATIONS

It is alleged that Officer Cushenbery did not appear in court for testimony after he was issued a subpoena.

Officer Cushenbery did sign and return the subpoena, but when contacted by court personnel to testify, he allegedly stated he had mandatory SWAT training on the date of the trial and could not leave.

Officer Cushenbery allegedly later stated to court personnel that he "messed up" and got the subpoena confused with another subpoena.

RECOMMENDATION
(Preliminary Cases Only)

- ☐ Reckoning Period Expired Before Complaint was Filed
- ☐ No Basis for Complaint
- ☐ Closed Pending Further Information
- ☐ Refer to Precinct with Coaching Documentation
- ☐ Exceptionally Cleared
- ☐ Policy Failure
- ☐ Other

DATE
11/5/14
DATE



MINNEAPOLIS POLICE DEPARTMENT

Internal Affairs Unit
Administrative Case #14-22453
Sgt. Matthew McLean
Date: December 20, 2014

CASE BACKGROUND

This case involves a missed court appearance on the part of Officer Christopher Cushenbery, who was one of two officers involved in the arrest of a juvenile, [REDACTED] who was subsequently charged with 5th Degree Assault after allegedly threatening a classmate at school.

Officer Cushenbery was closest to the exchange of words between the suspect and victim, and was in the best position to testify to exactly what was said.

In court, the victim denied that the defendant's threats made him fearful; rather he testified that the threats made him angry.

The Judge opined that "without further context or corroborating testimony from (the victim), it is difficult for this court to discern whether this was based on fear or something else."

The Judge ultimately acquitted [REDACTED]

The prosecuting attorney in the case, AHCA Adam Tomczik, filed a complaint in the form of a Hennepin County Attorney's Office Report of Non-Compliance with Court Process with the Minneapolis Police Department's Court Liaison Office.

AHCA Tomczik also prepared a memo to this investigator outlining the ramifications of Officer Cushenbery's fail to appear at trial. This memo can be found in Section 7.

CASE INVESTIGATION

MPD CCN 14-038257

On 2-5-2014, Officer David O'Connor, Badge #5269, and Officer Christopher Cushenbery, Badge #1375, submitted MPD CCN 14-038257 for the arrest of [REDACTED] at Edison High School. That report is summarized below:

Officer Cushenbery reported that he was working **13.43 - Personnel Data** at Edison High when he observed [REDACTED] engage in a verbal altercation with Joseph Real. He reported that he then escorted [REDACTED] out of the lunchroom.

After doing so, Officer Cushenbery reported that he engaged in conversation with the victim, Joseph Real, who told Officer Cushenbery about a previous incident involving threats by [REDACTED] towards him.

Officer Cushenbery reported that at the time Joseph Real was telling him this, Joseph Real had "a very scared demeanor in his voice and actions" and that he "was tearing up from his eyes to the point that tears were falling from his face."

Officer Cushenbery reported that he "was not close enough to hear what the verbal altercation was about at the time of the incident." Officer Cushenbery also noted that he was "approximately 30 feet away."

[REDACTED] was issued a citation at the school for 5th Degree Assault, and his mother came to the school to pick him up.

Subpoena, 260B.171- Juvenile Records

The Hennepin County Attorney's Office issued subpoena number 20129846 for MPD CCN 14-038257 to Officer Cushenbery with a Trial Date of Wednesday, 8-13-2014.

The subpoena advised that Officer Cushenbery was on standby from 1000 to 1200 hours.

Officer Cushenbery signed and returned the bottom portion of the subpoena, dated it 7-4-2014, and provided his cell phone of **13.43**

This cell phone is the same number that is listed in WorkForce Director as a contact number for Officer Cushenbery.

Subpoena, Jarvaughn Douglas Washington

The Hennepin County Attorney's Office also issued subpoena number 10220750 for MPD CCN 13-302583 to Officer Cushenbery with a Trial Date of Monday, 8-11-2014.

The subpoena advised that Officer Cushenbery was on standby day two from 1000 to 1200 hours.

Note that the dates for the two subpoenas are two days apart.

Hennepin County Attorney's Office Report of Officer Non-Compliance with Court Process

Assistant Hennepin County Attorney Adam Tomczik referred this instance of missed court to the MPD Court Liaison Office, via the Hennepin County Attorney's Office "Report of Officer Non-Compliance with Court Process" on 8-15-2014.

This form can be found in Section 7, and is summarized below:

According to this report, Officer Christopher Cushenbery:

- Did not appear for Court in response to a trial notice, subpoena, or other request by the County Attorney's Office
- The court case number was 27-JV-14-1134
- The court date was August 13, 2014
- The reason for the court appearance was a Court Trial
- The form of notice was a subpoena

The timeline for the events is below:

2-5-2014: Officer Cushenbery arrested and cited [REDACTED] for 5th Degree Assault.

6-6-2014: AHCA Adam Tomczik sent Officer Cushenbery a subpoena for this case.

7-4-2014: Officer Cushenbery signed the subpoena acknowledgement and mailed it to the County Attorney's Office.

8-13-2014: In the morning hours, Hennepin County Case Management Assistant Jenna Stringer called Officer Cushenbery to inform him that the case was going to trial and the prosecutor needed him to testify. Officer Cushenbery told Jenna Stringer that he could not come to court because he was doing SWAT training and he could not leave. Officer Cushenbery told her that he believed the [REDACTED] trial was scheduled for August 11.

8-13-2014: In afternoon of August 13, Hennepin County Case Management Assistant Deana Smith called Officer Cushenbery. He apologized for not being present to testify. Officer Cushenbery told Deana Smith that he believed the [REDACTED] trial was scheduled for tomorrow, (August 14)

Hennepin County "Subpoena Plus" Documentation

Hennepin County uses a program called "Subpoena Plus" to track the administrative details of the subpoena process, and also to keep records of updates and conversations with those under subpoena and administrative staff. This investigator obtain a copy of the "subpoena Plus" documentation relevant to this investigation. The reader is directed to refer to these documents, which are found in Sections 10 and 12.

The notes section shows that on 8-12-14 CMA DeAna Smith left a voicemail for Officer Cushenbery advising him on standby and that the prosecuting attorney may call him to do trial prep.

This document further shows that per the direction of the prosecutor, on 8-13-2014, CMA Jenna Stringer called Officer Cushenbery and spoke to him. He stated he was in SWAT training and could not leave. He stated he thought the trial date was on Monday, August 11, 2014. Officer Cushenbery was advised that the trial date was that day, August 13, 2014, and that the prosecutor needed him to proceed to court.

Officer Cushenbery told Jenna Stringer that he was on security, and was not able to leave. She stated she would contact the attorney, and call him back. Jenna Stringer spoke to the prosecutor, and was told it would be ideal to have Officer Cushenbery testify.

Jenna Stringer left a message with Officer Cushenbery advising him of this, and then contacted MPD Court Liaison Officer Angie Hayden via email to advise her of the situation and get guidance regarding what MPD policy is for this type of issue.

Officer Hayden responded to Jenna Stringer via email and told her (incorrectly) that a "subpoena trumps even mandatory training, unless the officer is the instructor."

NOTE: This investigator spoke with Officer Hayden and went over MPD Policy 3-706 and 3-707 and advised her that this is incorrect; a subpoena is an order from the court, and all parties under subpoena are required to comply with that order, or make timely notification to and receive permission from the issuing authority to be excused from court or to make alternative arrangements.

This investigator also spoke with Lt. Halvorson, who supervises the Court Liaison Function, and advised him of this. Lt. Halvorson has since taken corrective action regarding this.

Jenna Stringer forwarded the above information to the prosecutor, and asked him to let her know if he wanted Officer Cushenbery to be instructed to appear. When the prosecutor returned from court, he advised her that it was too late.

Later on 8-13-2014, DeAna Smith placed a call to Officer Cushenbery, who stated "I messed up" and explained that he got the subpoena mixed up with another subpoena sitting right next to it and thought the trial date was the following day, (8-14-2014)

DeAna Smith recorded that Officer Cushenbery apologized for the misunderstanding. She advised (him that the Court Liaison Officer was notified and (incorrectly) that the excuse of mandatory SWAT training is not valid unless instructing. She also advised him of the potential impact on the case.

Memo from AHCA Adam Tomczik

This investigator contacted the prosecutor in this case, AHCA Adam Tomczik, and asked him to provide his assessment of the failure of Officer Cushenbery to testify in this case. AHCA Tomczik responded to this request in memo form, which is summarized below. The full memo is included in Section 13.

AHCA Adam Tomczik, wrote that Judge Nancy Brasel opined:

“Officer O’Conner testified that he was not close enough to the incident for him to hear what was said, or to hear Joseph’s reaction to Respondent’s words, He testified that when he talked to Joseph, it appeared that he had been crying and was clearly shaken by the incident. Without *further context* or corroborating testimony from Joseph, it is difficult for this court to discern whether this was based on fear or something else.”

AHCA Adam Tomczik wrote, “Officer Cushenbery’s testimony might have provided the ‘further context’ that the judge needed to find [REDACTED] guilty.”

AHCA Tomczik further wrote, “Of course it is impossible to say that Officer Cushenbery’s absence necessarily meant the difference between an acquittal and a finding of guilt. But Officer Cushenbery’s testimony certainly would have strengthened the State’s case. Officer Cushenbery was near the two students when [REDACTED] made the threats. Officer Cushenbery could have testified to the exact language and the demeanor of the two students. It is possible that Officer Cushenbery’s testimony could have convinced the judge to convict [REDACTED].”

Effect of the failure to comply with court process on the outcome of the case:

Judge Nancy Brasel did not grant a continuance. AHCA Adam Tomczik tried the case without Officer Cushenbery.

On August 14, 2014, the Court found that:

1. The State has not proven beyond a reasonable doubt that the Respondant is guilty of the charge of misdemeanor assault in the fifth degree under Minnesota Statute sections 609.224, subdivision 1(1).
2. The petition in this case is DISMISSED.

Case Statements

Statement of Officer Christopher Cushenbery

On 12-18-2014, Officer Cushenbery provided a statement to Internal Affairs, which is summarized below:

Officer Cushenbery was asked if prior to or on August 13, 2014, did he understand the requirements as listed in Section 3-706 of the MPD Policy and Procedure Manual regarding Subpoenas or Trial Notices, employee responsibility, Officer Cushenbery responded, "Yes."

Officer Cushenbery stated he did receive the subpoena for the [REDACTED] case, and did sign and return the bottom portion, with his correct cell phone number.

Officer Cushenbery stated on August 13, 2014, he was providing security [REDACTED] 13.43 - Personnel Data
13.43 - Personnel Data

Officer Cushenbery was shown the Subpoena Plus notations by Jenna Stringer and DeAna Smith and asked if he felt they were accurate, and he stated they were.

Officer Cushenbery was asked what he said in his conversation with Jenna Stringer, and he responded, "I can't tell ya exactly what I said. I just said that I, um, I had a couple subpoenas. Um, one was a, one was a day two and one was a day of subpoena for standby, um, and I told her that I was under the impression if I said Monday then I would imagine that was the 11th. Um, at some point, I just miss, um, you know, two subpoenas. I thought one was one day and the other was the other day. I just mixed my days up when I assigned to do this assistance."

Officer Cushenbery was then asked about his second conversation with DeAna Smith later in the day on August 13, 2014. He was shown her notes, and asked if he thought they were accurate, and he stated, "That sounds about right."

Officer Cushenbery was asked if he appeared in court for the trial of [REDACTED] and he stated, "I did not."

Officer Cushenbery was asked what he was told by Jenna Stringer and DeAna Smith regarding SWAT training vs. court testimony and he responded, "Um, I don't remember exactly what was said. They just kind of let me know it was, um, it was super important that-, or not super. I shouldn't say that. They said it was important that I come in, uh, and I explained to them on normal other days I could actually leave and do that, but it was me and another guy pulling security. And like I said, I apologized to 'em. There wasn't a situation where I could've left that day due to the conflict, and they said they appreciate it. They were going to let the, the Liaison Officer Hayden know and we may or may not hear anything about it."

Officer Cushenbery acknowledged that he had also received a subpoena for the Washington case around the same time as the [REDACTED] case, and when asked why he did not attend court to testify in the [REDACTED] case, he responded, "At home, I have the subpoenas posted. I don't check them every day. I know about the dates that they're going to be on, so I can get close to the time to check it. I didn't check it that day to reconfirm that it was either day two or day one. I was under the impression one was a day one and other was day two. The [REDACTED] was day one. The, um, Jarvaughn Washington was day two. At some point earlier than the 11th or 13th, I

looked at 'em and I got 'em mixed up where I thought [REDACTED] was day two and this Jarvaughn Washington was day one.

Officer Cushenbery was asked if his understanding of the requirements of court appearances versus training or any other police activity has changed as a result of this missed court appearance, and he responded, "Yeah. It really just makes me pay attention to my subpoenas a little bit better. Um, like I said, normally, we'd be able to get out, but it was just a, that specific day I just, I, I couldn't leave this site cause these, I mean these guys are from around the country and, you know, they're doing simulation rounds. There's a lot of terrorist stuff that goes on. We can't leave those guys. So, I mean normally we can leave. I didn't learn anything. Also, I know I have to go to court. I just honestly messed up on my day one, day two on these two subpoenas."

The interview was then concluded.

SUMMARY OF ALLEGATIONS

Investigative Facts

Allegation # 1: It is alleged that Officer Christopher Cushenbery failed to attend court on Wednesday, October 13- 2014 after receiving and signing acknowledgement of a subpoena to do so. If this allegation were found to be true it would violate the following:

3-706 SUBPOENAS OR TRIAL NOTICES - EMPLOYEE RESPONSIBILITY (12/28/01)

(A-B)

If a conflict with the date of trial or specified standby period is known or arises, the employee shall notify the issuing authority during regular business hours on the first business day that the conflict is known to exist. Employees must obtain permission from the Issuing Authority to be excused from court or to make alternative arrangements.

Investigative Facts

- Officer Cushenbery participated in the arrest of [REDACTED] on 2-5-2014 at Edison High School for 5th Degree Assault, and completed MPD CCN 14-038257 for this arrest.
- Officer Cushenbery received a subpoena for the subsequent trial, which was scheduled for Wednesday, October 13, 2014.
- Officer Cushenbery signed, dated and returned the bottom portion of the subpoena, and provided his cell phone number of [REDACTED] 13.43 on the receipt.
- Officer Cushenbery also received a subpoena for a trial date of Monday, October 11, 2014, which he also acknowledged and returned the receipt.
- On 8-12-2014 at 1530 hours, CMA DeAna Smith called Officer Cushenbery and left a voicemail for him, advising that the prosecutor may call him to do trial prep.

- On 8-13-2014 at 1123 hours, CMA Jenna Stringer called Officer Cushenbery and told him he needed to appear in court as soon as possible.
- Officer Cushenbery told her he thought the trial date was Monday, 8-11-2014.
- Officer Cushenbery further stated that he was at SWAT training and could not leave.
- At 1227, AHCA Tomczik learned that Officer Cushenbery was not available to testify, and that at this point it was too late for him to do so.
- At 1605, Officer Cushenbery told CMA DeAna Smith the he "messed up" and confused the ([REDACTED] subpoena) with another (Washington) subpoena.
- On 8-15-2014, AHCA Adam Tomczik filed a report of Officer Non-Compliance with Court Process against Officer Cushenbery.
- AHCA Tomczik provided a memo where he detailed the effect of Officer Cushenbery's failure to testify on the outcome of the court case.
- Judge Nancy E. Brasel, Judge of District Court, Juvenile Division, found on August 14, 2014, that the State had not proven beyond a reasonable doubt that the defendant was guilty of the charge of misdemeanor assault in the fifth degree, and that the petition in this case was dismissed.
- In his statement, Officer Cushenbery admitted that he mixed up two subpoenas and was confused on the dates and the status of the cases.
- Officer Cushenbery admitted that he did not attend to court to testify, despite having received, signed and returned the subpoena in the [REDACTED] case, and being told by court personnel that he needed to come to court
- Officer Cushenbery also expressed a strong sense of duty as part of his assignment 13.43 [REDACTED]

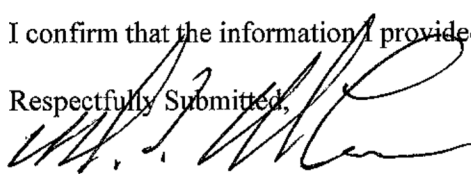
13.43 - Personnel Data

13.43 [REDACTED]

 which contributed to his missed court appearance.
- Officer Cushenbery did take responsibility for missing court, and is now clear on the policy and understands that an order from the court takes precedence over all other assignments or duties,

I confirm that the information I provided in this case is true to the best of my knowledge.

Respectfully Submitted,


 Sgt. Matthew McLean
 Internal Affairs Unit
 Signed, 12-19-2014



Minneapolis
City of Lakes

Police Department

Janeé L. Harteau
Chief of Police

350 South 5th Street - Room 130
Minneapolis, MN 55415-1389

612 673-2735
TTY 612 673-2157

May 15, 2015

Officer Christopher Cushenbery
Third Precinct
Minneapolis Police Department

Officer Cushenbery,

RE: IAU Case Number #14-22453
LETTER OF REPRIMAND

The finding for IAU Case #14-22453 is as follows:

MPD P/P 3-706 Failure to appear in court or standby violations, any criminal case.....SUSTAINED (Category B)

You will receive this Letter of Reprimand. This case will remain a B violation and can be used as progressive discipline for three years until 8/13/2017, which is from the date of incident. The case will remain in the IAU files per the record retention guidelines mandated by State Law.

Be advised that any additional violations of Department Rules and Regulations may result in more severe disciplinary action up to and including discharge from employment.

Sincerely,


Janeé Harteau
Chief of Police


BY:
Matthew Clark
Assistant Chief



Page 2
Officer Christopher Cushenbery
Letter of Reprimand

I, Officer Christopher Cushenbery, acknowledge receipt of
this Letter of Reprimand.


Officer Christopher Cushenbery 2 Jun 2015
Date of Receipt


Inspector Michael Sullivan 2 - June 2015
Date

CC: Inspector Sullivan
Personnel
IAU

MINNEAPOLIS POLICE DEPARTMENT

**Deputy Chief Travis Glampe
Office of Professional Standards
Room 130-City Hall
350 South Fifth Street
Minneapolis, Minnesota 55415
612 673-2445**



MEMORANDUM

05-01-2015

I agree with the final conclusion of the panel in sustaining the policy violation and issuing a letter of reprimand.

I would add the following to the documentation:

The panel specifically lists the mitigating factors, but does not specifically list any aggravating factors. The following aggravating factors should have been specifically mentioned:

- His failure to appear weakened the prosecutor's case, which eventually was dismissed by the judge.
- Officer Cushenberry could have easily alleviated his conflict by merely contacting a supervisor.
- Mixing up the subpoenas should not have been an issue. He was contacted by the prosecutor's office and directed to appear. At that point it shouldn't matter what he thought the dates of subpoenas were. He was ordered to appear and should have done so.

The department recognizes that this policy violation falls on the matrix as a "B" level with a baseline discipline of a 10 hour suspension. Based on all factors, a letter of reprimand is appropriate in this case.