City of Minneapolis

TIME REQUIRED TO RENDER AWARD: 21 DAYS

IN THE MATTER OF THE GRIEVANCE ARBITRATION BETWEEN

City of Minneapolis

and **BMS CASE NO. 99-PA-776**

Police Officers Federation of Minneapolis (Rickey Van Dyke)

NAME OF ARBITRATOR:	George Latimer
Assistant:	*Faith Latimer*
DATE AND PLACE OF HEARING:	July 7, 8 and 14, 1999 City of Minneapolis Public Service Center and Offices of Best and Flanagan
CLOSING BRIEFS RECEIVED:	August 6 and 7, 1999
DATE OF AWARD:	September 3, 1999

APPEARANCES

FOR THE EMPLOYER:	Karen S. Herland, Assistant City Attorney Monique Hawkins Quest Hawkins Kimberly Stanley Sergeant Frank Ellering Sergeant Cari Ann Gerlicher Deputy Chief William James Jones *Sergeant Medaria Arrandondo* Sergeant Bernard Martinson
FOR THE UNION:	Ann E. Walther, Attorney, Best and Flanagan Brian Curtiss Herron Sergeant Irvin W. Olson Amy Jo Van Dyke Merrill Irwin Anderson Rickey Paul Van Dyke

This matter was heard before Arbitrator George Latimer on July 7, July 8 and July 14 1999. Both parties had full opportunity to present evidence in the form of testimony, exhibits, and argument. Upon receipt of the post hearing briefs the record was closed on August 7, 1999.

THE ISSUE

Did the Employer have just cause to terminate the Grievant's employment and if not, what shall the remedy be?

BACKGROUND

The Grievant, Rickey Van Dyke has been employed by the City of Minneapolis as a police officer since 1983. His job in 1998 was beat officer assigned to the 3rd Precinct. On March 26, 1998 a Minneapolis resident named Monique Hawkins filed an Internal Affairs complaint with the Minneapolis Police Department (Employer). The complaint stated that on or about February 26, 1998, Ms. Hawkins saw a man outside her home late in the evening, looking around in a suspicious manner and walking on her property. On the evening of March 11, 1998, Ms. Hawkins' 12 year old son Quest encountered a man (later identified as the Grievant) outside their home. The Grievant told Quest that he was an undercover police officer. Ms. Hawkins recognized the Grievant as the same man she had seen on her property in February and became alarmed. While the Grievant stood outside her door, she called 9-1-1 emergency services and reported what was happening. Police arrived at the complainants home, approximately 20 minutes later, and by the time they arrived the Grievant

had gone. On March 26, Ms. Hawkins again reported seeing the Grievant look at her house as he walked by her living room windows.[1]

The Internal Affairs Unit investigated Ms. Hawkins complaint, and the Grievant was placed on "Relieved of Duty with Pay" status.[2] Because the allegations involved possible criminal violations, a criminal investigation was also conducted by officers in the sex crimes unit of the Department, Sergeants Bernard Martinson and Cari Ann Gerlicher. Criminal charges were brought against the Grievant by the City Attorney of St. Paul on May 18, 1998. The charges were one count of Harassment-Stalking, one count of Misconduct of a Public Official, and three counts of Invasion of Privacy. The Grievant was given another "Relieved of Duty with Pay" letter on the same date.[3] His employment was terminated by the Employer on July 13, 1998 after a disciplinary panel was convened to consider the facts and evidence surrounding the Grievant's alleged misconduct. The stated reasons for termination were violation of the Employer's Code of Ethics and Professional Code of Conduct, which read in part "be exemplary in obeying the laws of the land and the regulations of my department . . ." and "Employees . . . shall refrain from actions and words that bring discredit to the department."[4]

A grievance was filed by the Police Officers Federation of Minneapolis (Federation or Union) on July 21, 1998, which led to this Arbitration proceeding.[5]

A jury trial of the criminal charges was held in November 1998 and the Grievant was acquitted of all charges.[6] In March 1999, after the

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[1] Employer Exhibits 2 and 3.
[2] Employer Exhibit 6.
[3] Employer Exhibits 10 and 12.
[4] Employer Exhibits 20 and 21.
[5] Employer Exhibit 41.

Grievant's acquittal and when the Employer had access to the criminal trial transcript, the Grievant received notice from the Employer of an additional charge being leveled against him by the Employer, that of lying in the Internal Affairs investigation. An additional Laudermill hearing was held by the Employer on March 25, 1999 regarding the lying charge. The disciplinary panel reaffirmed the decision to terminate the Grievant.[7]

ADDITIONAL CHARGES ISSUE

One of the disputed issues in this case involves the City's action of bringing additional charges against the Grievant after his termination (what could be termed the "second firing").

Chronology: On May 18 1998 the Grievant was placed on "Relieved of Duty with Pay" status, the same date that criminal charges were brought against him by the city of St. Paul. On June 17 the city issued a "Notice of Disciplinary Hearing" to the Grievant, stating that one charge of violating the Minneapolis Police Department Code of ethics and one of violating the MPD Professional Code of Conduct had been sustained by the Discipline Panel. The Panel was chaired by Deputy Chief William J. Jones. This notice orders the Grievant to appear for a hearing on June 24. The hearing was held on June 24, and the disciplinary panel decided to maintain it's "finding of sustain" for the charges and recommend to the Police Chief that the Grievant be terminated. Thereafter there was discussion between the Union and the City about the charges having been processed as "C" level violations rather than "D" level.[8] The Employer

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[6] Employer Exhibits 37 – 40.
[7] Employer Exhibits 24, 25, 27 – 29.
[8] Minneapolis Police Department Policy on Disciplinary Range System, Employer Exhibit 54.

than issued a second Notice of Disciplinary Hearing on July 6/7, identifying the charges as "D" level and convening a "D" level panel. The hearing was held July 10. The panel recommended termination to the Chief. The Grievant was terminated on July 13, 1998.[9] The Union grieved the termination on July 21.

In November 1998 the Grievant's criminal trial was held. He was acquitted of all criminal charges.[10] Following the acquittal the Union requested that the termination be rescinded, which the Employer did not agree to. After the criminal trial record became available to the City, it examined the trial transcript and compared it to information provided by the Grievant during his internal affairs investigation. The Employer concluded from this analysis that the Grievant had lied during the IAU investigation, and on February 22 1999 it issued a new charge against the Grievant, of lying during the investigation.[11] The City then issued a new Notice of Disciplinary Hearing on March 18,1999, and held the hearing on March 25. The Union appeared on the Grievant's behalf and submitted both oral and written arguments. The disciplinary panel recommended this additional charge of lying be sustained and that it be "considered with the earlier discipline". New discharge forms were generated.[12]

Employer Argument:

The Employer argues that the lying violation occurred while the Grievant was employed (his IAU interview occurred in April 1998). In the summer of 1998 the City believed the evidence indicating that the Grievant lied about

[9] Employer Exhibits 10 and 12-21.
[10] Employer Exhibits 37 and 38.
[11] Employer Exhibits 22 and 23.
[12] Employer Exhibits 24-29.

the events in February and March 1998 was not strong enough to include a specific charge of lying in it's reasons for termination. The information in the criminal trial transcript only became available to the Employer after the Grievant had been terminated. The Employer points out that the Grievant had been informed that the charges against him could be changed at any point in the investigation. Since the Grievant's termination had been grieved, the discipline was not yet final, and the possibility of reinstatement existed up until an Arbitration proceeding. Finally the City argues that lying to the investigator would in itself be a dischargable offense. Therefore even if just cause had not existed to terminate the Grievant based on the other charges, he would have been fired for the additional charge. Had this proceeding been held without consideration of the additional charge, and had the Grievant been reinstated to his job, the City would have been obligated to terminate him again. That result would not make sense and would be wasteful of resources.[13]

Union Argument: The City had no authority to take disciplinary action against the Grievant in March/April 1999 because the Grievant was no longer employed by the City. The fact that the grievance process has not come to conclusion does not change the Grievant's employment status. The Employer made a precipitous and unjust decision to terminate the Grievant in July 1998. After the fact, the City searched for additional evidence to buttress their case. The Union denies the lying charge and submits arguments about that issue in this Arbitration, but maintains its

[13] Employer Post-Hearing Brief, Testimony of Deputy Chief Jones, Employer Exhibits 22-25 and 27-29.

position that the Employer does not have the right to fire an employee a second time.[14]

Reasoning and Decision

The Arbitrator finds the Employer did not have the authority to retroactively add charges to the Grievant's termination. Clearly Mr. Van Dyke was not an employee in March 1999. After approximately eight months with no paycheck, benefits or other rights as an employee, surely it is not reasonable for the Grievant to be "ordered to appear" before a disciplinary panel and be fired a second time.[15] The Employer's argument that charges against an employee could change in the course of the investigation points to the heart of the matter: what constitutes "the investigation" in terminating an employee. A ruling in favor of the City's argument on this question implies that in meeting its just cause burden, an Employer may first remove an employee from its payroll and then continue a disciplinary investigation indefinitely. This would certainly violate the spirit of due process.

Moreover, the second discharge was unnecessary. The heart of this matter is whether Grievant was wrongfully on the property on the dates in question. A finding in the affirmative implicitly rejects Grievant's denial as false. Likewise, implicit in the termination decision is a finding that the Grievant lied concerning the material elements of the charge. The criminal trial transcript is part of the record in this arbitration and may properly be used by the parties to test both the Grievant's and other witnesses' consistency and credibility in this case.

[14] Employer Exhibits 25 and 26, Union Post-Hearing Brief.
[15] Employer Exhibits 24 and 29.

UNDISPUTED FACTS

The pertinent undisputed facts about the events in question are as follows. The neighborhood where the complainant and Grievant reside has a relatively high crime rate. It is part of the Third Precinct, one of the two busiest in the city.[16] The complainant had cause to call 9-1-1 on at least a couple of occasions because of intruders in her yard in addition to the calls involving the events of this case. One of these calls was within a month of the events in question.[17] Regarding the February 25/26 incident, it is undisputed there was a man walking in Ms. Hawkins yard at approximately 10:30 p.m. and that she called 9-1-1 to report the incident. Part of that call follows:

> Ms. Hawkins: There's a guy creeping around my house right now . . . He was in front and I just happened – I just happen to peek out my window and he was just up on the side of my house and he was on the side of my house . . . I'm scared . . . And it's so weird because, you know, I am just getting ready to go to bed and I always look out my window. I don't know why, but I always do, and he was just walking right by and all of a sudden I thought, God, why is he staring at my house like that and then I kind of watched him and he jumped up on to my lawn and went on the side of my house . . . It makes me nervous because I am living here all by myself with my 12-year-old son and my 12-year-old son is out of town and I know that there's been a lot of break-ins on our street.[18]

The complainant was very upset by this incident. She and her neighbor and friend, Ms. Stanley, both described her as nervous about the neighborhood and the fact that she had experienced unwelcome

[16] Testimony of Monique Hawkins, Kim Stanley, Sergeant Ellering, Sergeant Gerlicher.
[17] Testimony of Monique and Quest Hawkins, Stanley, Employer Exhibits 3 and 4, M. Hawkins' testimony at criminal trial (Employer Exhibit 39).

individuals on her property before. Ms. Stanley described her as an "emotional wreck" during the time between February 25/26 and March 11.[19] Ms. Hawkins reported to the IA investigator: "Since February 25 I have not been able to sleep. I've hardly been able to go to work. I'm very paranoid to the point, I don't want to get harmed. I'm real afraid living in the house by myself."[20]

Regarding March 11, the Grievant was on Ms. Hawkins' property at approximately 10:30 p.m. He encountered Ms. Hawkins' son Quest. At the time of the encounter, Mr. Van Dyke was sitting/straddling the deck railing which was on the north side and perpendicular to the back of the house. With some variations as to wording, it is undisputed that the Grievant told Quest he was a police officer, showed him his badge, and asked him if he had seen anyone around the outside of his house. Quest went to get his mother. The Grievant followed him to the door. Ms. Hawkins said something to the effect of "wait just a minute." She never opened the door or spoke to the Grievant again. Precise time estimates in the record vary, but it is undisputed that he waited at least five minutes outside Ms. Hawkins' door, then left, and that the squad car took some more time before arriving. It is undisputed that the Grievant did not call the police department that night, or report what had happened the next day; and, it is undisputed that the Grievant walked by Ms. Hawkins' home on March 26 during the day.

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[18] Transcript of 9-1-1 call dated February 26, 1998, Employee Exhibit 47.
[19] Testimony of Stanley, Monique and Quest Hawkins, Employer Exhibit 3 and 4, Ms. Hawkins and Stanley testimony at criminal trial (Employer Exhibit 39).
[20] Employer Exhibit 3.

EMPLOYER POSITION

The City's position is that it had just cause to terminate the Grievant's employment. A citizen made two reports of a prowler on her property. The second occurrence involved a man who identified himself as a police officer. In each incident, the complainant got a good look at the prowler. She was confident the same man was on her property both times. She later identified him as the Grievant. Prowling and peeping is a serious breach of public trust. It is a violation of the obligations of a police officer to uphold the law and to be of upstanding character. It brings discredit to the police department and requires the strongest form of discipline, termination.

EMPLOYER ARGUMENT ON FEBRUARY INCIDENT

When the complainant called 9-1-1 on March 11, she stated three times "It looks like the guy that was . . . around my house the other day."[21] When questioned by criminal investigators, she had a high level of confidence in her identification of Mr. Van Dyke as the man on her property February 25/26.[22] When asked during the Internal Affairs Investigation if the man she identified as Van Dyke at the station house on March 26, was the same man as February 25/26, she answered, "Definitely."[23]

EMPLOYER ARGUMENT ON MARCH 11 INCIDENT

With respect to the March 11 incident, the Grievant acknowledged being on the complainant's property. His explanation for being there

[21] Employer Exhibit 49.
[22] Testimony of Sergeants Gerlicher and Martinson.

lacked credibility for at least three reasons. By his own description, the Grievant chose to follow a potentially dangerous person around a piece of property, in the dark, while off duty, unarmed and without a radio. This is an unlikely scenario and would at best be an unwise course of action. Additionally, computer records show the Grievant had only three arrests in a year's time. This small number of arrests indicates he would be unlikely to take the initiative in the way he describes on March 11.[24] Secondly, if his motivation and actions were innocent, it would have been the responsible and natural thing to report the incident to the police department, which he failed to do. Finally, his inconsistency in describing the person he claimed to have seen on the property is evidence that there was no such person.

EMPLOYER ARGUMENT ON FAILURE TO REPORT

The Employer argues even if Grievant's actions in checking out the Hawkins backyard had been reasonable, there is no viable explanation for his failure to either call the Police department that evening, or report the next day about what had occurred. It would have been obvious that the residents of that home were concerned or frightened about his presence. Since he had identified himself as a police officer, his failure to take any follow-up action would leave the citizen wondering about the conduct of the Police (or in fear of an imposter). The Employer notes the Grievant admitted considering whether a squad car was coming to the house.[25] He must have known it was likely the resident had called the police. The Employer asserts he failed to make a report in order to cover up his

[23] Employer Exhibit 3.
[24] Testimony of Sergeant Ellering and Employer Exhibit 2.

presence at the house, where he was spying on Ms. Hawkins and violating her privacy.

EMPLOYER ARGUMENT ON DESCRIPTION OF SUSPICIOUS PERSON

When asked about the suspicious person he claimed to have seen on Ms. Hawkins' property, the Grievant told criminal investigators on March 28 that he was unable to provide a description.[26] However, when questioned during the IA investigation April 30, he provided descriptive details. "My description, from what I could see at that point was maybe unknown race, 5'10", 5'11", all dark clothing. The jacket looked like it had white stripes around the top." And later in the same interview "Tall, slim, 5'10", 5'11" from the distance I saw. I don't know whether he had a knit cap on or just simply a round head. The jacket looked like one of those sport jackets, them light weight sport, deal, starter, pitching jacket whatever, with a stripe, like white stripes or light colored stripes around the top. The clothing was dark.[27] The Employer posits his inconsistency is because there was, in fact, no suspicious person. The lack of a description would also help the Grievant justify his failure to report the incident. The Grievant invented his description for IAU after he learned of Ms. Hawkins description of the February 25/26 individual, in an effort to make his story more credible. The Employer sees no reasonable explanation for why he would provide a description at one time but not at another. This inconsistency supports its contention that the Grievant is lying.

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[25] Testimony of Sergeants Ellering, Gerlicher, Martinson and Employer Exhibit 33.
[26] Sergeant Martinson Supplemental Report, Employer's Exhibit 33.

Since the Complainant's version of events was credible and the Grievant's was not, a reasonable conclusion was reached that the Grievant was guilty of the conduct he was charged with. This conduct most definitely brings discredit to the police department. It also compromises the Employer's ability to make normal work assignments to the Grievant and trust they will be handled properly. For these reasons termination was the only reasonable option for the Employer and was done for just cause.

UNION POSITION

The Union's position is that the Grievant did not commit the crimes he was accused of. This chain of events began with an honest mistake on the part of the complaining citizen. She was in error in identifying the Grievant. In its decision to terminate the Grievant, the Employer gave greater weight to that identification than to all the other relevant factors. It disregarded the Grievant's rights of due process in its rush to punish. The city did not conduct a thorough unbiased investigation or have proof of the allegations.

UNION ARGUMENT ON FEBRUARY INCIDENT

With respect to the February incident, the Grievant was never in the complainant's yard before March 11. On the evening of Wednesday, February 25, the Grievant was with his family at church (Ash Wednesday) and walked home with two of his sons, leaving church shortly after 8:00 p.m. They stopped at McDonalds and Dockers Superette on the way home. Mr. Van Dyke was with his sons the whole time they were out, and he did not go out again after arriving home.

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[27] Employer Exhibit 8.

On February 26, the Grievant came home after his shift ended at 6:00 p.m. and does not believe he went out again, since he had training scheduled for very early the next morning.[28]

The record of the 9-1-1 call placed by Ms. Hawkins on March 11 demonstrates that she was not certain that the Grievant was the same man who was on her property in February, but rather she convinced herself it was the same man.[29]

UNION ARGUMENT ON MARCH 11 INCIDENT

The Grievant 's version of events on March 11, 1998 are summarized as follows. He had worked his regular shift that evening which ended at 6:00 p.m. He then worked an extra four hour 'buy back' shift which ended at 10:00 p.m. He got a ride home from two other officers. When he arrived home he started to get ready to retire for the evening but was reminded by his wife to pick their son up at the bus stop. He walked to the bus stop, met his son and walked home with him. He then decided to walk to McDonald's for a cup of coffee. As he was walking on the south side of 40th street, travelling east, he saw a person on the back deck of the house in question. That person appeared to be handling one of the windows of the house. The Grievant was suspicious about what that individual was doing there, so he started to cross 40th street to investigate. As he crossed the street, the person seemed to drop out of sight on the north side of the deck railing. The Grievant slowly crossed the back yard and looked on the side of the house but did not see the individual. He then walked back to the south end of the deck, then walked onto the deck and examined the

[28] Testimony of Grievant, Mrs. Amy Jo Van Dyke, and Union Exhibits 3, 4 and 5.
[29] Union's Post-Hearing Brief and Employer Exhibit 49.

two windows to see if they appeared to be tampered with. The Grievant then walked to the north end of the deck and peered around the corner to see if the person was crouching or hiding there. He was not. The Grievant then began to climb over that railing with the intention of following the individual's probable route, to see if he was walking on the front sidewalk or in the area. As he started to climb over the railing, the porch light came on and he stopped while sitting on the railing. At that point Ms. Hawkins' son came around the corner of the house and they saw each other. The Grievant told the boy that he was a police officer and asked him if he had seen anyone come around the other side of the house. The boy shook his head no and appeared to be a little scared seeing the Grievant. The Grievant offered to show him his police identification and pulled his wallet with badge out of his pocket. The son then said he would go to get his mother. The Grievant followed him around to the porch in front of the door (facing south). The son went in the house. The Grievant heard a woman's voice say something like "just a minute". He stood outside the closed door for several minutes but no one came back to the door. After a while he got cold and left.[30]

The Union argues that Mr. Van Dyke's actions in approaching the property that night are understandable and believable. The Grievant is a beat cop with the habits of a beat cop; a lot of walking, being observant of events happening out on the street, and checking things out when they look questionable. The fact that this event occurs in his own neighborhood make his actions even more understandable. Although there may be different ways of handling the same situation, no evidence was presented

[30] Testimony of Grievant, Employer Exhibit 8, and Grievant Testimony at Criminal Trial, Employer Exhibit 39.

that the Grievant had violated any police policy in the way he investigated this incident.

With respect to the aggressiveness issue, the Grievant questioned the accuracy of the Employer claim that he had made only three arrests in a year's time. The Union argues that more importantly, the nature of his assignment as a beat cop means that number of arrests is not the appropriate way of measuring his effectiveness or his "aggressiveness". Character witnesses testified that on his beat the Grievant took the initiative in investigating situations on the street.[31] Recent performance evaluations shows that Grievant was rated "superior" in the area of self-initiated field activity.[32]

The Union points out that the Grievant identified himself as a police officer when he encountered Quest Hawkins, and voluntarily waited around for several minutes (estimates in the record vary between five and fifteen) while the citizen gave him no opportunity to explain what was happening. Both these facts are consistent with a person who was not at the home with bad intent. Finally, information was provided by both Ms. Hawkins and her neighbor that there had been unwelcome people on the property before, including at least one incident within about a month of March 11. This supports the likelihood that the Grievant saw such a person that night.

The Grievant gave a very plausible explanation of his actions on the evening of March 11, 1998, which were the actions of a concerned police officer and neighbor. His actions in identifying himself and than waiting on the complainant's property for ten minutes would not be consistent with the

[31] Testimony of Brian Herron and Merrill Anderson.
[32] Union Exhibit 2.

crimes he is accused of. Any alleged inconsistencies in the Grievant's version of events are minor and easily explained. The complainant, while sincere, had as many or more inconsistencies in her version than the Grievant did.

UNION ARGUMENT ON FAILURE TO REPORT

The Union argues filing a report was not required in these circumstances. The Grievant saw something he thought was suspicious, but he was not able to obtain any clear information about it. His physical description of the individual was not adequate to be helpful to police in searching for the person, nor was the description good enough to be required by police rules to be reported.[33]

UNION ARGUMENT ON DESCRIPTION OF SUSPICIOUS PERSON

The Grievant testified that he saw the suspicious person for a short period of time and observed a few descriptive facts: general height, dark cap (or round head) and the general type of jacket he was wearing.[34]

He maintains that he always considered his information to be too little to constitute a good description, and that he was not even certain whether the individual was attempting illegal activity or not ("I didn't know what I had"). He claims that he did provide the limited description he had to Sargent Martinson during the criminal investigation, and believes Sargent Martinson may have either forgotten to write it down, or considered it too limited to be worth noting. With respect to his criminal trial, the Grievant

[33] Testimony of Grievant, Union Exhibit 1.
[34] Employer Exhibit 8.

acknowledged that his testimony may not have been correct in responding to questions about the description, but stated he was being cautious to not speculate or embellish.[35]

UNION ARGUMENT ON PEEPING

The Union argues the content of the 9-1-1 call placed by the complainant on Feb 25/26 clearly indicates that whoever was on the property was not peeping in the windows. This person was looking around and cutting through the property, but not looking in windows. With respect to March 11, the Union argues that both Quest and Ms. Stanley describe the Grievant as having his back toward the Hawkins house. From his position on the deck, it is not possible he would have been looking in the Hawkins windows. Therefore aside from other factual disputes, there is no evidence that window peeping occurred on either of these occasions. The Union further argues that in order for the discharge to be upheld, the Employer needs to establish substantial evidence that the Grievant committed the crimes of Interference with Privacy and Harassment as defined in the criminal statute under which he was charged in May 1998.[36]

ARBITRATOR'S ANALYSIS AND FINDINGS

The question before the Arbitrator is whether the Employer had just cause to terminate the Grievant's employment, as required by Article 4 of the parties' collective bargaining agreement.[37] Of the elements of just cause traditionally applied in labor arbitration, the two being argued in this

[35] Testimony of Grievant.
[36] Union Closing Brief and Employer Exhibit 40.
[37] Employer Exhibit 56.

case are whether the Employer conducted a full and fair investigation of the employee's alleged misconduct, and whether there was adequate proof that he was guilty of that misconduct.

Regarding the first of these considerations, the record indicates a number of gaps in the Employer's investigation. For example, at the June 24, 1998 Laudermill hearing, the written record says the Grievant stated "I've got evidence of my whereabouts on those occasions. This is certainly an important claim in the context of this situation, yet neither the written record nor Deputy Chief Jones' testimony reflect that the discipline panel made any effort to track this down. Follow up questions or investigation on a claimed alibi, and inquiry as to which occasion, did not occur.[38] Neither does it appear that Internal Affairs investigated where the Grievant claimed to have been on February 25 or 26.[39]

It also does not appear that the Grievant's supervisor Sergeant Olson was consulted during the investigation.[40] As part of a full and fair investigation, Sergeant Olson would seem to be an obvious source of information about the "aggressiveness" question, among others.

Finally, although Deputy Chief Jones testified about the serious nature of the allegations, neither he nor any other witness spoke to the question of how facts were weighed by management personnel empowered to recommend discipline. Lack of information on this question raises doubts about how the investigation and due process were handled.

Notwithstanding the concerns outlined above, the Arbitrator finds the proof question to be the more weighty one in this case. Analysis of that question follows.

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[38] Employer Exhibit 14 and Testimony of Deputy Chief Jones.
[39] Employer Exhibits 2 and 8.

With respect to the February 25/26 incident, the uncertainty as to date means that both dates must be seen as possibly correct. Therefore, Mrs. Van Dyke's testimony regarding the evening of Ash Wednesday does not settle the matter. Since no one but Ms. Hawkins saw the face of the individual who was on her property, the only available evidence is her own words. There are some differences between Ms. Hawkins' contemporaneous report to 9-1-1 and her later statements to IA and in criminal court. The Union places emphasis on the fact that her descriptions of the individual's race and age were inconsistent:

"He's a white guy with a cap on and a leather coat ... 30s"[41]

"I believe him to be possibly Hispanic, not, he has darker skin tone. Maybe Hispanic, maybe 35 to 40 years old."[42]

"On my 9-1-1 call I described him as maybe 30 or 40 years old, Hispanic, not Caucasian, but Hispanic or Indian or something mixed.[43]

These inconsistencies alone do not persuade the Arbitrator that Ms. Hawkins was mistaken in her identification. Her description must be read in the context of the questions (e.g. "is he 20's, 30s? 30s.").[44] While during the criminal trial she forgot how she had described race to the 9-1-1 operator, the visual descriptions "white" and "Hispanic . . . darker skin tone" would both apply to the Grievant. The Arbitrator also does not agree with the Union's assertion that on March 11 the Complainant convinced herself that the Grievant was the same person she had seen February 25/26. An audio review of the March 11 9-1-1 tape demonstrates that the words "It looks like the guy that was snooping around my house . . . " were not

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[40] Testimony of Sergeant Olson
[41] Employer Exhibit 46.
[42] Employer Exhibit 3.
[43] Criminal Trial Testimony, Employer Exhibit 39.
[44] Employer Exhibit 46.

spoken in an uncertain way.[45] The Arbitrator is convinced she sincerely believed that this was the same man, immediately upon seeing him March 11.

Nonetheless, there are some troubling details in the Complainant's recollections. One is what appears to be the addition of her hearing the windows rattle on February 25/26. This detail emerges in the IA interview but was not reported to 9-1-1, even when specifically asked if she heard anything. It also appears that when being asked by Sergeant Ellering on March 26 about the February incident, Ms. Hawkins blended some things in her own memory:

> "Question: Did you hear anything other than the windows rattling coming from outside?
> Outside in the front he was doing his keys like this, he was doing his keys like this on March 12th when he was waiting outside . . . And he has a gold ring on one of his hands. I remember seeing that, I remember seeing a gold ring on the man's hands on the 25th and on the 12th."[46]

Here it seems that the complainant moved from one event to the other in the course of her answer. Also, her memory of seeing the gold ring in February is not consistent with her description of the event in general, or with her statement that the man had his hands in his pockets.[47]

Clearly Ms. Hawkins is a credible citizen with no reason to fabricate. The Arbitrator does not interpret these facts as evidence of an intention to lie, but only of the possibility of human error.

With respect to the March 11 incident, the Arbitrator finds the Grievant's version of events to be generally plausible. Since it is

[45] Employer Exhibits 48 and 49.
[46] Employer Exhibit 3.
[47] Employer Exhibit 47.

undisputed that the Grievant was on the property during the time in question, this issue largely gets down to what was in the mind of the Grievant. That can never be known for certain by anyone but the Grievant, so this analysis weighs several details in an effort to judge on balance whether his version of events is believable. First of all it is quite believable that a beat cop who is in the habit of walking, would walk over to investigate a suspicious person in a backyard. This is particularly believable in his own neighborhood, where he might have more interest. In choosing to follow the unknown person he would have put himself at some risk. However, Grievant described his approach as deliberate and careful rather than reckless. The testimony of two police officers was that, though questionable, that decision to follow the suspicious person was not unreasonable.[48]

With respect to Mr. Van Dyke's "aggressiveness," the testimony was mixed on whether his number of recent arrests was unusual, for a beat cop. The number does appear to be low. However, testimony from character witnesses indicates Mr. Van Dyke was aggressive in his approach to suspicious situations, and the Grievant questioned whether computer records concerning his arrest count were precisely accurate. His supervisor Sergeant Olson testified that even if the number of arrests reported by the computer was correct, he would still consider a "superior" rating to be appropriate in the area of self-initiated field activity, given the nature of beat cop duties. On balance the Arbitrator considers the evidence about the Grievant's aggressiveness to be unpersuasive either way.

[48] Testimony of Sergeants Martinson and Gerlicher, Criminal Trial Testimony, Employer Exhibit 39.

It is clear from the testimony of Kim Stanley (who corrected her earlier belief to the contrary), of Quest Hawkins, and of criminal investigators Martinson and Gerlicher that the Grievant could not have been looking into the Hawkins home at the time he and Quest encountered each other. Among other possible motivations for being on the deck railing, the Grievant's own story is a plausible one. The fact that there had been other recent incidents of unwelcome persons on and around the property at night lends some support to the likelihood that the Grievant's version is true. Finally, the Grievant's actions in identifying himself to Quest and especially in waiting several minutes for the resident to come out of the house, tend to support the belief that he was not on the deck for wrongful reasons.

Relevant to the credibility of Grievant's description of the suspicious individual issue are the following:

1) On March 28 when criminal investigators interviewed the Grievant about the events of March 11, Sergeant Martinson's report states "He could not give a good description of the individual that he saw between the two houses." Sergeant Martinson had a clear recollection that the Grievant was unable to describe the suspicious person at all.[49]
2) In his IAU statement taken by Sergeant Ellering on April 30, the Grievant stated "My description, from what I could see at that point was maybe unknown race, 5'10", 5'11", all dark clothing. The jacket looked like it had white stripes around the top." When asked again in that interview for a physical description, "Tall, slim, 5'10", 5'11" from the distance I saw. I don't know whether he had a knit cap on or just

simply a round head. The jacket looked like one of those sport jackets, them light weight sport deal, starter, pitching jacket whatever, with a stripe, like white stripes or light colored stripes around the top. The clothing was dark."[50] Ellering testified that Grievant's description "grew" from his initial description, leading Ellering to disbelieve him.

3) During his criminal trial, the Grievant testified he did not know the race of the individual, and was not able to identify any type of clothing.

> Question: Did you know if that individual had a gun with him at the time?
> Answer: No.
> Question: A knife?
> Answer: No.
> Question: Did you know anything about this individual?
> Answer: Not at all.
> Question: Did you know his race?
> Answer: No.
> Question: Were you able to identify any types of clothing he was wearing?
> Answer: Not at all.[51]

Without a tape recording of Sergeant Martinson's interview with the Grievant it is impossible to know exactly what was said. The Arbitrator is persuaded by the credibility and confidence of Sergeant Martinson's testimony that there is an inconsistency in the Grievant's descriptions. However, as in the analysis of Ms. Hawkins' words, the Grievant's statements must be read in context. The point blank and highly focused questioning at a criminal trial (admittedly with a very targeted purpose) is

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[49] Arbitration testimony, Employer Exhibit 33 and 39.
[50] Employer Exhibit 8.
[51] Employer Exhibits 39 and 23.

unlikely to elicit a response identical to the more discursive exchanges in the informal phase of the investigation. A more accurate characterization of Grievant's description was that it was contracted (Martinson), grew (Ellering) and contracted again (jury trial). His own belief that his descriptive information was not worth much may have influenced his response to Sergeant Martinson's questions. While his testimony at his criminal trial raises suspicions, the Grievant's explanation for why he testified as he did is understandable. His inconsistency alone does not prove a deliberate falsehood.

The Arbitrator finds that Grievant's failure to call in or report the events of March 11, though defendable on technical grounds, is cause for concern relative to the charge in this case. His conduct at the scene, in which he identified himself and waited for some time the opportunity to speak to complainant lends support to his version of the events. His failure to report the incident stands in direct contrast and lends support to Employer's assertion that he had something to hide.

CONCLUSION AND AWARD

This case is replete with proof of the fallibility of the human powers of observation and recollection. The person observed on complainant's property on March 11 has been variously described as black, white and Hispanic. The Deputy Chief testified to three window peepings when in fact there is not a scintilla of evidence to support that conclusion. The Grievant himself has varied over time in the specificity of his description. The complainant seems to have confused her observations between two different occasions. The investigating officers repeatedly used two dates February 25 and February 26 interchangeably. Inexplicably, the confusion

in the dates continued right through the criminal trial in November, 1998 when the parties actually stipulated that the date in question was February 25 (Ash Wednesday) when in fact the record discloses to this arbitrator's satisfaction that the events in dispute arose on February 26. The errors and inconsistencies in the record do not demonstrate wrong doing nor are they finally dispositive of the case. They do however, caution against declarations of absolute certainty in this matter. They also help to shape application of the burden of proof.

BURDEN OF PROOF

The parties agree that the Employer has the burden of proof. The parties do not agree on the conduct necessary to prove or the weight, or quantum of that proof. The Union argues that the Employer must prove that the Grievant was guilty of the crimes of Interference with Privacy and Harassment, as defined in the criminal statute.[52] The Arbitrator rejects that position. If the question were merely whether peeping occurred, this would be a simple case. It is not. The Arbitrator accepts the Employer's view that proof that the Grievant was wrongfully on Complainant's property on the dates in question would be sufficient to justify discharge.

As to the quantum of proof the Arbitrator is guided by Supreme Court Justice John Harlan who stated that the purpose of the burden of proof standard is "to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[53] In this case the penalty is not only the "capital punishment" of employment relations but the allegation is one

[52] Union's Closing Brief.
[53] Quoted in Colorado vs. New Mexico, 467US310 at p. 312.

of egregious conduct involving moral turpitude. In these circumstances, this Arbitrator does not apply the criminal trial standard of beyond a reasonable doubt. However, the test must be more than a mere preponderance of reasonable evidence. Given the allegations in this case, the Arbitrator finds the Employer must bear the burden of proof by clear and convincing evidence that the Grievant was guilty of the misconduct charged. What constitutes clear and convincing evidence has been characterized as proof "with a high level of probability."[54]

Given the conflicting factual scenarios and inferences in this case, other factors, including the Grievant's past record, should be considered in judging the guilt of the accused. This is not to use the past record to mitigate the penalty, but rather as a tool to help determine the probability that the misconduct and the lying occurred as alleged. The Grievant has been cooperative throughout and was consistently described by all witnesses as calm and non-threatening. In this case there is nothing in the record which even implies past wrong-doing by the Grievant. Nor is there any evidence of him lying in the past. All of this militates against the likelihood that he is in this case.

Taking the evidence as a whole and applying a clear and convincing burden to that evidence, leads to the conclusion that there is not sufficient proof the Grievant committed the alleged offense. The Employer has not met its just cause burden.

[54] Quoted in Colorado vs. New Mexico, 467US310 at p. 312.

AWARD

The Grievance is sustained. The Grievant shall be reinstated to his position with the Minneapolis Police Department with full restoration of seniority rights. He shall receive full back pay since the date of termination, minus any interim earnings.

September 3, 1999
Date

George Latimer
George Latimer, Arbitrator