

LABOR ARBITRATION FORUM

CITY,

and

ASSOCIATION.

Grievance: ____ Suspension

AAA Case No ____

Arbitrator Lee Hornberger

DECISION AND AWARD

1. APPEARANCES

For the City: ____, Attorney

For the Association: ____, Attorney

2. INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement between the Association and the City. The Association contends that the City suspended Public Safety Officer/Equipment Operator 1 ____ for eight workdays (192 hours) without just cause. The City maintains Officer 1 ____'s suspension was justified by his alleged insubordination and failure to timely respond to an alarm.

Pursuant to the procedures of the American Arbitration Association, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on March 2, July 15, and September 13, 2010, in _____. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses, and for introduction of relevant exhibits. The dispute was deemed submitted on November 1, 2010, the date the post-hearing submissions were received.

The parties stipulated that the matter was properly before me.

3. FACTS

Background.

1 ____ is employed by the City as a Public Safety Officer/Equipment Operator. He has been employed by the City since February 17, 1989. He has a Masters degree and engages in extensive of-the-job community activities, including being a ____ volunteer. Sgt 2 ____ testified that Officer 1 ____ is “very responsible,” a “good” Officer, and helps to train other Officers.

As of September 2008, Officer 1 ____ had been working at ____ for seven months. At ____, there is an apparatus bay in which there were a fire engine and a SUV with medical equipment. ____ has two garage doors. Several Officers were assigned to _____. Officer 3 ____ was responsible for driving the fire engine. Officer 1 ____ and another Officer were responsible for driving the SUV. Across the street, there is a City owned parking lot for visitors and employees. The parking lot is quite a distance from the building. An Officer can grab a radio from the vehicle. If the Officer were outside the building, it is the Officer’s responsibility to properly respond to a call. According to Officer 4 ____, Officers are allowed to have visitors after 2100. It is not rare for Officers to go outside the building after 2100. An Officer outside the building had “to be in communication” but did not have to carry a radio. There was an alarm that awakens sleeping Officers. Officers were not required to carry a radio while asleep. A police Officer on patrol wears a tropical worsted uniform with radio, leather belt, and weapon. A fire Officer wears a fatigue uniform, the radio is in the vehicle, and there is no equipment belt.

Officer 1 ____ did not know there were no alarms outside the building. On the other hand, at most, if not all, of the other stations there are alarms that can be seen and heard outside the building. For example, at ____ there are alarms “all over.”

September 27, 2008, Evening Activity

On September 27, 2008, Officer 1 ____ awoke around 2115. His phone rang. 5 ____ was calling him. She wanted to know if he wanted to step outside to pick up some food from her. Officer 1 ____ went outside. He walked across the street and stepped into the car parked in the parking lot. 5 ____ was in the car. Being outside the building, having a visitor outside, and being in the parking lot at night were not rule violations. Sgt 6 ____ stated, "I don't believe he was doing anything wrong" being in the parking lot. According to Lt 8 ____, there was "no probable cause" to believe Officer 1 ____ engaged in any illegal activity in the parking lot.

At 2335, September 27, 2008, a "medical rescue" call was received. This set off alarms signaling it was a medical rescue. Lights came on inside the building and the sleeping quarters. The call was a Med 1, which justified lights and sirens. The call was not responded to within two minutes because Officer 1 ____ was not available. Supervisor Sgt 6 ____ and other employees looked for Officer 1 ____ in the Station. After Officer 1 ____ could not be found, Sgt 6 ____ had Officer 18 ____ drive the SUV. The station door opened. The alarms inside the building could be heard outside. For the first time, Officer 1 ____ realized there was an alarm. He immediately exited the car, ran across the street, and jumped into the departing emergency vehicle. Because Officer 1 ____ was not initially available, there was a seven minute delay in the vehicle leaving. A run should start within two minutes. Ultimately a private ambulance arrived at the emergency scene and the call was cancelled.

By the time Sgt 6 ____ returned to the Station, Officer 1 ____ was appropriately in bed. There was no questioning of Officer 1 ____ that work-day concerning the situation. A run leave might slide a bit beyond two minutes. Sgt 6 ____ considered the seven minute delay to be a serious

rule infraction. He got in his car and drove around because he was “upset.” He did not ask Officer 1 ____ for an explanation or do an oral reprimand that night. He decided to take the situation to his Supervisor as he had been instructed. Sgt 6 ____ had not told Officer 1 ____ to wear a radio at all times, had issued no prior disciplines to 1 ____, and did not pull 1 ____’s file. Officer 1 ____ had never previously been late under Sgt 6 ____’s supervision.

Sgt 6 ____ informed Lt 7 ____ of the situation. Lt 7 ____ asked Sgt 6 ____ to send an explanatory e-mail to Cpt 9 _____. Sgt 6 ____ understood that Officer 1 ____ believed there was a system outside the building to alert for a call. In fact, nothing happens outside the building when an alarm comes on. Officer 1 ____ got off duty at 0700, September 28, 2008, and did not return to work until September 29, 2008.

September 29, 2008, Activity

When Officer 1 ____ came to work at 0700, September 29, 2008, Sgt 10 ____ met with him and told him in writing to write a memo explaining the September 27 incident, including answering “Who were you with?” Officer 1 ____’ written response said he had been “talking to a friend... .” The response did not give the friend’s name. Sgt 10 ____ took Officer 1 ____’s memo to Cpt 9 ____ at Headquarters.

Wednesday, October 1, 2008, First Meeting Activity

On Wednesday morning, October 1, 2008, Cpt 9 ____ told Sgt 6 ____ to go to ____ and ask Officer 1 ____ to write a memo telling who he had been in the car with, and, if Officer 1 ____ did not do this, to give him a direct order to do so. Sgt 6 ____ went to ____ and asked Officer 1 ____ to provide the information about who he was with. Officer 1 ____ said he did not understand why he should have to do this. Sgt 6 ____ then gave 1 ____ a direct order to provide “a memorandum

identifying the occupant of the vehicle... , to include a phone number and contact information.”

Officer 1 ____ turned in the memo. The memo did not provide the name of the occupant of the car or other identifying information. The memo indicated, in part:

“Sgt 6 ____ stated that he was told that I need to write a memo in reference to my visitor. I asked him for what? And he said that he was told by his commanders that he needed to give me a direct order to write a memo.

This memo is in reference to the direct order. I’m writing this memo to ask why it’s relevant who visited me? If there’s a problem with me not hearing the alarm, then what does my visitor have to do with it?”

Wednesday, October 1, 2008, Second Meeting Activity

Later on Wednesday, October 1, 2008, there was a meeting scheduled by Lt 8 ____ with Officer 1 ____ which would have apparently led to a third request for the name of the other individual in the car. Sgt 2 ____, Officer 1 ____, Officer 12 ____, and Lt 8 ____ were in the ____ office. The telephone rang. Lt 8 ____ answered the telephone. It was a call from Cpt 9 ____ to “stand down.” Lt 8 ____ said “We’re going to discontinue this meeting. I’ll get back to you.”

October 1, 2008, Meeting with Chief 11 ____ Activity

Officer 1 ____ called President 13 ____ and Officer 4 ____ . 13 ____ is the President of the Association. Officer 4 ____ is an officer and Board member of the Black Police Officers Association; and an Association Executive Board member. The Black Police Officers Association addresses minority officer issues. Officer 4 ____ said he would call Chief 11 ____ . Officer 4 ____ asked 1 ____ if it were okay for Officer 4 ____ and Chief 11 ____ to meet with 1 ____ . Officer 1 ____ agreed.

Officer 1 ____ told Officer 4 ____ that 1 ____ was under investigation. According to Officer 4 ____, there had been no prior order of this type. Officer 4 ____ called Chief 11 ____ . Chief 11

___ said he would meet with 4 ___ and 1 ___. On October 1, 2008, Chief 11 ___, 1 ___, and 4 ___ had a conversation by the picnic table outside of ___.

Chief 11 ___ testified concerning the October 1, 2008, picnic table meeting that Officer 1 ___ said, "I'll give you the name of who I was with if you just tell me why." Chief 11 ___ said, "I will look into it." Chief 11 ___ wanted time to hear of the whole situation. Officer 1 ___ said, "I will give you the name if you want it."

Officer 4 ___ testified he went to ___. Officer 1 ___ was there "by the picnic table." Chief 11 ___ arrived. They had a discussion concerning why was it necessary to have the name. Chief 11 ___ initially did not know why they were asking for the name. Chief 11 ___ said, "Would they be asking for my [the Chief's] visitor." Chief 11 ___ said he would look into it and get back to them. Officer 1 ___ said he just wanted to know why. At the meeting, Chief 11 ___ was told, "Officer 1 ___ doesn't have a problem giving the name. We just want to know why." According to Officer 4 ___, the meeting was at the picnic table outside of ___.

Officer 1 ___ testified that before the picnic table meeting there was a "private meeting" in the Sergeant's room behind "closed doors." During this private meeting, Officer 1 ___ said to Chief 11 ___, "I would be more than willing to give you the name right now." Chief 11 ___ responded, "That's not important. If it were me, they would not have asked me, being a white guy, they wouldn't have asked me. We all have friends we are not proud of." They then walked out to the picnic table as they talked. Chief 11 ___ said he "would get back to us." Officer 1 ___ felt Chief 11 ___ would get it right.

On approximately October 6, 2008, the City and the Association received the October 6, 2008, Award of another Arbitrator. This concerned a 32 hour suspension given to Officer 1 ___

on September 24, 2007, for alleged “disrespect” and alleged “refusal to obey a lawful order.” The October 2, 2008, Award sustained the “refusal to obey” charge, vacated the “disrespect” charge, and reduced the suspension from 32 hours to 8 hours.

In the meantime, 5 ____ sent Officer 1 ____ a written invitation to an October 18, 2008, “house warming” party at her house. 5 ____’s address, telephone number, and last name were on the invitation.

1730-1739, November 4, 2008, Meeting Activity

There was a meeting at 1730, November 4, 2008. In attendance were Lt 8 ____, President 13 ____, Officer 1 ____, and Sgt 2 ____. Lt 8 ____ had been given a written list of questions. Sgt 2 ____ was told by Lt 8 ____ to sit in on the meeting. Sgt 2 ____ was given questions to read to Officer 1 ____. At the meeting Sgt 2 ____ asked Officer 1 ____ “What is your friend’s name?” 1 ____ responded “It’s in my memo. ... That’s what I’m saying, it’s my friend.”

Lt 8 ____ told Officer 1 ____:

“We need to know the friend’s name and any contact information you have so we can get ahold of that friend for an interview for completion of this investigation. ...

I am hereby giving you a direct order, failure to comply with this direct order will result in discipline up to and including termination. I want you to provide your friend’s name and any contact information so we can get ahold of them.”

Officer 1 ____ responded “My friend is irrelevant to this case.”

In the meantime, Chief 11 ____ had not gotten back to Officer 1 _____. According to Officer 1 ____, Officer 1 ____ now had a “man to man” relationship with Chief 11 ____ concerning the identity situation.

On November 5, 2008, Inspector of Professional Standards 14 ____ met with Officer 1

____, and placed him on paid administrative leave.

In addition, at approximately this time, Lt 19 ____, a BPOA Executive Board member, asked Officer 4 ____ to arrange a meeting with Chief 11 ____.

1506-1530, November 5, 2008, Meeting Activity

There was a meeting at 1506, November 5, 2008. In attendance were Officer 1 ____, Chief 11 ____, Inspector 14 ____, Lt 19 ____, and Officer 4 _____. President 13 ____ was not at this meeting. Officer 1 ____ had not expected her to be there. At this meeting Inspector 14 ____ said:

“This hearing is being held for the purpose of affecting [Officer] 1 ____ ... the opportunity to respond to the allegations regarding ... conduct which appears to have been in violation of ... two minutes of the dispatch [rule], ... respond without delay ... [rule], and ... respond to lawful orders... .”

Officer 1 ____ stated:

“Her name is 5 _____. ... I don’t know 5 ____’s last name. ... I don’t have her cell phone number off the top of my head... . 5 ____ and I have talked about the incident in reference to being told to write a memo.”

According to Officer 1 ____, he had known “5 ____” for eight months, had been to her home once or twice, and her cell phone number was in his phone in his car.

November 5, 2008, Tracking Down 5 ____ Activity

After the November 5, 2008, meeting, Inspector 14 ____ spoke with Cpt 15 ____ and said he was looking for 5 _____. Cpt 15 ____ knew 5 _____. She had come in earlier for smoke detectors. 5 ____ had called Cpt 15 ____ a number of times. They were able to figure out her full name and cell phone number. Inspector 14 ____ called 5 _____. She said she was in the car with 1 ____ on September 27 and she had brought 1 ____ food and reading material.

5 ____ told Cpt 15 ____ that her boss was upset that she had gotten smoke detectors. 5

___ was upset that Cpt 15 ___ had given her telephone number to Sgt 14 ___. She told Cpt 15 ___ that she had talked to Officer 1 ___ in November at ___.

It was Inspector 14 ___'s viewpoint that the prior summer Officer 1 ___ had been in the presence of felons. He ran a computer query to see if 5 ___ were a felon. She was not. It is the policy that Officers cannot "harbor felons." Inspector 14 ___ "knew" that Officer 1 ___ had been involved the prior year with a situation involving an automobile and "two known felons." He did not look the documentation up. According to Lt 8 ___ "We were all concerned about the liability that was opened up to our Department."

According to Officer 1 ___, 5 ___ called him crying, said, "[14 ___] just called me. He said he got my number from [15 ___]," and she did not want to be a part of the situation. Inspector 14 ___ found out later from Officer 1 ___ that after November 6, according to Officer 1 ___, Cpt 15 ___ had talked with 5 ___ and she was crying and upset.

According to Officer 1 ___:

"They harass us over the small things. ... I had no reason to hide 5 ___. ... I have the right to know why. ... With the Department, if you don't know, it is best to say you don't recall. ... I don't feel like I have done anything wrong."

1409-1411, November 6, 2008, Pre-determination Meeting Activity

There was a 1409, November 6, 2008, "pre-determination hearing." In attendance were President 13 ___, Chief 11 ___, Officer 4 ___, HR Director 20 ___, Inspector 14 ___, Assistant Chief 21 ___, and Officer 1 ___. Chief 11 ___ asked Officer 1 ___, "Is there anything that you'd want to say on your behalf in regards to these allegations that would help me make a determination?" Officer 1 ___ responded, "No."

1454, November 6, 2008, Meeting Activity

Subsequently there was a 1454, November 6, 2008, meeting. In attendance were President 13 ____, Chief 11 ____, Officer 4 ____, HR Director 20 ____, Inspector 14 ____, Assistant Chief 21 ____, and Officer 1 ____. Chief 11 ____ said to Officer 1 ____ “I believe you wanted to make a statement... .” Officer 1 ____ responded that he was not being disrespectful or disobeying a lawful order concerning his friend’s name. He did not want to have his friend harassed. She had done nothing wrong. Since her name had been revealed, she had called him crying. He “didn’t want the girl being harassed like now she’s feels she has been.” Officer 1 ____ stated that the City must have had 5 ____’s name all along because she was contacted so quickly after the meeting when he stated her first name; the City “had Captain 15 ____ ... walk across the street ... and question the young lady at her job.” Officer 1 ____ stated “... I was just trying to avoid keeping the young lady from being harassed. “

1326-1343, November 12, 2008, Suspension Notification Meeting Activity

There was a November 12, 2008, notice of 8 day (192 hours) “effective immediately” suspension meeting. In attendance were Chief 11 ____, President 13 ____, Officer 4 ____, HR Director 20 ____, Inspector 14 ____, and Officer 1 ____. At this meeting, Chief 11 ____ issued the 8 day suspension to Officer 1 ____. According to Chief 11 ____ the basis for the length of the suspension was, in part, the prior insubordination discipline, when Officer 1 ____ answered a question with a question, that was a refusal to obey a direct order, and the City needed the name because having the name would show in future that the City had done “due diligence.”

According to Assistant Chief 9 ____, the City was concerned with missing a medical service call and possible civil liability. He was “very concerned” when he heard it was Officer 1 ____ and the year before Officer 1 ____ had been in a car accident situation with two “convicted

felons.” There was a concern with who was with him that night regardless of who it was. The City had to be able to interview all who had information and had to protect itself from what an unknown person might later say.

On November 12, 2008, the Association filed its grievance protesting the discipline. The matter proceeded through the grievance steps. The Association filed a January 30, 2009, Demand for Arbitration.

4. RELEVANT CONTRACTUAL LANGUAGE

ARTICLE I, SECTION 2 - EMPLOYERS RIGHTS: The Association recognizes that, except as specifically limited or abrogated by the terms and provisions of the Agreement, all rights to manage, direct or supervise the operations of the Employer and the employees are vested solely and exclusively in the Employer. ...

ARTICLE I, SECTION 6(b): The Employer agrees to recognize as representatives for employees ... the... Grievance Committee Chairperson [who] will serve as the primary representative for the Association for the purposes of ... representing ... employees during investigation and administration of discipline. ... Under normal circumstances, the Employer will either (1) obtain the Grievance Committee Chairperson’s consent to use an alternate Association Committee person or will (2) defer holding meetings

ARTICLE III, SECTION 2 ... [T]he arbitrator ... shall [not] have authority to add to, subtract from, change or modify any provisions of this Agreement, Civil Service Ordinances, City Personnel Rules, Regulations and Personnel Rules, Regulations and Personnel Policies of the City ... , and the ... Public Safety Department Rules and Regulations and/or Policies and Procedures, but shall be limited solely to the interpretation and application of the specific provision contained therein. However, nothing shall be construed to limit the authority of ... the arbitrator ... to sustain, reverse or modify an alleged unjust discipline The decision of ... the arbitrator shall be final and binding

ARTICLE IV, SECTION 1 - CONTESTING DISCIPLINE: In the event an employee ... shall ... be suspended from work for disciplinary reasons, ... , and he ... believes that the discipline was unjustified, such discipline shall constitute a case arising under the Grievance Procedure, provided a written grievance with respect thereto is presented

Article IV, SECTION 2 - GRIEVANCE DISPOSITION: In the event it should be decided under the Grievance Procedure that the employee was unjustly suspended ..., the Employer shall reinstate such employee and pay full compensation, partial or no compensation as

may be decided under the Grievance Procedure

5. CONTENTIONS OF THE PARTIES

1. For the Employer

According to the City, there is no factual dispute that Officer 1 ____ failed to promptly respond to the September 27, 2008, emergency call in violation of General Order 30 (Response to Fire Alarms and Rescues) Department of Public Safety R-15 (Code of Conduct) Section 5.2.

There is no factual dispute that Officer 1 ____ refused to obey direct orders given by Sgt 6 ____ on October 1, 2008, and by Lt 8 ____ on November 4, 2008, to provide the name and contact information of the individual Officer 1 ____ was with on September 27, 2008, when he failed to timely respond to the call in violation of Code of Conduct Section 5.5. There is no factual dispute that Officer 1 ____ knew details involving his presence in the car, and that during the November 4, 2008, investigatory interview he deliberately withheld that information by responding that he did not recall. There is no factual dispute that Officer 1 ____ knew the name of the individual who was in the car, and that during the November 4, 2008, investigatory interview he refused to provide that information. There is no factual dispute that Officer 1 ____ knew the last name and that during the November 5, 2008, investigatory interview he asserted that he did not know her last name after having been advised that "you are required to answer questions directed to you truthfully" since that interview was part of an official investigation. Chief 11 ____ correctly determined that Officer 1 ____ violated standards of conduct and did not act in an arbitrary or capricious manner when he imposed an eight day unpaid suspension on Officer 1 ____ for these violations.

2. For the Association

According to the Association, this case is not complex *per se* but made complex by Chief

11 ____ and Command's actions. Officer 1 ____ did not violate any rule when he went to the parking lot to meet a visitor and was not cited for a violation because of this. He believed ____ had outside alarms as all other stations do. He did not hear the alarm but, when the door opened, he immediately responded. When questioned why he was late, he honestly said he was with a friend in the parking lot and did not hear the alarm. This was confirmed by Sgt 6 ____ when he went to the lot, had an alarm turned on, and could not hear it. The normal discipline for a late response is a written criticism. Sgt 6 ____ saw 1 ____ exit the car and saw nothing that led him to believe he was doing anything wrong. Cpt 9 ____ ordered Sgt 6 ____, Lt 7 ____ and Lt 8 ____ to do a covert investigation. Cpt 9 ____ testified he needed a covert investigation because of possible liability for the late call and he needed to know if 1 ____ had contact with a convicted felon; a reason never offered before the arbitration hearing.

Cpt 9 ____, on October 1, 2008, directed Sgt 6 ____ to order Officer 1 ____ to write a memo giving the name of his friend. Officer 1 ____ wrote the memo and asked why the name was relevant since no other Officer had been asked for this information. 1 ____ believed he was being discriminated against. When Cpt 9 ____ received the memo from 1 ____, asking why the name was relevant, Cpt 9 ____ could have told 1 ____ why it was relevant but he chose to escalate the case and pounce on the opportunity to discharge 1 ____ for insubordination. Cpt 9 ____ ordered Lt 8 ____ to obtain an Association representative for 1 ____ and give 1 ____ a direct order to name his friend, telling him failure to do so would result in discharge. Before 8 ____ could meet with 1 ____, Chief 11 ____, at the impetus of the Association President, intervened and told Cpt 9 ____ to "stand down."

Chief 11 ____ met with Officer 1 ____ and Officer 4 ____ on October 1, 2008. 1 ____ told

Chief 11 ____ he would reveal the name right then. All he asked was why Command needed the name as they had never asked the names of other Officers' visitors. He believed they were discriminating against him, telling Chief 11 ____ he feared Command would harass his friend. 11 ____ responded he did not want the name because, if it were he or a white officer, Command would not ask for the name. He said, "I will look into this and get back to you." At that point Chief 11 ____ superseded all other Command by saying that he did not believe the name was relevant and 1 ____ did not have to respond with the name until 11 ____ got back to him and told him to give the name. It was not insubordination when 1 ____ did not give the name on October 1, nor was it insubordination when he did not give the name on November 4, 2008. Chief 11 ____'s next contact with 1 ____ was November 5, 2008, when Inspector 14 ____, in Chief 11 ____'s presence, asked for the information. 1 ____ immediately gave all the information he had in his possession. The Command, based upon the information given by 1 ____, located 5 ____ and called her phone within one hour of receiving the information.

The charges that involve Officer 1 ____' tardy response are Code of Conduct R-15, 5.2 and General Order G-30, III, B, 1. The facts establish that he was late in responding and he admitted it. The maximum penalty for failure to respond has been written criticism, as established in the 16 ____ and 17 ____ situations. In this case mitigating factors exist.

When ____ was remodeled in 2006, the exterior alarms were removed. 1 ____ did not know ____ did not have exterior alarms. When the call came, he was rightfully and without violating any rule in the parking lot with a friend. He did not hear the alarm due to the removal of the alarm. 1 ____ should not have been held responsible for his tardy response.

The Association requests that the Arbitrator grant its grievance.

6. ISSUE

The parties agreed the issue to be: “Was the suspension for just cause, and, if not, what is the proper remedy?”

7. DISCUSSION AND DECISION

The Collective Bargaining Agreement provides that an employee cannot be “unjustly suspended.” Article IV, Section 2. It is well established in labor arbitration that where, as in the present case, an employer’s right to suspend an employee is limited by the requirement that any such action be for just cause, the employer has the burden of proving that the suspension was for just cause. Therefore the City had the burden of persuading me that the suspension of Officer 1 ____ was for just cause. The City satisfied that burden. “Just cause” is a term of art in collective bargaining agreements. “Just cause” consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he was disciplined. Other elements include a requirement that an employee know or reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline, the existence of a reasonable relationship between an employee’s misconduct and the punishment imposed and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

For the following reasons, I conclude that Officer 1 ____ was justly suspended.

Officer 1 ____ had received a prior suspension for disobedience. On September 29, October 1, November 4 and 5, 2008, he was asked who he was with when he belatedly responded to an alarm. The answer would have been two words. The question did not seek privileged or

protected activity information. Answering the question would not have raised a safety or health concern. Officer 1 ____ decided he was not going to answer the question. When he did ultimately “answer” the question, he gave incomplete information although he had access to complete information. This conduct was a violation of Code of Conduct Rule 5.5 which states:

“Officers shall, at all times, respond to the lawful orders of supervisors and other proper authorities ... ,”

and Policies and Procedures Section G-2 which states:

“... Insubordination - refusal to comply with a direct order from management, unless such order is injurious to the employee’s safety or health, or disrespectful towards management.”

After several unsuccessful attempts to get an answer to the question, and after hearing the belated incomplete “answer,” Chief 11 ____ decided to impose an eight day suspension. This was after Officer 1 ____ had received, as amended by another Arbitrator, an eight hour suspension for disobedience. In addition, the work rules authorize the Chief to do suspensions of five days or more. Code of Conduct, R-15, Section 2.2

The Association makes several serious arguments concerning the situation. I have seriously considered each of them.

The Association argues that the City alleged Rules violations that were not originally charged or cited. This argument does not control because the original charges alleged violations of General Order 30, III-B(1) [“two minutes”], Code of Conduct 5.2 [“without delay”], Code of Conduct 5.5 [“lawful orders”], and Policies and Procedures G-2 #2 [“insubordination”]. It is with these allegations that I am concerned. The City provided information concerning General Order G-66 [“radios”], General Order G-160 [“leather case”], and General Order 133 [“visitors on premises”]. I am not making any findings as to whether there were violations of these Orders.

This is a “within two minutes,” “without delay,” “lawful orders,” and “insubordination” allegations case. It is not a “radios,” “leather case,” or “visitors on premises” case.

The Association argues that since the City failed to preserve and produce the video tape of the October 1, 2008, Sgt 6 ____ meeting, Officer 1 ____’s testimony concerning that meeting should be paramount. According to Sgt 6 ____, the MVR videotape was in use during this meeting. He activated the tape but did not review it before depositing it in the ____ MVR vault. Cpt 9 ____ does not know what happened to the tape. Inspector 14 ____ was not aware of any tape. The tapes are kept for 60 days before they are recycled. The November 12, 2008, grievance requested all relevant information concerning the discipline. Given the failure to produce the tape, it is 1 ____’s recollection of that meeting that is paramount. Officer 1 ____’s contemporaneous memo memorializes his viewpoint of the meeting and is the best evidence of his recollection. 1 ____’s memo said Sgt 6 ____:

“was told I need to write a memo in reference to my visitor [H]e needed to give me a direct order to write to write a memo. This memo is in reference to the direct order. I’m writing this memo to ask why it’s relevant who visited me?”

The Association argues that the City failed to prove that Officer 1 ____ knowingly and willfully failed to follow a lawful order. This argument does not control because Officer 1 ____ refused to answer the identity question on several occasions. He either knew or had almost immediate access to the answer, but chose not to answer. The City asked for the name with courtesy, clarity and precision. To the degree that one might argue that one or two of the repeat requests for the name did not have complete clarity, it is clear that Officer 1 ____’s refusals were done with complete clarity. Sgt 10 ____’s September 29, 2008, memo to Officer 1 ____ said the information was needed because “the delay occurred on your work shift... .” On October 1, 2008,

Sgt 6 ____ told Officer 1 ____ “he was told by his Commanders to give me [1 ____] a direct order... .” On November 4, 2008, Lt 8 ____ told Officer 1 ____ “we need to know the friend’s name and any contact information you have so we can get ahold of that friend for an investigation for completion of this investigation.”

The Association argues that the City failed to prove that Officer 1 ____ was late responding to an alarm. This argument does not control because Officer 1 ____ was late responding to an alarm on September 27, 2008.

Code of Conduct R-15, Chapter 5.2 provides:

“Officers shall respond without delay to all calls for police assistance from citizens or other members. Emergency calls take precedence. However, all calls shall be answered as soon as possible, consistent with normal safety precautions and traffic laws. Except under the most extraordinary circumstances or when directed by competent authority, no officer shall fail to answer any call when directed at him.”

General Order G-30, Paragraph III-B(1), provides:

“... When an alarm is dispatched, equipment operators and seat personnel shall promptly acknowledge the dispatch. All apparatus shall be in motion to the scene within two minutes of the dispatch.”

Officer 1 ____ left the building, crossed the street, and sat in someone else’s car in the parking lot. During the November 5, 2008, meeting, Officer 1 ____ said “I did neglect to take a radio out and I did neglect to immediately respond to alarm.” There is no dispute that a late response merits at least “a written criticism.” If 1 ____ had answered the name question, this might be “a written criticism” situation. 1 ____ violated Code of Conduct 5.2 and General Order G-30 by not responding without delay and by failing to respond within two minutes.

The Association argues that the discipline was based on disparate treatment. This argument does not control because Officer 1 ____ was not treated differently from anyone else

who had a prior suspension for insubordination and, while sitting in a car, failed to timely report for a run and then refused to provide the name of the person the Officer was with. There are no similarly situated employees with whom Officer 1 ____ was treated differently. Neither Officer 16 ____ nor Officer 17 ____ had prior disciplines, left the building, was sitting in a car with an unknown person, or refused to answer questions.

The Association argues that the testimony concerning the reasons for the City wanting to know the name were concocted and not worthy of credence. This argument does not control because, in part, the City would almost inherently want to know the name of the other person in the car, at least, in part, to help decide what to do to prevent a reoccurrence by Officer 1 ____ or others. What occurred caused a delayed run. A delayed run is a rare occurrence, a rule violation, and inconsistent with the mission of the City. Regardless of the background “felon” situation or the desire for a complete investigation in case there was a lawsuit, the City would inherently want the details of the situation that resulted in the delayed run.

The Association argues that other Officers had not been asked for the name of the person who was in a car with them when they missed a call. This argument does not control because this situation had not happened with any other Officer. The in-the-car-in-the-parking-lot-with-an-unknown-person situation resulting in a late run had never happened before.

The Association argues that Command officers were out to get Officer 1 _____. This argument does not control. Officer 1 ____ had a prior suspension for disobedience. It is reasonable that line supervisors would relay an alleged rule violation situation up the chain of command. It is reasonable that once an Officer refused to provide the requested name, that there would be follow-up activity to find out the name.

The Association argues that it was appropriate for an Officer to ask “why” in response to an order. This argument does not control. Officer 1 ____ did more than ask “why.” He consistently refused to answer the question. When he did decide to “answer,” he gave an incomplete answer. In addition, no grievance was filed protesting the question.

The Association argues that it was inappropriate for the City not to have President 13 ____ at the October 1, 2008, Lt 8 ____ meeting with Officer 1 _____. The Collective Bargaining Agreement, Art I, Sec 6(b), provides that the City recognizes:

“... as representatives for employees ... the... Grievance Committee Chairperson [who] will serve as the primary representative for the Association for the purposes of ... representing ... employees during investigation and administration of discipline. ... Under normal circumstances, the Employer will either (1) obtain the Grievance Committee Chairperson’s consent to use an alternate Association Committee person or will (2) defer holding meetings and will waive applicable time limits in order to facilitate the presence of the Grievance Committee Chairperson”

President 13 ____ was the Grievance Committee Chairperson. She was not contacted to be at the meeting. She was informed about the situation, briefly discussed the situation with Lt 8 ____, contacted Chief 11 ____, and the meeting was ended before it really started. No investigatory, if any, questions were asked. The meeting was curtailed when Lt 8 ____ received a call telling him to stand down. Therefore there was no meeting where “investigation and administration of discipline” occurred.

The Association argues that Chief 11 ____ said the name would not have been asked of a “white officer.” This argument does not control. Chief 11 ____, Officer 1 ____, and Officer 4 ____ testified about the October 1, 2008, picnic table meeting. Officer 4 ____ testified that, when he got to ____, Officer 1 ____ was at the “picnic table,” Chief 11 ____ arrived, and there was a discussion at the picnic table, including Chief 11 ____ saying “Would they be asking for my visitor?” Chief 11

___ and 4 ___ testified about one meeting which was at the picnic table. Neither 11 ___ nor 4 ___ testified there was a pre-picnic table meeting of only 11 ___ and 1 ___ in the Sergeant's room. Only Officer 1 ___ recalled a Sergeant's room 1 ___ and 11 ___ "both doors" closed "private meeting." Chief 11 ___ testified that 11 ___ said at the picnic table "they would not ask me that question." Only 1 ___ testified that 11 ___ said "white officer." The preponderance of the evidence is that Chief 11 ___ did not say "white."

The crucial points in this case include Officer 1 ___'s (1) prior recent suspension for insubordination, (2) repeat failures to comply with specific direct orders which were not adverse to his safety, health, privacy, or privilege rights, and (3) the apparent situation that unless the City decides not to ask Officer 1 ___ questions this situation may be repeated.

Officer 1 ___ was adequately warned of the consequences of his conduct. The responding and obedience rules were reasonably related to efficient operations of the City.

The City did a fair and objective investigation before administering discipline. There was progressive discipline before the suspension. The need for obedience was neither a secret nor a non-recurring issue. Before taking the suspension action, the City had appropriate evidence or proof of the late response and disobedience.

The rules and penalties were applied evenhandedly and without discrimination. Even though the Association alleges two other Officers violated the late response rules, these Officers had not received prior suspensions for disobedience and did not disobey an order.

The eight day suspension was reasonably related to the seriousness of the situation and Officer 1 ___' record. After previously administering a discipline concerning disobedience, the City may have felt the only alternatives open to it were to either seriously suspend Officer 1 ___

or acquiesce and let Officer 1 ____, rather than the City, determine what questions are to be answered and what questions are not to be answered. Under the facts of this case, the rules and orders referred to in the Collective Bargaining Agreement give the City the authority to do the first and not have to do the second.

8. AWARD

The grievance is denied and the suspension is sustained.

Dated: November 12, 2010

Lee Hornberger

Lee Hornberger, Arbitrator