

## LABOR ARBITRATION FORUM

CITY,

Grievance:        Suspension

and

AAA Case No       

Arbitrator Lee Hornberger

ASSOCIATION.

---

—

## 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 \_\_\_\_\_.  
6

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 \_\_\_\_'s 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