

In the Matter of the Grievance Arbitration Between

St. Paul Police Federation,

St. Paul, Minnesota,

Matthew Gorans, grievant

BMS case No. 14-PA-0219

And

City of St. Paul, Minnesota

Before: Arbitrator Harley M. Ogata

Date and Place of Hearing: December 18-20, 2013,
Bureau of Mediation Services
St. Paul, Minnesota

Date of brief submission: January 17, 2014

Advocates – for the Employer:

Gail L. Langfield
Assistant City Attorney
City of St. Paul
400 City Hall
15 West Kellogg Blvd.
St. Paul, MN 55101

For the Union:

Christopher K. Wachtler, Esq.
Wachtler Law Office
831 Como Ave
St. Paul, MN 55103

This is a grievance arbitration between the above named parties in accordance with procedures outlined in the collective bargaining agreement (CBA). The grievance involves the termination from employment of Matthew Gorans (grievant) from his employment with the above named city (employer). The parties agreed that the matter was properly before the arbitrator.

ISSUES

Whether the city violated the collective bargaining agreement by terminating the grievant from his employment as a police officer without just cause. If so, what is the appropriate remedy?

INTRODUCTION

This grievance arbitration concerns a St. Paul police officer who was involved in an arrest of a St. Paul man in the summer of 2012. The grievant has been employed with the city since October of 2009. The city employs almost 600 full-time police officers.

On August 29, 2012, a YouTube video posted which depicted an officer (not the subject of this arbitration) kicking a suspect, Eric Hightower, in the upper body area as a prelude to handcuffing the suspect. The video was posted the day after the actual arrest. The video went viral and a lot of media attention resulted. The grievant arrived on the scene after the kicking incident and assisted in getting Hightower in the back seat of the police car. The alleged activity took place out of the sight of the YouTube video and was not the subject

of the initial rounds of media attention. However, in the media portrayals, the grievant's activities quickly got swept together with the other officer's.

The grievant was administratively suspended on August 30, 2013 after an initial review of in-car-cameras revealed a potential issue regarding excessive use of force by the grievant in his actions in the back seat of the squad car while assisting in the effort to get Hightower in the car and under control, as further detailed below.

On August 31, 2012, the media covered and reported on a news conference where various church leaders and the local NAACP president decried the treatment of Hightower. The event was held at the site of the arrest and was attended by Hightower and his attorney.

On September 16, 2012, the grievant was returned to work, albeit doing administrative duties and not on the street.

The Ramsey County Attorney referred this matter to the Olmstead County Attorney for purposes of determining whether Gorans and the other officer should be charged with felonies for the actions described herein. The matter was referred to avoid a potential conflict of interest. On November 29, 2012, the Olmstead County Attorney declined to bring felony charges against either officer. In relevant part, the County Attorney determined that:

[o]fficer Gorans is allowed to use reasonable force in assisting another officer in making an arrest. Eric Hightower is actively resisting the efforts of three officers to place him in the backseat of a squad car and that is despite the fact Hightower is handcuffed. Officer Gorans' decision to Mace (sic) Hightower occurred during the

few seconds he was struggling with Hightower in the backseat of the squad car. Great physical effort was being used without success to get Hightower into the squad car and the officer decided to use Mace (sic) to achieve compliance by Hightower. In escalating the degree of force necessary to subdue Eric Hightower Officer Gorans used the most expedient technique to achieve compliance by Hightower by using Mace (sic). There is simply insufficient proof beyond a reasonable doubt that Officer Gorans used unreasonable force during the arrest of Hightower.

City Exhibit 63; Union Exhibit P-079.

The city next referred this case to the City Attorney to determine whether misdemeanor level offenses should be brought under these facts. The St. Paul City Attorney referred the matter to the Minneapolis City Attorney due to potential conflict of interest issues. On February 15, 2013, that office declined to prosecute the complaint stating:

I am declining to issue criminal charges in this case. Officer Gorans arrived on the scene of a struggle with Eric Hightower, who was being arrested on a warrant. At the time of Officer Gorans' arrival, the struggle was already underway, and Hightower was struggling and arguing with officers. By his own admission, Officer Gorans used force with Hightower, including macing him and pushing into the squad car. The most applicable charge is fifth degree assault. However, there is insufficient evidence that Officer Gorans assaulted Hightower. The force used by Officer Gorans appears to be an authorized use of force, necessary to effectuate Hightowers' (sic) arrest.

City Exhibit 63; Union Exhibit P-085.

The city next referred the case to the Police Civilian Internal Affairs Review Commission (PCIARC). This Commission was established as a citizen review board for purposes of maintaining trust and cooperation between the communities of St. Paul and its police department. All members are appointed

by the mayor. Five members are appointed from the community with an attempt to reflect the diversity present in a major metropolitan city like St. Paul. The final two members are appointed by the mayor from the police force.

The PCIARC is charged with reviewing all matters involving discharge of firearms and other matters that are referred to it. It has the power to make internal determinations as to whether allegations made against the police department are true or not and to make recommendations as to how to dispose of those allegations. The final disposition of any discipline that might be recommended is vested with the Chief of police.

In this matter, the PCIARC reviewed three allegations concerning the grievant. The first allegation concerned whether he used excessive force in assisting in the arrest of Hightower. This allegation focused on pulling Hightower into the squad car by grabbing his hair. The Commission sustained the allegation by a 5 to 2 vote.

The second allegation concerned the use of mace on Hightower. The Commission considered whether the use of mace was improper conduct under these circumstances. The Commission determined that Gorans had deliberately sprayed aerosol subject restraint (ASR) into Hightower's ear and sustained that allegation unanimously.

Finally, the Commission sustained the allegation, by a 4 to 3 vote, that Gorans did not follow proper procedure because he failed to document his use of force in his report (pulling Hightower into the squad car by his hair).

In the end, based on this record, the Commission recommended that the grievant be suspended from his employment for a period of ten days.

On June 6, 2013, the Chief overruled the PCIARC's recommendation and issued the grievant a letter of termination, effective on June 24, 2013.

The union appealed through the grievance procedure in the collective bargaining agreement and this decision is the end result of that process. The hearing on this matter took place over three days with 20 witnesses testifying, including the chief and the grievant. The record consists of paper documents stacked almost 6 inches high. In addition, the employer submitted over 14.5 gigabytes of additional documents, photos, and videos into the record. The Arbitrator has reviewed every page of this record at least once. Additionally, the arbitrator reviewed the in-car camera video and still photographs of the ten seconds showing officer Goran's attempting to get Hightower into the squad car have been reviewed in excess of twenty times. Suffice it to say that the record has been adequately perused.

FACTUAL BACKGROUND

As indicated earlier, there are two officers who are subject to discipline as a result of conduct engaged in the arrest of Hightower on the date in question. The first officer is the subject of a different potential proceeding and his actions and alleged behavior have no bearing on the matter concerning the grievant, other than to provide a context for the grievant's actions and behavior.

For purposes pertaining to this arbitration and with two exceptions specified below, the city's description of the underlying facts is accepted by the arbitrator as accurate and true. In relevant part, the city wrote in its brief:

Through its investigation, Internal Affairs found that on August 28, 2012, Officer Zilge responded to a Terroristic Threats call. The victim, Kara Drew, indicated that her boyfriend, Eric Hightower, threatened her earlier in the day. Officer Zilge attempted to locate and arrest Mr. Hightower. When Officer Zilge located Mr. Hightower he was walking with two friends in the area of Milford and Woodbridge. Once Officer Zilge located Mr. Hightower he got out of his vehicle, told Mr. Hightower he was under arrest and instructed him to lie down on the ground with his hands behind his back. Mr. Hightower asked Officer Zilge why he was under arrest and Officer Zilge continued to instruct Mr. Hightower to lie on the ground with his hands behind his back. In order to gain compliance, Officer Zilge deployed his Aerosol Subject Restraint ("ASR") in Mr. Hightower's face. The ASR deployment was ineffective in gaining compliance therefore Officer Zilge called a 10-2 over the radio and requested additional assistance. Officer Zilge was finally able to get Mr. Hightower to the ground but he continued to ask why he was under arrest. This is approximately when Lord Stitts began filming the video that was uploaded to YouTube. *City Exhibit 37.*

Officer Neubrand was the first officer to arrive on the scene. When Officer Neubrand arrived on the scene, Officer Zilge instructed him to watch the people gathered in the park. Officer Petron arrived on the scene shortly after and was able to assist with handcuffing Mr. Hightower. Officers Zilge and Petron escorted Mr. Hightower to the front of the squad car where they searched him for weapons. Shortly after that, the grievant arrived on scene and walked towards Mr. Hightower while shaking his ASR. The grievant and Officers Zilge and Petron moved Mr. Hightower to the rear of the squad car where they once again searched him for weapons. *Id.*

City summation pp.3-4.

The arbitrator accepts the city's version of the events to this point with two exceptions. First, Officer Petron did not assist in handcuffing Hightower. By the

time that Petron was in the physical vicinity of Zilge and Hightower, Hightower was handcuffed on both wrists and sitting next to Zilge. Additionally, the city's description fails to indicate that when Petron and Zilge lifted Hightower on his feet, Hightower made a sudden move with his head toward Zilge which both officers took as physically aggressive enough that it required them to rush Hightower to the squad car and forcibly push his upper body and head onto the hood of the car, creating an obvious dent in the hood.

At this point, the grievant had arrived on the scene and the other two officers escorted Hightower to the rear passenger door. Zilge can be seen placing his ASR into the right front slot of his holster (viewed on the front in-car camera video on Zilge's squad car). City Exhibit 48. The grievant assisted in searching Hightower at this point, placing articles from Hightower's pockets on the squad car.

From this point forward, the rear in-car camera from Zilge's squad car provides the best record of what happens next. The rear camera faces backwards towards the backseat and one can see the entire backseat area from door to door. As indicated earlier, the record consists of both video and still photographs extracted from the video of the struggle to get Hightower into the back seat of the squad car. The arbitrator counted 25 or 26 still photos for every one second of video. Accordingly, a careful review of the videos and stills allows for a fairly detailed view of what occurred in the back seat, at least from the viewpoint of the camera.

Notwithstanding the above, there is a clear controversy between the parties to this arbitration as to what actually happened in the ten seconds in question. The main point of contention concerns whether the grievant intentionally sprayed ASR into Hightower's ear during the struggle in the back seat of the squad car. After an exhaustive review of the record, the arbitrator makes the following findings of fact concerning what happened between the grievant and Hightower.

15:39 (all references are to minute/second on City Exhibit 43 which is from the rear in-car camera of Zilge's squad car) – Either Zilge or Petron is heard telling Hightower to have a seat. Hightower immediately puts his left leg into the bottom corner of the door and locks his leg tight so that he cannot be placed into the squad car. Hightower is told to either have a seat or to get into the car at least ten times over the next 20 seconds. The commands are very clearly heard on the audio portion of both the rear in-car camera and the front facing in-car camera of Zilge's squad car. City Exhibit 48.

15:53 - the grievant first appears from the right hand side of the screen.

15:55 – the grievant slides across the seat and grabs Hightower's t-shirt and attempts to pull him in the car.

15:57 – Hightower pulls loose and falls to the ground.

16:03 (JPEG 1593 – JPEG reference to still photo in numerical order)– Petron and Zilge turn Hightower around so that they can get him going into the car head first. At this point, the grievant is in the car, on his knees and reaches

out and grabs Hightower's hair (longish dreadlocks). He first pulls with his left hand and then uses both hands.

16:05 (JPEG 1604) – The grievant's right hand is visible for the first time.

The ASR canister is visible and is held by his index finger around the canister.

16:06 (JPEG 1669) – Either Petron or Zilge kick Hightower in the leg in an effort to get him into the car. Hightower is shown hooking his legs around the wheel well of the car in an apparent effort at resisting being put into the car. An officer is heard clearly instructing bystanders to "back off – get back".

16:07 (JPEG 1687) – The ASR canister is visible in the grievant's right hand. Hightower's legs are still hooked around the outside of the door, preventing him from going all the way into the car.

16:07 (JPEG 1702) – the grievant first depresses the trigger on the ASR.

16:07 (JPEG 1709) – the grievant releases the trigger.

The still photos are inconclusive as to where the spray is pointing during these 8 photos because Hightower's face and ear are outside the photo frame. However, the following 4 photos clearly indicate to the arbitrator that the spray was pointed below the ear. In these four photos, the grievant stops the spray and pulls his hand away from Hightower's face and moves toward the back of the head. The angle and direction of the trigger and thumb clearly indicated an aim below the ear toward the cheek area. The duration of the burst is quite short (7/26ths of a second).

16:08 (JPEG 1730) – The grievant depresses the trigger again. The direction of the thumb and nozzle is pointed below the ear toward the cheek area again.

16:09 (JPEG 1740-1742) – liquid from the ASR is clearly visible on the jpeg and it is located on the cheek and jaw area below the ear. The grievant is moving the canister up the head at this point. The angle of the wrist, and thumb and nozzle show clearly that he is spraying and pointing below the ear.

16:09 (JPEG 1742 -1767) – The grievant continues to spray ASR and Hightower struggles and jerks away from the spray at JPEG 1767.

16:10 (JPEG 1770) – Either Petron or Zilge is seen grabbing Hightower's legs and pushing them inside the door.

Hightower is told three times during the time he is head first in the back seat to “get your feet in there” by either Zilge or Petron.

16:11 (JPEG 1800) Hightower is seen struggling and the grievant is preparing to spray him again.

16:12 (JPEG 806-808) the grievant sprays Hightower very quickly again (3/26ths of a second) and liquid is clearly visible around Hightower's ear area.

At this point, the grievant exits the car.

DISCUSSION

Dishonesty

Chief Smith testified at the hearing that the main reasons for the grievant's termination was due to his intentional, willful and malicious spraying ASR in

Hightower's ear in direct violation various Department orders and Civil Service Rules. Additionally, he cited the grievant's dishonesty in failing to submit a report right away and how he characterized the events in the back seat of the squad car. This description of the reasons for termination are consistent with the letter of termination issued by the chief to the grievant on June 6, 2013.

As an initial matter, the arbitrator finds that the city failed to prove the dishonesty factor. Specifically cited by the chief was the statement by the grievant that he was engaged in "hand to hand combat" with Hightower in the backseat. The grievant made this statement in response to the internal affairs interview question as to whether he was specifically aiming for Hightower's ear in the spraying of his ASR. The grievant unequivocally states that he was not aiming for the ear and tries to explain that Hightower was not cooperating and was squirming around and he was trying to control him and spray the ASR at the same time. His description of it being "hand to hand combat" the arbitrator takes at face value. The grievant, in describing things this way, knew that Hightower was handcuffed and simply used the phrase to describe the conditions from his perspective. There is nothing in the response that would lead this arbitrator to believe that the grievant was literally trying to persuade the internal affairs officer that Hightower was not handcuffed or that he was trying to make her believe something that wasn't on the video.

The second statement that the chief cites as being dishonest is the series of denials where the grievant denied that he was intentionally aiming at the ear

canal. This would only be a lie if, in fact, the grievant was actually aiming for the canal. For reasons more fully explained below, the arbitrator finds that the evidence is insufficient to prove that the grievant aimed for the ear with his ASR intentionally and therefore, dishonesty has not been proven on this record.

Failure to File a Complete Report

The evidence proves conclusively that the grievant failed in this regard. The grievant admitted on the record that his report was inadequate. The city's position on this issue is that the failure to file the report on time and the failure to include necessary information was intentional and designed to cover up for the grievant's alleged misdeeds. The arbitrator finds that the record does not support that contention.

The record established that the grievant did fail to file his report on time. The report was written, but had not been transmitted electronically in the system. It also established that another report that the grievant wrote on the day in question was transmitted correctly, which is why the city argued lent credence to its assertion that he purposely held this report back. The grievant did not file his report until two days after the event. He was on vacation the next day and filed his report immediately upon coming on duty on the second day.

The city asserted that the failure to file the report on time was intentional in an effort to see if the incident would die down first. However, the YouTube video and subsequent media attention did not occur until the day after the incident and the grievant would have had no reason to know that the arrest would cause such

a commotion. Additionally, the grievant's uncontroverted testimony was that he was informed of his failure to file the report the day after the arrest and offered to come in and complete the process. He was told that he could file the report when he returned to work the next day.

Finally, the city inferred that the grievant's failure to document the use of force in pulling Hightower into the squad by his hair was intentional and another attempt to hide adverse facts. After listening to the recorded interview and the grievant's testimony, the arbitrator is satisfied that the failure to include use of force details was not designed to cover up actions by the grievant, but was a deficiency in thoroughness on his part. The report did contain the fact that he used ASR, even though details were left out, in hindsight.

The biggest error in this regard concerns his failure to even mention the hair pulling incident, which the grievant acknowledged. The grievant further asserted that it would not be very intelligent of him to purposely leave out parts of the activities considering he knew that everything was filmed on the in-car cameras. The city countered by stating that there is a tremendous amount of footage recorded everyday and virtually all of it is destroyed as a normal part of business and that the grievant would have counted on this fact in attempting to hide his use of force. The arbitrator finds that the same argument would apply to the use of ASR as well and the grievant would have an equal reason to hide that use as well if he wanted to cover up his actions. Lastly, the arbitrator notes that the grievant asked to add or review his report upon reporting for duty, but was

not allowed to do so by his commanding officer. Nonetheless, the grievant admitted that the report was inadequate and failed to live up to policy. Standing alone, the failure to file a complete report would not support a termination decision here.

Excessive Use of Force

This allegation concerns the fact that the grievant pulled Hightower into the squad car by his hair and questions the use of ASR in the first place. The internal affairs investigation did not seek a use of force trainer's opinion as part of its investigation.

Sgt. David Gora testified for the City. He was the acting commander of Internal Affairs when it investigated the allegations herein, although a total of three investigators participated in the investigation. Gora testified that the pulling of hair, the use of ASR in general and the intentional aiming of the ASR into the ear were all grounds for sustaining the excessive use of force allegation. However, Commander Colleen Luna, who was the senior commander of Internal Affairs at the time of the investigation, testified that the reason they did not seek a use of force trainer's opinion during the investigation is because the question was whether the use of ASR into the ear was intentional or not and not whether the use of force was proper. While that may be true on the question of intentionality, a use of force trainer's opinion as to the hair pulling and use of ASR at all are both issues where a trainer's opinion would be illuminating. Indeed, one of the union's witnesses, Terrence Erdman, provided expert

assistance to the city attorney from Minneapolis, which resulted in a declination in bringing misdemeanor charges here.

The arbitrator finds that there were four main witnesses who testified extensively and compellingly regarding use of force and how St. Paul officers are trained. All four have taught use of force tactics for the city, testified under oath and were subject to cross examination here. The city called Commander Steve Frazer and Sgt. John Linssen. The union called Terrence Erdman and Jason Brubaker. Without going into great detail here, all four have extensive experience in training on the use of force and neither side seriously questioned their ability to testify on these matters. None of them were consulted during the Internal Affairs investigation.

At the hearing, Linssen, Erdman and Brubaker all testified that pulling a suspect by the hair in an attempt to restrain is within the confines of the city's use of force policies. All the witnesses testified that the accompanying circumstances would dictate the level of force necessary and whether pulling Hightower by the hair was justified. Here, the officers made repeated attempts to get Hightower into the car. They verbally ordered him into the car at least ten times. Hightower did not comply. Instead, he locked his leg up on the door frame so that he could not be pushed through the door. Outside officers attempted to get him into the car by using foot strikes to his legs in an effort to get him to comply. The grievant tried to assist by grabbing his t-shirt from the inside of the car, but the three

officers were not able to get him close to going inside. In the meantime, Hightower is heard continuing to try to get the large crowd to support him.

Finally, Hightower was turned around in an effort to get him into the car head first. The grievant reached down and pulled him into the car by the hair. The grievant essentially had the lead responsibility for getting Hightower into the car at this point. The officers outside had little ability to pick him up and carry him through the door opening given the fact the car door blocks a large portion of the entry way. The space in the car is quite small and it would have been unreasonable to think that the grievant could have reached all the way down and grabbed him by the underarms to try to pull him in. Additionally, such an action would have put the grievant in a vulnerable position with a defiant arrestee who had shown no willingness to comply. Finally, Hightower continued to refuse to get into the car by locking his legs around the car wheel well and ignoring three commands to get his legs in the car and sustaining at least one leg kick from one of the outside officers.

The St. Police department, like many departments, utilizes a use of force continuum. The continuum runs the gamut from using an officer's presence and verbal commands up to deadly force. The officers are trained to use that amount of force on the continuum "when and only to the extent necessary." Necessary is defined as "no reasonable effective alternative appears to exist and the amount of force used is reasonable to effect the lawful purpose intended." City Exhibit 36. The arbitrator finds that the use of force with regard to pulling Hightower's

hair was justified under the circumstances and should not be used as a basis for discipline here.

Linssen, Erdman and Brubaker agree on the next issue, which is whether the use of ASR at all was appropriate under these facts. All three testified that the use of ASR was appropriate, but not if it was aimed directly into the ear as alleged. In addition, Commander Frazer's opinion that the grievant's actions was premised on the "fact" that he had aimed the ASR directly into Hightower's ear. Therefore, the central issue in this case is whether the grievant intentionally sprayed Hightower with AST directly into his ear. For the following reasons, I find that the city has not carried its burden of proof in this regard.

Intentional Spraying of ASR in the Ear

As indicated earlier, the arbitrator has viewed both the video and the still photos taken from the video in excess of twenty times. In addition, the training ASR canister was used to reenact the spraying in the photos, frame by frame. Based on this, the arbitrator concluded that the ear was neither sprayed intentionally nor at any length.

In the finding of fact enumerated earlier, it becomes clear that what might first appear to be spraying in the ear, was not in the ear at all, at least for the large percentage of spraying. In relevant part, the findings concerning the ten seconds in question are reprinted here for convenience:

16:07 (JPEG 1702) – the grievant first depresses the trigger on the ASR.

16:07 (JPEG 1709) – the grievant releases the trigger.

The still photos are inconclusive as to where the spray is pointing during these 8 photos because Hightower's face and ear are outside the photo frame. However, the following 4 photos clearly indicate to the arbitrator that the spray was pointed below the ear. In these four photos, the grievant stops the spray and pulls his hand away from Hightower's face and toward the back of the head. The angle and direction of the trigger and thumb clearly indicated an aim below the ear toward the cheek area. The duration of the burst is quite short (7/26ths of a second).

16:08 (JPEG 1730) – The grievant depresses the trigger again. The direction of the thumb and nozzle is pointed below the ear toward the cheek area again.

16:09 (JPEG 1740-1742) – liquid from the ASR is clearly visible on the jpeg and it is located on the cheek and jaw area below the ear. The grievant is moving the canister up the head at this point. The angle of the wrist, and thumb and nozzle show clearly that he is spraying and pointing below the ear and over the ear.

16:09 (JPEG 1742 -1767) – The grievant continues to spray ASR and Hightower struggles and jerks away from the spray at JPEG 1767.

16:10 (JPEG 1770) – Either Petron or Zilge is seen grabbing Hightower's legs and pushing them inside the door.

Hightower is told three times during the time he is head first in the back seat to "get your feet in there" by either Zilge or Petron.

16:11 (JPEG 1800) Hightower is seen struggling and the grievant is preparing to spray him again.

16:12 (JPEG 806-808) the grievant sprays Hightower very quickly again (3/26ths of a second) and liquid is clearly visible around Hightower's ear area.

The first spray lasts less than 1/3 of a second and, as indicated, is not pointed at the ear. Based on what the photos show, the arbitrator concludes that the grievant needed to reposition himself in order to get a proper spray.

The second spray lasts 37 frames which is about 1 and 11/26ths seconds. This spray starts below the ear and moves up the side of the head. The liquid is clearly visible below the ear, on the jaw line and cheek. The movement of the canister stops and hovers over the ear area. The arbitrator's view of the canister indicates that the spray is not pointed directly at the ear. The grievant's closed fist around the canister is angled in such a way that his wrist is touching Hightower's head and so are only the tips of his fingers. The wrist is bowed out, and the position of the thumb and nozzle are not pointed downward toward the ear canal. The makeup and structure of the ASR canister is such that the direction of the thumb is going to dictate the direction of the spray. The high curved walls around the trigger force the thumb into this directional position. The visible spray in JPEG photo 1740 confirms this result and premise.

The third spray is very short (about one tenth of a second). This time there is liquid that appears in the ear area, but the angle of the nozzle, thumb and wrist indicate that the spray is not going directly downward into the canal.

Based on this review of the evidence, it is very clear that some ASR liquid would likely enter the ear. It is also equally clear to the arbitrator that the ear canal was not intentionally targeted. If it was intentional, the grievant was aiming poorly.

This conclusion was reached based on a couple of other factors as well. The area in which this all took place was quite small. The grievant was holding onto Hightower with his left hand on his head and hair. Hightower's face was in the direction of the grievant's left hand. The grievant would have had to reach over Hightower's face with his right hand and spray backwards in order to get a stream directly into the face. This would have been very awkward and not very smart, especially considering the fact that Hightower was struggling and could easily have jerked or bumped the canister and/or the grievant could have ended up spraying himself. As well, officers are trained to hold the canister at least 6 inches from the eyes to avoid injury. In the arbitrator's mind, that would have been an unreasonable move to make under the circumstances and finds that the grievant deployed ASR in a reasonable fashion under the circumstances.

Finally, if the grievant would have really wanted to hurt Hightower, he could have sprayed him directly in the eyes at close distance. All parties agreed that this would likely result in injury to the recipient. The evidence indicating that spraying in the ear would result in injury is somewhat slight and deficient, based on the record established in this hearing.

REMEDY

There remains the issue of what remedy to award herein. Chief Smith persuasively argued that incidents of this type degrade the fragile public trust between law enforcement and the community at large. He is entrusted with the responsibility of maintaining and establishing close relationships with the communities he serves and ensuring the public safety that the public demands. This is the goal of all law enforcement.

In this matter, after having determined that the grievant engaged in egregious improper conduct by intentionally aiming for the ear, the chief responded in the fashion that he believed the community and the department would expect. He fired the grievant. It should be noted that had the city proved that the grievant had intentionally sprayed Hightower in the ear, a discharge might have been sustained here.

The arbitration process is designed to provide a check on those decisions. Under the rules and procedures designed to provide a due process check on matters such as this, this arbitrator is empowered to rule on the efficacy of those decisions based on the evidence and testimony educed at a hearing designed to produce a just result. This decision is the result of that process.

Maintenance of the public trust is an important issue for a police department, especially in a large urban environment such as this. Without the belief that law enforcement will enforce the laws of the land equally and without prejudice, community peace and harmony cannot exist. That is precisely why

our courts and legislature have established and upheld an independent, objective review of actions such as this through arbitration.

It is also why the city established the PCIARC. The PCIARC was established for the direct purpose of providing public input on the very trust issue that is in play here. The members are appointed by the mayor with the understanding that the committee will reflect the diversity of a metropolitan community like St. Paul.

The PCIARC reviewed the facts of this case based solely on a presentation from the Internal Affairs unit. All of the facts presented were based on the conclusions and determinations made by that unit, which had already determined that the grievant had engaged in sustainable misconduct concerning the failure to write a proper report, the excessive use of force concerning the hair pulling actions, and the improper conduct involving intentionally spraying Hightower in the ear with ASR.

It is important to note in this regard that the PCIARC is presented evidence solely from the perspective of the Internal Affairs unit. It does not obtain the perspective of any other entity or person. In this regard, the PCIARC acts most similarly to a grand jury, even though the standard of proof is different. The point is that it really only hears the perspective of the Internal Affairs unit and makes its determinations therefrom.

After deliberating on the facts that were presented to it, the PCIARC found that the grievant intentionally sprayed Hightower in the ear with ASR. Given that

finding, the PCIARC only recommended a ten day suspension for that determined violation.

The import of that recommendation involves the intersection of the public trust issue cited by the chief and the determined violation found by the committee. In other words, the committee found that the evidence produced by the city warranted no more than a ten day suspension. However, in this decision, the arbitrator has specifically found that the grievant did not deliberately spray ASR into Hightower's ear. The arbitrator gives great weight to the level of punishment that should be administered here based on the community trust procedure that has been established by the city to ensure fair treatment in cases like this. Ultimately, this means that the grievant should be administered discipline well short of a ten day suspension.

In this matter, the arbitrator has found, based on the evidence and testimony after three days of hearing, that the city did not prove that the grievant engaged in conduct that would justify his termination as a police officer with the city of St. Paul. On the other hand the city did prove that the grievant violated certain policies and rules governing the conduct of all police officers. That leaves the question of what the appropriate discipline should be.

The grievant was suspended for three days for conduct involving excessive use of force in the past. In that case, he used a stronger form of force in kicking a suspect repeatedly in the head area. The use of force here is clearly

less than that in the previous matter. However, both instances implicate use of force that, at minimum, is subject to question.

Police officers, like other people, come in all shapes and forms. The arbitrator came to the conclusion, after three days of hearing and witnessing the demeanor of the grievant, that he would most likely be on the more aggressive end of the continuum of police officers. In any profession, you will find people on the full spectrum of this continuum. Based on the record before the arbitrator the grievant appears to be an officer who will readily step in when physical assistance is needed. While this proclivity is commendable in a para military environment, it also leaves such personnel vulnerable to allegations such as the instant matter.

After he got his three day suspension, the arbitrator believes that the grievant used a level of force with Hightower that was lower on the use of force continuum. He escalated the use of force to the next least harmful level, which is the use of ASR. He did not strike Hightower in any fashion and did not escalate his use of force to anything that could be considered potentially deadly or inciteful, given the large crowd gathering around the officers. Notwithstanding that, his conduct caused him to come under scrutiny and resulted in his being proposed for termination in large part because he was willing to step forward and help.

The record is somewhat limited in comparative disciplinary actions taken by the city in the past and either acceded to or sustained by previous arbitral

decisions in similar matters between the parties. The arbitrator is guided by the findings of the PCIARC in rendering the level of discipline administered here for the found violations of policy and rules that relate to the failure to properly report out what happened here. In particular, the arbitrator is guided by the chief's desire to maintain and enhance public trust, which is the goal and reason for the PCIARC in the first instance.

The PCIARC recommended a ten day suspension based on its finding that the grievant intentionally applied ASR to Hightower's ear. As indicated above, this decision disagrees with the conclusion that the ASR was aimed at the ear intentionally. Accordingly, the arbitrator is persuaded that some form of discipline, if any, should be awarded here that is short of the ten day suspension.

If the grievant had properly reported out the events of what transpired, it is the finding of this arbitrator that he should have received no discipline for the activities in contest here.

In keeping fidelity with the conclusions reached by the PCIARC, absent the findings concerning sustaining the intentional spraying of ASR into the ear, the arbitrator determines that a one day suspension is warranted for the proven act of failing to file a complete and documented report.

For the foregoing reasons, the grievance is sustained in part. The grievant should be made whole with respect to any loss of pay, benefits or other contractual issues other than a one day suspension and returned to his position as a police officer with the city.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "H. Ogata".

Harley M. Ogata

February 3, 2014