

THE MATTER OF ARBITRATION BETWEEN

POLICE OFFICERS FEDERATION)
OF MINNEAPOLIS,)
)
Union,)
)
and) **LEHNER TERMINATION**
) **GRIEVANCE**
)
CITY OF MINNEAPOLIS,)
)
Employer.)
)
_____)

Arbitrator: Stephen F. Befort

Hearing Dates: August 16, 2016
September 2, 2016

Post-hearing briefs received: September 16, 2016

Date of Decision: October 6, 2016

APPEARANCES

For the Union: Kevin M. Beck

For the County: Trina Chernos

INTRODUCTION

Police Officers Federation of Minneapolis (Union), as exclusive representative, brings this grievance claiming that the City of Minneapolis (City or Employer) violated the parties' collective bargaining agreement by discharging Police Officer Blayne Lehner without just cause. The City asserts that the discharge was warranted because the grievant violated department policies concerning the use of force, reporting the use of force, and verbal conduct. The grievance

proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

- 1) Was the termination of Blayne Lehner for just cause?
- 2) If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 4

DISCIPLINE

Section 4.1 The City, through the Chief of the Minneapolis Police Department or his/her designee, will discipline employees who have completed the required probationary period only for just cause. . . .

FACTUAL BACKGROUND

The grievant, Blayne Lehner, has been employed as a police officer by the City of Minneapolis since 1998. He generally has received positive evaluations of his work performance, and he has received numerous commendations and awards. Pursuant to the collective bargaining agreement between the City and the Union, the grievant may be discharged only upon a showing of just cause.

The incident giving rise to this grievance arose out of a domestic disturbance call to a South Minneapolis apartment building that was answered by Officer Lehner and his partner, Marcus Lukes, on August 4, 2014. Upon arrival, they found two females – Amy Nelson and Missy Desjarlais – engaged in a protracted yelling match. Desjarlais, Nelson’s girlfriend, had decided to move out of their apartment and was packing her belongings. Nelson was very upset about the departure and also concerned about what property items were being removed.

Lehner testified that Nelson was out of control. She was intoxicated on a combination of alcohol and prescription medicine and acting in a very rambunctious manner. The two officers separated the two females with Lukes shadowing Desjarlais inside the apartment and Lehner working to keep Nelson in the hallway. An apartment security camera captured some of the events that transpired.

While Desjarlais, her daughter, and several residents worked on removing her property from the apartment, Nelson continued to yell and agitate outside the door to the apartment. At one point, Nelson attempted to push past Lehner and enter the apartment, but Lehner was able to keep her at bay with a hand to her stomach. At about this time, one witness, Shenita Esaw, claims that she heard Lehner call Nelson a "cunt."

After Desjarlais removed all of her belongings and departed to the apartment's ground floor, Lehner told Nelson to go inside the apartment and check to see if any of her property items were missing. Lehner and Lukes instructed Nelson to stay inside the apartment, but she kept attempting to leave. After waiting for a period of time, the two officers left for the ground floor rear exit where Desjarlais was packing up her property in her car. The video shows that Nelson exited the apartment just a few seconds later.

The officers were outside the ground floor exit when Nelson arrived. She opened the exit door and split her time between talking on her cell phone and yelling at Desjarlais who was still packing up her car. Lehner moved to block Nelson's egress from the building, and the two stood at close quarters in the doorway. The video shows that Lehner then pushed Nelson, causing her to stumble backwards a few feet before falling over some hallway steps. Lehner testified that he directed Nelson to put the phone down and turn around with her hands behind her back because she was going to be placed under arrest. When Nelson did not comply, Lehner swatted the phone out of

Nelson's hands. Nelson then attempted to stand up and grabbed Lehner's hand. Lehner responded by pushing Nelson back to the ground. From the video, it is unclear whether Lehner grabbed Nelson by the throat, as the City alleges, or whether Lehner pushed her in the upper chest area, as the Union alleges.

At this point, one of the residents said "please don't arrest her, we will take care of her." Since Nelson had now calmed down somewhat, Lehner decided to comply with the request, and the resident escorted Nelson back to her apartment.

Apartment manager Alyssa Kiffmeyer subsequently learned of the incident and filed a complaint with the police department. She provided copies of the video recordings from the apartment building.

The complaint prompted an investigation by Sergeant Jason Walters into the August 4 incident. The investigative file was then forwarded to the Office of Police Conduct Review where a panel consisting of two civilians and two lieutenants concluded that Lehner had violated department policies relating to the use of force, reporting of incidents, and inappropriate language. A three-person department leadership panel also reviewed the investigation and sustained the finding of three policy violations, namely

- Use of force - 5-303;
- Use of force reporting requirements - 5-306; and
- Code of conduct, decorous language – 5-505.15.

The panel also decided that Lehner's failure to report could be enhanced to a higher level D violation due to a 2014 suspension of 40 hours for a use of force violation. This discipline was grieved by the Union, and that grievance has not yet been resolved.

The City placed Lehner on administrative leave on September 2, 2015. The City invited Lehner to respond to the pending charges at Loudermill hearings held on October 29, 2015, and on November 16, 2015. Lehner made presentations on both occasions.

Chief Janee Harteau concurred with the panel's recommendation and terminated Lehner on January 22, 2016. In her termination memorandum, Harteau wrote:

Officer Lehner's actions were not consistent with the Minneapolis Police Department's core values of commitment, integrity and transparency or the MPD guiding principle, "Did my actions reflect how I would want a family member of mine to be treated? . . ."

Public trust and procedural justice is vital in our ability to effectively protect and serve, and as a result I have lost all confidence in Officer Lehner's ability to serve the citizens of Minneapolis due to his poor judgment and his lack of integrity."

At the arbitration hearing, the Union introduced evidence of several other disciplinary incidents that have occurred during Chief Harteau's administration. Federation President Robert Kroll testified that while several of these incidents involved injuries, none resulted in discharge. The City maintains that Lehner's infraction is more serious than that of any in the alleged comparator group.

POSITIONS OF THE PARTIES

Employer:

The City contends that it had just cause to discharge the grievant for three violations of Minneapolis Police Department (MPD) policies. First, the City alleges that Lehner used excessive force in subduing Nelson. In particular, the City argues that Lehner's two pushes constituted more force than was necessary given that Nelson posed no threat to the safety of the officers or others and was not attempting to flee. Second, the City claims that Lehner violated department policy by failing to file a report about his use of force. Third, the City asserts that Lehner violated the

department's Code of Conduct by calling Nelson a "cunt." The City finally contends that these serious violations warrant the penalty of discharge and that the City's discipline of Lehner cannot be invalidated on the grounds of disparate treatment.

Union:

The Union maintains that the City did not have just cause to support its discharge decision because the City cannot carry its burden to establish any of the three purported policy violations. The Union first contends that Lehner did not violate the use of force policy because each action undertaken by Lehner served a legitimate purpose and was measured in its severity. As to the City's second alleged violation, the Union asserts that Lehner had no duty to report the incident in question because a push is not considered a takedown technique. Third, the Union claims that the record does not support a finding that Lehner called Nelson a "cunt." Even if the City is able to establish the existence of one or more policy violations, the Union argues that the City engaged in disparate treatment by punishing Lehner more severely than other officers who have engaged in more serious misconduct. The Union also urges that Lehner's long and good work record should be treated as a mitigating factor warranting a sanction short of discharge.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See ELKOURI & ELKOURI, HOW ARBITRATION WORKS 15-23 (7th ed. 2012).*

A. The Alleged Misconduct

The County alleges that Officer Lehner engaged in misconduct by violating three MPD policies. Each of these alleged violations is discussed below.

1. Use of Force – Policy 5-303

MPD Use of Force Policy – 5-303 provides as follows:

5-303 AUTHORIZED USE OF FORCE (10/16/02) (08/17/07)

Minn. Stat. §609.06 subd. 1 states, “When authorized...except as otherwise provided in subdivision 2, reasonable force may be used upon or toward the person of another without the other’s consent when the following circumstances exist or the actor reasonably believes them to exist:

When used by a public officer or one assisting a public officer under the public officer’s direction:

- In effecting a lawful arrest; or
- In the execution of legal process; or
- In enforcing an order of the court; or
- In executing any other duty imposed upon the public officer by law.”

In addition to Minn. Stat. §609.06 sub. 1, MPD policies shall utilize the United States Supreme Court decision in *Graham vs Connor* as a guideline for reasonable force.

The *Graham vs Connor* case references that:

“Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, its proper application requires careful attention to the facts and circumstances of each particular case, including:

- The severity of the crime at issue,
- Whether the suspect poses an immediate threat to the safety of the officers or others, and;
- Whether he is actively resisting arrest or attempting to evade arrest by flight.

The "reasonableness" of a particular use of force must be judged from the perspective of the reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation.”

The City claims that Lehner’s action at the apartment on August 4 violated this policy because he utilized excessive force under the circumstances. The City supports this claim with the following allegations:

- Lehner’s initial two-handed shove of Nelson was forceful and violent;
- The second push involved Lehner grabbing Nelson by the throat and taking her down;
- The crime at issue, *i.e.*, a non-violent domestic disturbance, was not severe;
- Lehner acknowledged that he did not feel personally threatened by Nelson’s behavior;
- Nelson was not attempting to flee;
- Lehner’s prior efforts at light touching were effective to control behavior; and
- The allegations of excessive force were sustained by the Office of Police Conduct Review panel, the department leadership panel, and by Chief Harteau.

In contrast, the Union contends that the grievant’s conduct did not constitute excessive force. The Union makes the following countervailing arguments in support of its position:

- Nelson was inebriated and combative;
- Nelson was passively resistant and non-compliant and did not respond to officer presence and verbalization;
- The department’s use of force continuum authorized Lehner to employ escalating force to obtain compliance;
- Each use of force employed by Lehner was purposeful and measured. The first push created distance, the swatting of the phone removed a distraction, and the second push kept Nelson on the ground;

- The video does not corroborate the claim that Lehner's second push involved a grab of Nelson's throat;
- Lehner did not use more force than necessary under the circumstances.

I believe that the truth lies somewhere in between these two positions. Lehner used more force than was necessary to secure Nelson's compliance. The two pushes were with sufficient force to propel Nelson to the ground. And, Nelson's behavior, although disquieting, was not threatening to the well-being of Lehner or anyone else in the apartment building. She was not attempting to flee, and Lehner was not using force to effectuate an arrest.

That said, Lehner's behavior was on the mild side of the use of force continuum and was not substantially inappropriate as a response to Nelson's pattern of passive resistance. The first push was forceful, but not violent. It is unclear whether Lehner's second push was to the throat or to the upper chest. Neither push caused injury to Nelson.

Accordingly, I conclude that the city excessive force allegation is sustained in part, but at a less severe level than as alleged by the City.

2. Use of Force Reporting Requirements – Policy 5-306

MPD Policy 5-306 states:

Any sworn MPD employee who uses force shall comply with the following requirements:

Medical Assistance: As soon as reasonably practical, determine if anyone was injured and render medical aid consistent with training and request Emergency Medical Service (EMS) if necessary.

Supervisor Notification and CAPRS Reporting Requirements

No CAPRS Report Required

Unless an injury or alleged injury has occurred, the below listed force does not require a CAPRS report or supervisor notification.

• Escort Holds

- Joint Manipulations
- Nerve Pressure Points (Touch Pressure)
- Handcuffing
- Gun drawing or pointing

CAPRS Report Required – No Supervisor Notification required

The following listed force requires a CAPRS report, but does not require supervisor notification.

- Takedown Techniques
- Chemical Agent Exposures

CAPRS Report Required - Supervisor Notification Required

All other force, injuries or alleged injury incidents require both a CAPRS report and supervisor notification. The sworn employee shall remain on scene and immediately notify a supervisor by phone or radio of the force that was used.

The City contends that Lehner's second push constituted a take-down technique which must be reported pursuant to Policy 5-306 through the CAPRS reporting system. The disciplinary panel considered the second push to involve a takedown technique since it involved a throat grab. Pursuant to department policy, an officer is required to file a CAPRS report for an incident involving a takedown technique or an incident that results in injury. It is undisputed that Lehner did not file a report concerning the incident in question.

The Union argues that Lehner's actions neither involved a takedown technique nor resulted in injury. The City's Use of Force Continuum defines a "controlled takedown" as "physically directing a person to the ground by utilizing joint manipulation techniques and leverage that has no to low injury potential." The City acknowledges that a push normally does not constitute a takedown technique. Several witnesses corroborated this view. The City's argument that Lehner's second push constituted a takedown technique apparently is premised on the contention that Lehner employed a throat grab in conjunction with that push. But, the video recording does not clearly

establish that Lehner grabbed Nelson by the throat. The video shows that Lehner responded to Nelson's attempt to stand up by reflexively pushing on her upper chest area.

Since the record does not establish that Lehner either utilized a takedown technique or inflicted injury, Lehner did not violate Policy 5-306 by failing to file a CAPRS report. The City, accordingly, has not established this alleged violation.

3. Professional Code of Conduct – Policy 5-105.15

As a third allegation, the City contends that Lehner called Nelson a “cunt” during the August 4, 2014 incident. This allegation is supported by the interview statements of Ms. Nelson and another building resident, Shenita Esaw. If true, such conduct would undoubtedly violate MPD Policy 5-105.15 which states:

Employees shall be decorous in their language and conduct. They shall refrain from actions or words that bring discredit to the Department. They shall also not use words or terms which hold any person, group or organization up to contempt. The use of such unacceptable terms is strictly forbidden.

I believe that the evidentiary record falls short of establishing this violation for the following reasons:

- 1) Neither Nelson nor Esaw testified at the arbitration hearing. While the formal rules of evidence are not required in labor arbitration, I am hesitant to find a disciplinary violation established solely through hearsay evidence that is not subject to cross-examination.
- 2) Both Nelson and Esaw were intoxicated during the evening of August 4, 2014.
- 3) Nelson initially identified a picture of Officer Lukes as the person who pushed her and called her a “cunt” during the August 4, 2014 incident.
- 4) Nelson and Esaw provided differing accounts of when and where the alleged utterance occurred. Esaw stated that the statement was made while Nelson was still upstairs near

the door to her apartment. Nelson, in contrast, believed the statement was made downstairs after she had been pushed.

The City has not established this allegation.

B. The Appropriate Remedy

The remaining question is whether discharge is an appropriate sanction under the circumstances of this case. In its post-hearing brief, the City asserted that discharge was appropriate due to the severity of the misconduct resulting in three policy violations. The City also argued that the grievant's prior disciplinary record and the Chief's lack of trust in Lehner's possible rehabilitation provide further support for a termination remedy.

The force of the City's contentions has been blunted by the fact that only one of the City's misconduct allegations have been sustained. And that allegation has been sustained only in part as a more modest use of force violation. In addition, it is inappropriate to consider the 2014 suspension as a basis for enhancing the current penalty as that discipline has been grieved and is not yet a final disposition of discipline. *See* Minn. Stat. §13.43, subd. 2(b). Finally, the comparator evidence submitted by the Union shows that other officers who have engaged in other policy violations have received discipline short of discharge.

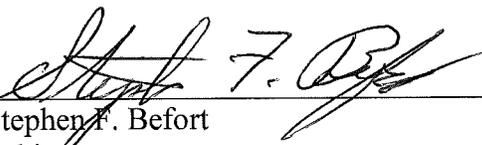
In sum, the grievant's use of force misconduct constitutes a serious violation and warrants a significant penalty. But the City's discharge decision is a step too far. I believe that the remedy in this matter should be reduced to an unpaid suspension of 40 hours.

AWARD

The grievance is sustained in part and denied in part. The termination decision is reduced to a suspension without pay of 40 hours. Beyond that penalty, the City shall reinstate the grievant and make him whole for lost compensation and benefits. The City also is directed to amend the

grievant's personnel file to reflect this determination. The arbitrator will retain jurisdiction for sixty days for the purpose of addressing any remedial issues as may be necessary.

Dated: October 6, 2016.



Stephen F. Befort
Arbitrator