

MG/LRI-2C

8-1700-3165-2
DHR File No. PS 550-

(Debra Wilbert)

MG/LRI-2C

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DHR File No. PS 548-

[Marvin Byrd]

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by
Stephen W. Cooper, Commissioner,
Department of Human Rights,

Complainant,

vs.

City of Saint Paul,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS AND
ORDER

State of Minnesota, by
Stephen W. Cooper, Commissioner,
Department of Human Rights,

Complainant,

VS.

City of Saint Paul,

Respondent.

The above-captioned matters came on for hearing before
Administrative Law
Judge Jon L. Lunde commencing at 1:30 p.m. on Monday, January 8, 1990
at the
City Hall Annex in St. Paul, Minnesota. Additional hearings were held
in St.
Paul on January 9, 10, 11, 12 and 16, 1990 in St. Paul. The
hearings were
held pursuant to two Complaints and two Notices of and Orders for
Hearing
filed with the Office of Administrative Hearings on January 30,
1989. The

cases were consolidated for hearing pursuant to agreements reached during a prehearing conference held on Monday, March 13, 1989.

Andrea Mitau Kircher, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul . Minnesota 55101 , appeared on behalf of the Complainant. Paul F. McCloskey, Assistant City Attorney, City of St. Paul, Office of the City Attorney, 647 City Hall, St. Paul, Minnesota 55102, appeared on behalf of the Respondent (City). The record closed on April 3, 1990, when the Complainant filed notice that it was waiving its right to file a reply brief.

NOTICE

Pursuant to Minn. Stat. 363.071 . subd - 2. this Order is the final decision in this case and under Minn. Stat. 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 14.63 through 14.69.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are whether the Respondent, through employees of its police department, violated Minn. Stat. 363.03, subd. 4 (1984), by discriminating against two persons' access to, admission to, full utilization of or benefit from a public service on the basis of their race; and, if so, what damages or other relief should be granted to the Complainant and the persons (charging parties) for whom these actions were commenced, and what penalties, if any, should be assessed against the Respondent pursuant to Minn. Stat. 363.071, subd. 2 (1984).

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. In July 1985, Debra Wilbert resided at 532 Edmund in St. Paul, Minnesota with her husband, David, and their two children: Angie, who was eleven, and Andre, who was seven. The Wilberts lived in a two-story single-family home which they had purchased in May 1985. The house was situated in a racially-mixed neighborhood. T. 377.

2. The house at 532 Edmund is located on a small, elevated lot 40 feet wide. The front of the house is situated about 30 feet from the street. Steps lead from the sidewalk to the top of the lot and another short staircase leads to the front door. The front yard is small and most of the yard is enclosed in a tall fence. The Wilberts kept a large doberman pinscher in the back yard and had a smaller schnauzer which stayed inside.

3. The first floor of the Wilbert home had three rooms of approximately equal size. The living room, located at the front of the house, contained a stairway leading to the second floor and had two windows overlooking the street. A dining room separated the living room from the kitchen which was located in the back of the house. The three rooms had large entryways for easy passage between them. The kitchen, which had a door leading outside, was partially divided by a counter.

4. To celebrate her husband's 30th birthday and give their friends a

chance to see their new home. Debra Wilbert decided to have a surprise birthday

party at her home at 8:00 p.m. on Saturday, July 27.

Handwritten invitations were prepared and sent to many of the Wilberts' friends.

Other friends and neighbors received verbal invitations. The invitations stated that food and beer would be provided and that guests should bring any other beverages they wanted to drink (i.e., BYOB). Most of the invitations were sent to the

Wilberts' coworkers at Sperry Univac. Debra Wilbert worked as a lab technician

for Sperry on the midnight shift from 11 p.m. to 7 a.m.

David Wilbert worked the same shift at Sperry but in a different building. T. 303.

5. On July 27, Debra Wilbert spent the day finishing preparations for the party. Calvin Godbolt persuaded David Wilbert to leave the house with him so that Debra could finish preparing for the party without David's knowledge.

David and Godbolt invited Marvin Byrd to join them after they left. Byrd is

5' 9" tall and is slightly built. At the time of the party he weighed approximately 130 pounds. T. 61.

6. Guests began arriving at the party about 8:00 p.m. David Wilbert,

Godbolt and Byrd arrived about an hour later. T. 212 At the height of the party, 25 to 30 adult guests were present. Like the

Wilberts, most of the guests were African-Americans (black) although two were of Latin American ancestry and two were of other national origins (white). The guests, like the hosts, were predominantly in their late twenties.

7. The party), started rather slowly. The guests socialized, danced,

played cards and backgammon, and ate and drank. Beer, wine and intoxicating

liquor were available to them. A generally happy mood prevailed and no one

got out of hand. By 2:40 a.m. , nearly half of the guests, including both

whites, had left the party. At that time, the Wilberts gave one of their

guests a ride home. Ex. 5, p. 2. David drove. Near the intersection of

Victoria and Selby, where the guest lived, David was stopped by two police

officers -- Lawrence Rogers and Gregory Kuehl -- because he had not made a complete stop at the intersection. During the stop, the officers discovered that there was a problem with the status of David's license. However, when they learned it was his birthday, they decided not to issue any citations (T. 160-61, 387), but Debra was told to drive home due to David's license problem. During this incident, the officers did not believe that Debra or David were intoxicated (T. 388, 549) and there is no evidence that Debra or David were uncooperative.

8. David and Debra returned home at approximately 3:00 a.m. By 3:30 a.m. about 15 guests were still present. T. 169. Most of the guests had been drinking and some may have been intoxicated at that time. Debra Wilbert and Marvin Byrd had been drinking also, but they were not intoxicated. The Wilberts' two children and two other children were asleep in the basement. An infant was sleeping upstairs. The three additional children were visiting the Wilberts at the time of the party.

9. About 3:30 a.m. on July 28, a person residing at 531 Edmund, which is across the street from the Wilberts' home, telephoned the police department complaining about a "live band" at the Wilberts' residence. Ex. 32. The noise complaint was given the lowest priority (priority 5) and Officer Dennis Meyer was dispatched to respond to it. Ex. 32, T. 617. Officers Catherine Janssen and Cyril Dargay were apparently dispatched as Meyer's back-up.

officer Eugene Polyak, a rookie, and Sergeant Robert Fletcher also responded to the call. Polyak and Fletcher were in separate vehicles (squads) that morning. When time permits, it is common practice for Police officers other than those dispatched to a call to respond to it or, at the very least, to drive by to see if their assistance is needed. T. 931.

10. Sergeant Fletcher arrived at the Wilberts' home first. T. 877. There was no live band at the Wilbert home. However, when Fletcher was three houses from the Wilbert residence (40 yards) he could hear music that was being played on their stereo. T. 885, 929. He parked his vehicle across the street from their home. Before getting out of the car, he turned his spotlight on the house to check its address and announce his presence. Debra Wilbert and some of the guests noticed the light shining into the home, and Debra looked out of the front door and saw Fletcher's vehicle. T. 163, Ex. 5, P. 2. While looking out, the light was directed on her face and she yelled: "Fucking bastard, turn off the light." T. 892, 929-930. After that, she shut the front door. Ex. 5, P. 2. David Wilbert turned the volume of the music down at that time, however, it was still plainly audible outside the Wilberts' property line.

11. Because Fletcher could plainly hear music from the Wilberts' stereo on the street in front of their house and on the street in front of other houses on the block when he arrived, and the fact that it was 3:30 a.m., he decided that he was going to enter the home and disperse the guests. T. 897. His usual policy is to break up parties he is dispatched to investigate after 1:30 a.m. T. 973-74. Fletcher reported to the dispatcher that he was at the home and proceeded to the door. Other officers were already approaching the home when he did so, but none of them arrived before he was at the front door.

12. Debra Wilbert answered the door after Fletcher knocked. Her

husband, David, and at least one guest were behind her. T. 217, 933. When she opened the door, Fletcher asked to speak to the owner. Debra Wilbert told him she was the owner and asked if she could help him. T. 923-924. Fletcher recognized Debra as the woman who shouted at him on his arrival and he put his foot over the threshold of the door. T. 163-164, 891. While doing so, Fletcher told her that a noise complaint had been received, that her music was too loud, and that the party would have to end. T. 224, 533, 883, 923-924.

13. Debra Wilbert did not want Fletcher to enter the house and break up the party and she was not pleased that he was interrupting it. T. 536. She was initially irked by the spotlight. When Fletcher placed his foot in the door and other officers began arriving, as they did during Fletcher's initial remarks, she became even more upset and belligerent. She told him she did not think the music was too loud (T. 924) even though it was still plainly audible outside the boundaries of her property. Fletcher did not ask her to turn it down further and she did not offer to do so.

14. Fletcher proceeded to explain the requirements of the noise ordinance and restate his intention to break up the party. T. 524, 533-535. Debra Wilbert did not believe that Fletcher had authority to enter the house and was quite upset with his desire to do so. T. 534. Fletcher spent several minutes trying to persuade Wilbert to let him in while Debra yelled and screamed at him. T. 533, 834. The men at the door behind Debra Wilbert were

encouraging her not to let Fletcher In (T. 934, 935) and she continued to deny Fletcher's request to enter. Debra never requested Fletcher's forbearance, attempted to explain the noise violation, or offered to comply with the ordinance if given a chance.

15. After several minutes, Fletcher concluded that Debra Wilbert definitely would not let him in to break up the party. Consequently, he decided to issue a misdemeanor citation to her and he asked for her driver's license. She asked him why he needed her driver's license when she was not driving. He told her he needed it to issue a citation for the noise ordinance violation. T. 937. She refused to give her license to him stating that she did not have to show him a "fucking driver's license." Fletcher never told Wilbert that he would not arrest her or break up the party if she gave him her driver's license, and there is no evidence that he told her she would be arrested if she didn't.

16. When Debra Wilbert refused to give Fletcher her driver's license, he decided that he was going to forcibly enter the home to stop the noise violation, arrest Wilbert and cite and disperse the guests. He instructed one of the officers present to radio for additional backup (four squads). Ex.

26. Fletcher believed that the officers present were capable of obtaining entry, but based on Debra Wilbert's behavior, the support she had from other people standing behind her at the door, and his estimate of the number of guests inside (12 to 20 persons, T. 894), he felt that additional officers might be needed to arrest the Wilberts and control the guests. T. 964. Many of the fights police officers become involved in are related to parties. T. 670.

17. At the time the backup call was made, Officers Meyer, Polyak, Janssen and Dargay were present. They had been behind Fletcher on the steps for varying times during Fletcher's conversation with Debra Wilbert. Patrick

Kane and Douglas Holtz were the first officers to arrive after Fletcher's call for backup. They arrived within a minute or two. T. 682. When they arrived Kane could tell there was a party going on. T. 663. He could hear voices and music from the street. T. 667. The music was plainly audible outside the property lines of the Wilbert residence at that time.

18. Fletcher was still talking to Debra Wilbert when Kane and Holtz arrived. Kane was standing too far from the door to hear what was said. However, Holtz heard Fletcher telling Debra to open the door and heard people inside the house yelling obscenities at him. T. 713 At that time Fletcher was trying to remove his foot from the door. T. 713. Fletcher was able to free his foot and the door was pushed shut (T. 663) but Debra Wilbert was unable to lock it. T. 165, 534, 536. Fletcher knocked again and Debra Wilbert slightly reopened the door. At that time, Fletcher repeated his request to come in, Wilbert told him he could not come in her "fucking house" without a search warrant. T. 821, 937. Following a short conversation, Debra and others inside attempted to shut the door a second time. When they did so, the officers, spearheaded by Fletcher, forced the door open and went inside. T. 663, 536.

19. Before the police forcibly entered the Wilbert home, Fletcher did not specifically tell Debra Wilbert to instruct her guests to leave (T. 168, 847), and Wilbert did not volunteer to do that.

20. The seven officers entered the Wilbert home about ten minutes after Fletcher first arrived. After entry, the officers scattered throughout the house to round up all the guests in the house. Some officers went upstairs and Janssen went into the basement. T . 396, 541 . Other officers went into the dining room and kitchen areas of the home while Fletcher stationed himself in the living room. The police typically spread out and secure all areas of a home after forced entry. T . 666.

21 . The Wilberts and their guests were very upset with the police entry. None of them were violent (T. 395), but there was abundant yelling and screaming. T. 665, 393, 530, 538. When the police entered, Debra shouted that they had no right to be in her home without a warrant, and retreated toward the kitchen to telephone her lawyer. As she was doing so, Fletcher ordered Polyak to arrest her for allowing a noisy assembly. T. 813, 939. Polyak followed Debra into the kitchen, and while she was attempting to telephone her lawyer, grabbed the phone from her hand, told her she was under arrest, and attempted to grab her arm. Debra resisted his efforts and asked the guests to help her. T. 813, 815. 841. Polyak quickly grabbed one of her arms. He pushed her against the wall, put her arms behind her back and handcuffed them. T. 172, 816-17. Polyak then escorted her out of the house. Debra had no shoes on and Polyak held her in a manner that required her to walk on her tiptoes. While Debra was being taken to Polyak's vehicle, she told Polyak that she had a screw in her shoulder and that he was hurting her and that the handcuffs were too tight. Polyak did not loosen or check her handcuffs at that time. The following day, Debra's wrists were swollen and raw where the handcuffs had been. T. 176, 312. This resulted, in part, from the movements she made to ease the pain in her shoulder after she was handcuffed. T. 175. When she moved, the handcuffs became tighter. Id. After Debra was at the police station, an officer asked her if she wanted to

go to the hospital for attention. She refused because it was too embarrassing for her to go with a police officer. T. 191.

22. Before Debra was removed from the home, several additional officers arrived and entered the house. They included Lawrence Rogers, Gregory Kuehl, John Cannefax, Charles Major and Ronald Whitman. All five officers, like those who arrived earlier, were white. Cannefax and Whitman went to the kitchen. Rogers went upstairs to help other officers look for guests and later helped in the arrest of David Wilbert at Fletcher's direction. T. 396, 417. His partner, Gregory Kuehl, assisted in the arrest. T. 551. Kuehl was told to charge David Wilbert with allowing a noisy assembly, among other things. Kuehl was unfamiliar with such a charge. Although he had made arrests at loud parties (T. 569), he had never tagged anybody for such an offense in his 12 years on the police force. T. 552-53.

23. When Kuehl put his hand on David Wilbert's shoulder, and told him to come along Wilbert resisted. T. 556. Consequently, Wilbert was also handcuffed. He was led out of the house and placed in a different squad than Debra.

24. Marvin Byrd, Calvin Godbolt and several other guests were in the kitchen at the time Debra Wilbert was arrested and removed from the home. They had been told to line up to be tagged. Id. Pursuant to instructions from Sergeant Fletcher, Officer Whitman was issuing tags to these guests. He

was being assisted by Officer Major. Cannefax was stationed nearby. Cannefax is a K-9 officer who had responded to Fletcher's request for back-up with his police dog, a German shepherd named Bandit. When Cannefax first arrived at the Wilbert home approximately six squad cars were already there (T. 448) and he could hear people yelling inside the house. T. 447, 448. He immediately took Bandit out of his squad car and entered the house with the dog. T. 449. other officers were already inside. Cannefax believed the dog's presence might have a "calming effect" on any unruly persons inside. T. 456-457. Fletcher had not specifically asked for Cannefax when he called for back-up and did not ask Cannefax to bring the dog into the home. T. 963. However, when Fletcher saw the dog in the house he did not tell Cannefax to remove it. Id.

25. In order to issue a citation to Byrd, Whitman asked him for some identification. Byrd gave Whitman his driver's license and a National Guard identification card. As Whitman was writing out Byrd's citation there was a lot of activity in the kitchen. The Wilberts' doberman was barking outside near the kitchen window, Bandit was barking in the kitchen, and David Wilbert was complaining about Bandit's presence in the house and his wife's arrest. T. 152, 342, 451. Byrd was agitated and objected to the tag Whitman was writing. He was gesturing with his arms and asked Whitman why he didn't just tell everyone the party was over. Whitman instructed Byrd to calm down, but Byrd moved closer to Whitman and continued to question him about being tagged. Whitman then ordered Byrd to sit down in a nearby chair. Ex. 26. Byrd refused and unsuccessfully attempted to grab his identification cards from Whitman. When he did so, Whitman attempted to grab Byrd to sit him down but Byrd evaded his grasp and a struggle ensued. T. 338, 465. During this "struggle", Officer Cannefax went to Whitman's assistance. T. 464. With his free hand, Cannefax unsuccessfully attempted to help Whitman control Byrd. T.

467. About that time, Whitman pushed Byrd backward (T. 358) and Cannefax gave Bandit enough slack on his lead to reach Byrd. T. 452 , 466. Bandit attacked Byrd and bit him on the inside of his left thigh near the groin about the time Byrd landed on a chair in the kitchen. T. 358, 466. After Byrd landed in the chair, Cannefax pulled Bandit off him. T. 466. Major and Whitman subdued Byrd at that time by pulling his arms to the back and handcuffing his hands together. T. 399. After Byrd was subdued, Cannefax told Byrd he was under arrest for being bitten (T. 344), and Whitman escorted Byrd out of the home and placed him in the nearest available squad car.

26. Cannefax decided to use Bandit to subdue Byrd because Whitman was having no success controlling him. Also, due to the availability of bottles, kitchen utensils and other possible weapons in the kitchen, Cannefax concluded that a "speedy resolution" of Whitman's struggle with Byrd was necessary. T. 469.

27. Polyak was in and out of the squad car while Debra was in the back seat. After Polyak learned Debra's identity, he got in the front seat and informed her that he knew her identity by typing on a computer screen in the police car the words "Hi, Debbie, we're only here to help you." T. 174, Ex. 5. p. 3. Later, while Debra was still in the squad car, an unidentified officer opened the front door and addressed Debra saying: "Oh I know you, you're the whore from the Belmont." Before Debra was taken downtown, an officer outside the house made remarks about the "niggers" and "bitches" at the party. T. 792.

28. When Debra Wilbert was Inside Polyak's squad car, she was very upset. She was yelling for someone to bring her shoes to her and was yelling about the children and asking who would care for them. When Debra was yelling for someone to bring her shoes, an unidentified officer came over to Polyak's vehicle. opened the door, called Debra a bitch, told her to shut up, and waved a can of mace in front of her face in a threatening manner. At that time Debra yelled to neighbors to take notice that she was in good condition and if something happened to her they should know who did it. T. 176.

29. While Debra was in Polyak's squad car expressing concerns about a caretaker for her children. Polyak told her the children would be fine because her husband would not be arrested. Shortly thereafter, Debra saw David being removed from the house and she began questioning Polyak further about a caretaker for her children. At that time, one of the guests, Debra Bean, took Debra Wilbert's shoes out to the squad car. When Bean got to the car, Debra was still inquiring about a caretaker for her children. Polyak said Deborah Bean could stay with them, and Bean stayed with the children until the Wilberts were released from jail later that day.

30. Polyak subsequently took Debra to the police station. At the station, while being transported up to an interrogation room Debra asked one of the officers why they were treating her so badly. All the officer said at that point is: "All you people are the same." T. 178. Debra Wilbert remained in Jail until 11:00 a.m. on Sunday, July 29. T. 180. She was charged with three misdemeanors: disorderly conduct, violation of the city's noise ordinance and obstructing the legal process. She retained legal counsel to defend against the charges. Her pretrial legal fees amounted to \$2300. Ex. 18. On December 21, 1985 Debra Wilbert pled guilty to the misdemeanor charge of violating the noise ordinance. The other two charges were dismissed on motion of the prosecution. She was fined \$100. Ms. Wilbert pled guilty to

the misdemeanor because she could not afford the costs of contesting the misdemeanor citations. T. 205.

31. After officer Whitman put Byrd in the back seat of his squad, Whitman returned to the house to resume tagging the guests. Although Byrd was handcuffed, he was able to remove a cigarette from his pocket and light it. While he was smoking, another officer came to the squad car, opened the door, grabbed Byrd by the neck and said: "Spade [or nigger] who told you you could smoke in my car?" T. 60, 61. While Byrd was trying to explain, the officer pulled Byrd out of the car and put a choke hold on Byrd from behind. Byrd thought he was going to pass out while he was taken to Whitman's squad car and thrown in the back seat. T. 61. Byrd was scared and angry. Id. He was afraid that when the police got him alone there was no telling what they might do to him. T. 60. On the way to the police station, he asked Whitman to remove his cuffs and at least give him a fighting chance. T. 61. Whitman did not so so and Byrd was not abused further.

32. When Whitman and Byrd arrived at the police station, Byrd complained to Whitman about the dog bite. Whitman pulled his pants down to examine the bite. Seeing that Byrd's skin had been broken, Whitman transported Byrd to Ramsey Hospital. T. 63. A medical examination at the hospital revealed that Byrd had sustained a 2-cc laceration on the inner aspect of his left thigh. Ex. 12. After treatment, Byrd was returned to the police station. The

following day, Byrd was taken back to Ramsey Hospital. At that time he was complaining about increased pain in his left shoulder and arm and increased pain and decreased vision in his left eye. After medical examination he was returned to the jail. He remained there until Monday evening, July 30, 1985.

33. Byrd was booked for a gross misdemeanor ((obstructing the legal process with force) and a misdemeanor (disorderly conduct). However Byrd was only), charged with two misdemeanors: (disorderly conduct and obstructing the legal process (no force). He was originally arraigned on August 8, 1985. On January 27, 1986 Byrd pled guilty to disorderly conduct and the other misdemeanor charge was dismissed on motion of the prosecution. Byrd was fined \$100. Ex. A.

34. St. Paul police officers are frequently dispatched to investigate complaints about noisy parties. The number of complaints received varies with the time of year and the day of the week. On average, however, most officers on patrol are required to investigate from two to four complaints weekly. T. 402, 529, 559. On weekends, most complaints are received between 1:00 and 3:00 a.m. The police department generally dispatches one squad to investigate a noisy party complaint. If a second squad is available, it is asked to assist. T. 380. K-9 squads will be dispatched to such calls. T. 381-82.

35. The St. Paul Police Department's Manual (Police Manual) does not contain specific procedures or guidelines for investigating and handling noisy part), complaints. T. 347. hence, individual officers are permitted to use their discretion in dealing with them. Generally, their response varies with the time of the call, prior contacts with the home, and the type of party involved. As a general rule, if the police have not been to the house earlier in the evening, the house is not one with a history of noisy parties, and the owners are cooperative, the owners are generally informed about the city's noise ordinance, told to curtail the noise and advised that if the police are

called back a criminal citation will be issued. T. 379-80, 547, 559-560, 594, 672, 830-31. Some officers will go back to a residence more than twice before breaking up a party. Others will break the party up on the second call. T. 380, 569 when the first response is received after 3:00 a.m. some officers are inclined to break up the party. T. 404-05, 972-73. In all cases. the police response will vary with the attitude of the owners, whether the guests are intoxicated and the number and whereabouts of the guests. T. 569, 594, 972-73. Citations are sometimes issued and arrests are sometimes nude. T. 402-03, 529-30, 559, 594.

36. When police officers first come to a home in response to a noisy party complaint, they usually ask to speak to the owner and they frequently ask the owner to identify himself or herself. T. 607, 671, 830. However, the police do not uniformly require the owner to provide documentary identification such as a driver's license. Some will rely, instead, on the individual's statements. T. 608, 830. However, the standard operating procedure is to require the owner to furnish identification. T. 607. Some officers follow this policy. T. 675.

37. Homeowners sometimes object to police entry without a warrant. T. 595. When police officers encounter such objections, they will sometimes force their way in to issue citations or make arrests. T. 597. However, if the officer has no need to enter and only intends to issue a warning, such objections are frequently honored. T. 569, 671.

38. K-9 officers working for the police department seldom bring their dogs into private homes in connection with noisy parties or use them in other misdemeanor situations. T. 444, 500, 729-31. Dogs have been used at noisy parties where there are a large number of guests (80-100) but before a dog is brought into a home, officers usually go into the home alone to determine if a dog is needed. T. 347, 510.

39. The St. Paul police department is it certified training center for the United States Police K-9 Association (Association). T. 498. The Association has guidelines for the use of police dogs. Under the Association's guidelines, trained police dogs may be used to search buildings and outside areas for unauthorized persons, to track criminals and search for lost children, to search for evidence dropped by criminals in flight, to search for hidden explosives and narcotics, to chase and apprehend persons fleeing felony arrest, and to attack only on command. T. 499; Ex. 28. The police department has also authorized the use of police dogs in crowd control situations. T. 500. However, there are no written guidelines in the Police Manual regarding the use of police dogs in connection with misdemeanor investigations or arrests or their use in private homes. T. 506, 441-442; Ex. 25, pp. 169-170. The only guidelines K-9 officers are restricted by are the use of force guidelines in the Police Manual. 'Hose guidelines only allow officers to use a reasonable amount of force in apprehending an individual. T. 507.

40. The Police Manual does not contain any specific guidelines regarding the use of police dogs. T. 441-442. The guidelines are written in very general terms, providing, for example, that dogs are to be used to provide back-up on request or perform other duties as assigned. T. 441 ; Ex. 25, pp. 169-170. Unlike the Association's guidelines, the Police Manual permits police dogs to attack without command if the dog or its handler are assaulted. T. 442.

41. St. Paul police officers generally believe that they have authority to enter homes to break up noisy parties. T. 406, 422, 527, 547, 594, 891, 934. When the owner does not consent to their entry, the officers believe that they may forcibly enter to disperse the gathering and issue citations or make arrests when the noise violation occurs in their presence. The record does not contain any specific evidence regarding the frequency of forcible entries into homes in connection with noise violations, but they are uncommon. T. 423. However, when homeowners do not cooperate with the police, forcible entries will be made. T. 597, 890. Police officers believe that they are obligated to enter a home, even against the owner's wishes, to cure noise violations. T. 597.

42. In 1985, the police department had no guidelines specifically relating to misdemeanor arrests under Minn. Stat. i 629.34, subd. 1. However, the Police Manual contained a general guideline relating to constitutional rights. It stated:

150.03 RESPECT FOR CONSTITUTIONAL RIGHTS:

No person has a constitutional right to violate the law. Nor may any person be deprived of his

constitutional rights merely because he is suspected of having committed a crime. The task of determining the constitutionality of a statute lies with a court of proper jurisdiction, not with an officer who seeks to properly enforce the law as it exists. Therefore, an officer may enforce any Federal, State, or local statute which is valid on its face without fear of abrogating the constitutional rights of the persons violating that statute. An officer who lawfully acts within the scope of his authority does not deprive persons of their civil liberties. He may, within the scope of his authority, make reasonable inquiries, conduct investigations, and arrest on probable cause. However, when an officer exceeds his authority by unreasonable conduct, he violates the sanctity of the law which he is sworn to uphold.

43. At the time of the Wilberts' party, the use-of-force policy in the Police Manual stated:

150.04 USE OF FORCE:

In a complex urban society, officers are daily confronted with situations where control must be exercised to effect arrests and to protect the public safety. Control may be achieved through advice, warnings, and persuasion, or by the use of physical force. While the use of reasonable physical force may be necessary in situations which cannot be otherwise controlled, force may not be resorted to unless other reasonable alternatives have been exhausted or would clearly be ineffective under the particular circumstances. Officers are permitted to use whatever force that is reasonable and necessary.

Ex. 25. In addition, the Police Manual contained specific guidelines for handcuffing which read, in part:

408.05 HANDCUFFING:

PURPOSE:

To establish procedures for handcuffing prisoners to prevent escape of prisoners and to provide the utmost protection for departmental personnel.

GENERAL:

1. Handcuffs are a safety device, used for the control of one or more prisoners.
2. Handcuffing is required in the following circumstances:
 - A. If a prisoner is unruly, belligerent, or has indicated that he may try to escape.

- C. When one officer is required to transport one or more prisoners.

HANDCUFFING PROCEDURES:

The following procedures should be followed when handcuffing prisoners:

- A. Prisoners should be handcuffed behind the back, unless officers are equipped with proper waist belt or chain.
- B. Handcuffs should be placed on the bare wrists of the prisoner, never over clothing or watchbands.
- C. Handcuffs should be applied only tight enough to prevent escape. The handcuffs will be double locked if at all possible.
- G. Cuffs should be removed only when the prisoner is in a secure area.

44. Before the evening of July 28, 1985, Fletcher did not know the Wilberts and had never been called to their home. Officer Cannefax knew Debra Wilbert, but none of the officers had ever been sent to her home for any purpose.

45. None of the officers involved in the incident at the Wilbert home have been previously charged with racial discrimination in the performance of their duties or found to have discriminated against anyone on the basis of race. Officer Polyak was charged with the inappropriate treatment of a black family but the charges made against him were not based on race and he was not found to have discriminated against that family on the basis of their race.

46. on July 30, 1985 the Wilberts filed an informal charge of racial discrimination against the police department with the City's human rights department. Ex. 17. On August 1, 1985 they filed a formal charge with the City's human rights department. Ex. 5. On February 5, 1986 the formal charge was transferred to and docketed with the Minnesota Department of Human Rights (Department). Ex. 2. On the same day, notice of the Wilberts' charge was

given to the City's police chief. Ex. 7. The Department subsequently investigated the charge and unsuccessfully attempted to conciliate it. T. lo. on October 1, 1986 the Department found probable cause to credit Debra Wilbert's discrimination charge and sent notice of that determination to the Chief of Police. Ex. 8.

47. on August 22, 1985 Marvin Byrd filed a formal charge of racial discrimination against the police department with the City's human rights department. Ex. 1. On February 5, 1986 Byrd's charge was transferred to and docketed with the Department. Ex. 2. On the same day, notice of Byrd's charge was given to the City's police chief. Ex. 3. The Department

subsequently investigated the charge and unsuccessfully attempted to conciliate it. T. 10. On October 1, 1986 the Department found probable cause to credit Marvin Byrd's discrimination charge and sent notice of that determination to the Chief of Police. Ex. 3.

48. The parties to this proceeding, as well as the two charging parties, have waived service of this Findings of Fact, Conclusions of Law and Order and have agreed to accept service through counsel for the parties.

49. In order to attend the hearing on her charge in this case, Debra Wilbert sustained a wage loss of \$450. Marvin Byrd had no wage loss, but he spent \$777 to attend the hearing and used 17 days' accumulated leave time. The expenditure was incurred to fly to St. Paul from Byrd's army base in Germany.

50. Both Debra Wilbert and Marvin Byrd were embarrassed and humiliated by their treatment, and Marvin Byrd was frightened by it. Byrd is afraid of dogs and was extremely upset when he was bitten.

51. Before David Wilbert was removed from his home, Sergeant Fletcher approved arrangements for the care of the Wilbert children. The arrangements were also approved by David Wilbert. T. 424, 641, 910-912.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction over the subject matter of this case and authority to order the relief requested under Minn. Stat. 363.071, subds. 1 and 2 (1984 Supp.) and 14.50 (1989).

2. The Complainant gave proper notice of the hearing and has fulfilled all relevant substantive and procedural requirements of statute and rule.

3. The Respondent through its police department provides a public service to the citizens of the City of St. Paul for purposes of Minn. Stat. 363.03, subd. 4 (1984).

4. Under Minn. Rules pt. 1400.7300, subp. 5 (1989), the Complainant has the burden of proof to establish, by a preponderance of the evidence, that the Respondent committed an unfair discriminatory practice entitling it to the relief requested.

5. At the time Sergeant Fletcher arrived at the Wilbert home on July 28, 1985, the volume of the music at the home was excessive and violated Section 293.01 of the St. Paul Legislative Code.

6. After Sergeant Fletcher's presence at the Wilbert home on July 28, 1985 was known, the volume of the music at the home was reduced but it was still excessive for purposes of Section 293.01 of the St. Paul Legislative Code.

7. The Complainant made a prima facie showing that Sergeant Fletcher's

decision to forcibly enter the Wilbert home and arrest Debra Wilbert was based on her race.

8. The Respondent articulated a legitimate nondiscriminatory reason for Sergeant Fletcher's actions and the Complainant failed to establish by a preponderance of the evidence that his actions were racially motivated.

9. The Complainant failed to establish a prima facie showing that officer Polyak used excessive force in arresting Debra Wilbert, or even if excessive force was used, that it was racially motivated.

10. The Complainant made a prima facie showing that while in custody she was subjected to unnecessary threats and demeaning insults because of her race.

11. The Respondent failed to articulate a legitimate, nondiscriminatory reason for the discriminatory treatment Debra Wilbert was subjected to while she was in custody or to rebut her prima facie case, and the Complainant established by a preponderance of the evidence that Debra Wilbert was the victim of discrimination in violation of Minn. Stat. 363.03, subd. 4(1) (1984 Supp.).

12. The Complainant made a prima facie showing that excessive force was used in Marvin Byrd's arrest because of his race.

13. The Respondent articulated a legitimate nondiscriminatory reason for the level of force used to arrest Marvin Byrd.

14. The Complainant failed to establish that the excessive force used to arrest Marvin Byrd was racially motivated.

15. The Complainant made a prima facie showing that while in custody Marvin Byrd was the victim of verbal and physical abuse because of his race.

16. The Respondent articulated a legitimate nondiscriminatory reason for Byrd's physical treatment while in custody, but failed to rebut his prima facie showing of verbal abuse.

17. The Complainant established that while in custody Marvin Byrd was physically and verbally abused because of his race in violation of Minn. Stat.

363.03, subd. 4(1) (1984 Supp.).

18. Under Minn. Stat. 363.071, subd. 2 (1984), the Respondent should pay to Debra Wilbert the sum of \$2,500 for the mental anguish and humiliation she suffered as a result of the verbal abuse she endured.

19. Under Minn. Stat. 363.071, subd. 2 (1984), the Respondent should pay to Marvin Byrd the sum of \$8,000 for the mental anguish and humiliation he suffered as a result of his discriminatory mistreatment.

20. Under Minn. Stat. 363.071, subd. 2 (1984), the Respondent should pay a civil penalty to the state in the amount of \$5,000.

21. Under Minn. Stat. 363.071, subd. 2 (1984) and Minn. Stat. 549.20 (1989), the Respondent should not pay punitive damages to Debra Wilbert and Marvin Byrd.

22. The Respondent should pay Debra Wilbert compensatory damages of \$450 and should pay Marvin Byrd three times his compensatory (damages of \$777 or \$2,331 .

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

(1) The Respondent shall cease and desist from its discriminatory practices as set forth herein and Respondent shall direct its police officers to cease and desist from using demeaning remarks and unnecessary violence or threats of violence because of a person's race.

(2) Within 30 days the Respondent shall pay to Marvin Byrd as compensation for mental anguish and suffering the sum of \$8,000 and shall pay him \$2,331 in compensatory damages.

(3) Within 30 days the Respondent shall pay to Debra Wilbert as compensation for mental anguish and suffering the sum of \$2,500 and shall pay her \$450 in compensatory damages.

(4) The Respondent shall pay to the Commissioner of the Department of Human Rights for deposit in the general fund of the State of Minnesota as a civil penalty the amount of \$5,000.

(5) All payments to be made to Marvin Byrd and Debra Wilbert shall be submitted to Complainant's counsel for redistribution to the charging parties.

Dated this 30th day of May. 1990.

JON L. LUNDE
Administrative Law Judge

Reported: Court Reported. Kimberly Wood, Ray J. Lerschen & Associates.

MEMORANDUM

The complaints in this case charge the Respondent with a violation of
Minn. Stat. 363.03, subd. 4(1). In 1985, the statute read as follows:

Subd. 4 . Public services. It is an unfair discriminatory practice:

(1) To discriminate against any person in the access to, admission to, full utilization of or benefit from any public service because of race

For purposes of the statute, "public services" include any department or agency of any city in the State. Minn. Stat. 363.01, subd. 19 (1984). There is no doubt that the Respondent's police department provides a public service and that any discriminatory mistreatment of a person on the basis of race by Respondent's employees is prohibited by § 363.03, subd. 4(1). City of Minneapolis v. Richardson. 307 Minn. 80, 239 N.W.2d 197 (1976). Consequently, it is necessary to determine whether the Charging Parties were discriminated against by the Respondent's police officers under the statute.

Analysis of a discrimination charge alleging disparate treatment under the Minnesota Human Rights Act must follow the three-step process first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 688 (1973). The order and allocation of proof adopted in *McDonnell Douglas* requires the complainant to establish a prima facie showing of unequal treatment. If a prima facie showing is made, the respondent must articulate a legitimate, nondiscriminatory reason for the adverse action taken. If the Respondent articulates a nondiscriminatory reason, the complainant may then present evidence that the respondent's proffered explanation is a mere pretext for discrimination or is not worthy of belief. See, e.g., *Lamb v. Village of Bagley*, 310 N.W.2d 508, 510 (Minn. 1981). The burden of proof in a discrimination case remains, at all times, on the complainant. *Sigurdson v. Isanti County*, 386 N.W.2d 715 (Minn. 1986).

The specific showing required to establish prima facie case of disparate treatment varies with each set of differing factual circumstances. *Danz v. Jones*, 263 N.W.2d 395, 399 (Minn. 1978). In each case, the elements of the

prima facie case are designed to require -a complainant to present evidence which, if unexplained, suggests that it is more likely than not that the complainant was the victim of discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 567, 576-77 (1978). In City of Minneapolis v. Richardson, supra, 239 N.W.2d at 202, the court held that a finding of an unfair discriminatory practice may be made when the record establishes:

- (1) an adverse difference in treatment with respect to public services of one or more persons when compared to the treatment accorded others similarly situated except for the existence of an impermissible factor such as race, color, creed, sex, etc.; or
- (2) Treatment so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation.

The court adopted the second test because it recognized that in some cases II. might be unreasonably difficult to make a showing of unequal treatment under the first test. It stated:

To establish the existence of such a distinction (in treatment), it is often essential to show how similarly situated individuals who do not possess the impermissible or irrelevant factor are treated. For example, to establish discrimination in the arrest of a black person, one might undertake to show that white persons, whose behavior was substantially the same as the black persons, were not arrested. But, in some cases, this may be an unreasonably difficult burden on those charging discrimination. An act of discrimination may involve a situation so unique that a comparison is impossible.

Id.

The Complainant correctly pointed out that the Richardson decision was issued before the Minnesota Supreme Court required that the three-step McDonnell Douglas analysis be used in all disparate treatment cases. See, e.g., Sigurdson v. Isanti County, 386 N.W.2d 715, 721 (Minn. 1986). Nonetheless, the Administrative Law Judge is persuaded that the McDonnell Douglas analysis is consistent with the Richardson decision. In both cases the court adopted similar approaches for apportioning burdens of production and persuasion and of analyzing the evidence presented. After discussing the required prima facie showing, the Richardson court stated: "When such a showing has been made, it is reasonable to require an opposing party to respond with evidence of a permissible basis for the distinction being made." 239 N.W.2d at 202. The quoted statement is identical to the second element in the McDonnell Douglas analysis -- the articulation of a legitimate nondiscriminatory reason for the disparate treatment. The final element of the McDonnell Douglas analysis, which permits the Complainant to present evidence showing that the proffered nondiscriminatory reason is a mere pretext, is not

inconsistent with the Richardson decision because the presentation of such rebuttal testimony is permissible in any proceeding. Consequently, the Administrative Law Judge is persuaded that Richardson is consistent with McDonnell Douglas and that Richardson is applicable here.

Two alternative methods exist for analyzing the facts to determine if Debra Wilbert and Marvin Byrd were the victims of discrimination. All the incidents at the Wilbert home can be viewed as a whole and considered as one occurrence. Alternatively, the various incidents can be viewed separately and considered as several different occurrences. Complainant used the first alternative in its brief. Using that alternative has the advantage of keeping the totality and overall tenor of the incidents in mind.

The second alternative has other advantages. It focuses on the motives of the officers involved in each of the incidents. In addition, it clearly identifies the specific discriminatory violations that occurred, if any,, thereby permitting more meaningful damage calculations. Because the second alternative does not preclude consideration of the overall situation, while the first tends to ignore motives and the specific violations, if any, that occurred, the second alternative should be used, keeping the overall situation in mind. Hence, the forcible entry into the Wilbert home, Debra Wilbert's arrest, and Marvin Byrd's arrest, will each be considered separately.

In the Complainant's view. Sergeant Fletcher's decision to forcibly enter the Wilbert home was unreasonable, unnecessary and unusual and was so at variance with what would reasonably be expected absent a discriminatory motive that discrimination is the probable explanation for his decisions. In Richardson, the court stated that the prima facie test the Complainant proposes here is to be used when it is not possible to make comparison between the treatment accorded to persons of different races. The court reserved for "unique" cases the test Complainant proposes. 239 N.W.2d at 202. In this case, however, a comparison can be made between Fletcher's treatment of Debra Wilbert and the treatment accorded to other, similarly situated persons. The record contains ample evidence regarding a typical response of the Respondent's police officers to noisy party complaints. Hence, it is concluded that the first method of establishing a prima facie case articulated in Richardson should be used; that is, whether Debra Wilbert was treated differently than others similarly situated. Use of this standard is closer to the objective criteria adopted in McDonnell Douglas and is, therefore, preferable.

The Complainant clearly established prima facie showing of an adverse difference in treatment with respect to the forcible entry into her home and the decision to arrest her. Her prima facie case consists of the following elements:

- (1) She is the member of a protected group;
- (2) The usual police policy on the initial visit to noisy party is to warn the owners to stop the noise and not to forcibly enter the home to break up the party or arrest the owners;
- (3) She hosted a party;
- (4) On the initial visit to her home in response to a noisy party complaint, the Respondent's police officers did not issue a warning but demanded entry to break up the party, and when entry was refused they forcibly entered her home to disperse her guests and arrest her.

The showing made by the Complainant raises an inference that the treatment

accorded to Debra Wilbert was based on her race and, in the absence of explanation, is sufficient to support a finding that she was the victim of discrimination in the provision of a public service. Even if it were concluded that some additional evidentiary showing is necessary to establish an inference of discrimination, such additional evidence exists. Use of 12 police officers and a police dog in connection with the forcible entry of a private residence in response to a noisy gathering of 15 people is unusual and suspect. The fact that citations were issued to all the guests contrary to the usual practice of many officers further strengthens the inference of the Complainant's prima facie case, especially in view of the fact that those citations were all subsequently dismissed.

The Respondent articulated a legitimate nondiscriminatory reason for its officers' actions. Sergeant Fletcher, the officer in charge, and the person who made the decision to forcibly enter the Wilbert home and have Debra Wilbert arrested, testified that his initial decision to depart from usual procedures and to break up the party was due to the party's loudness and lateness. He

also testified that Debra Wilbert's hostile and uncooperative attitude, which included her refusal to furnish identification so a citation could be issued, mad* it necessary for him to enter her home and arrest her. The Complainant argues that the proffered reasons for Fletcher's decision are a mere pretext for discrimination and are not worthy of belief and argues that Debra Wilbert was treated differently than similarly situated white persons would have been treated due to her race. In Complainant's view, the record shows that Fletcher's actions were unnecessary, excessive and unreasonable.

For the most part the testimony Supporting each party's version of the relevant events on the morning of July 28 is irreconcilable. Fletcher said the Wilbert party was loudest he had heard in years; Debra Wilbert said the music was not loud. Fletcher said Debra Wilbert yelled at him when he shined his spotlight on her house; Debra Wilbert denies she did so. Fletcher said he informed Debra Wilbert that a noise complaint had been received, that the music was too loud, and that the party would have to end; Debra Wilbert said that the complaint and the noise from her party were never mentioned. Fletcher said that the music was still on when he decided to arrest Debra Wilbert; she said the music had been turned off before Fletcher came to the door. Evidence presented by the Respondent generally tends to support Fletcher's testimony while evidence presented by Complainant tends to support Wilbert's testimony.

The gist of the Complainant's position is that an excessive number of police officers forcibly broke into the Wilbert home without need, and contrary to usual procedures, to break up a party that was not noisy or disruptive. According to the Respondent, however, the police forcibly entered the Wilbert home in order to break up a noisy party only when all other enforcement alternatives had been exhausted and it was necessary to stop an ongoing noise violation, to arrest the owners and issue citations to their guests. In resolving the significant factual disputes in the record, the initial focus

must be on two discrepancies: (1) whether the Wilbert's party was noisy; and (2) whether Debra Wilbert yelled at Fletcher when he first arrived and shined his spotlight into her home.

WAS THE WILBERT PARTY TOO NOISY?

Chapter 293 of the St. Paul Legislative Code contains noise regulations.

Section 293.01, pertaining to noisy assemblies, states:

Subdivision 1. Definition. A noisy assembly under this section means any gathering of more than one person in a private residence which creates excessive noise. Any such gathering between the hours of 11:00 P.M. and 7:00 A.M. in such manner as to be plainly audible at the property line of a structure or building in which it is located or in the hallway or apartment adjacent shall be prima facie evidence that the noise is excessive.

Subd. 2. No person shall knowingly remain at a noisy assembly.

Subd. 3. No person shall permit real estate under his control to be used for a noisy assembly.

Respondent Ex. D. Under section 293.07 of the Code, the violation of section 293.01 is a misdemeanor.

The investigation of noise complaints, while important, is different from the investigation of most crimes. Bies v. State, 76 Wis.2d 457, 251 N.W.2d 461 (1977). In Bies the court stated:

Checking noise complaints bears little in common with investigation of crime. As a general matter it

is

probably more at part of the "community caretaker" function of the police which, while perhaps lacking in some respects the urgency of criminal investigation, is nevertheless an important and essential part of the police role. A brief word from an officer, or in some cases his mere presence, often will put an end to disturbing behavior which otherwise might lead to serious breaches of the peace or worse.

Id. at 468.

There is no dispute that music was played on a "stereo" during the Wilberts' party and that many guests had danced. In fact, according to one guest, Ernestine Bowman, people were dancing when Fletcher first arrived and shined his spotlight into the interior of the home. However, Debra Wilbert and three guests -- Myron Jordan, Ernestine Bowman and Deborah Bean -- all testified that the music was never loud. Byrd was the only exception. He stated that the music had been loud for about one hour that morning but at 1:00 a.m. there was a problem with the stereo and the music stopped. T. 39, 40. The other guests maintained, however, that the music was still on when Fletcher arrived. Debra Wilbert and Bean said the music was turned off when Fletcher shined his light on the house, and Bowman said that David Wilbert turned it down very low. Jordan did not state that the music was turned down when Fletcher arrived, but he said that it was not loud prior to the time Fletcher entered the house. He stated that he was able to carry on a normal conversation at that time. If the music had been turned down when Fletcher shined his light into the house, Jordan probably was not present because he,

like Byrd, could not recall the spotlight. Cynthia Johnson, a guest who had left the party before midnight testified that she returned to the party about 2:00 A.M. but did not go in the house because it looked like the party was over. At that time she said no music was being played. T. 307, 308.

The guests' testimony is at variance with that of Olivia Odell, a neighbor who lived next door to the Wilberts. Odell testified that when she woke up to go to the bathroom on the morning of July 29, she looked out of her window and saw a group of police officers at Wilbert's door. At that time she said you could hear the music but it wasn't "really really loud.,, In Odell's view, the music wasn't loud enough to wake her up, but was just "regular music" that could not have been heard out in the street. T. 785-86.

Odell has no direct interest in this case. However, her initial remarks about the party not being "really really loud" were unsolicited and indicated an anxiousness to support Wilbert's position. Hence, there is reason to suspect that she may be understating the volume of the music at the Wilbert

party when police Officers were at the door. This is further evinced by her questionable statement that she could hear the music in her house but that it could not be heard on the street. Her choice of words to describe the noise level at the house reveals the same desire to minimize the volume. She stated, first, that the music was not "really, really loud." The quoted words suggest music that is loud but not deafening or, at the very least, music that was plainly audible outside the Wilberts' property line. Her subsequent statement that it was just "regular music" is not entirely consistent with the statement that it was not really, really loud.

If the music was plainly audible outside the property line after Fletcher and other officers were at the door of the Wilberts' home, it must have been even louder when Fletcher first arrived and the music had not yet been turned down. The fact that David Wilbert turned the music down is further evidence that the music was louder when Fletcher arrived. If it wasn't loud and did not interfere with regular conversation, there would have been no reason to turn it down.

Fletcher's testimony and the testimony of other officers about the noise level is consistent with these conclusions. Fletcher said that on his arrival the Wilberts' party was the loudest party he had heard in years and that the music was plainly, audible when he was three or four houses from the Wilberts' home. He also said that the music was still on when he was talking to Debra Wilbert at her door. Officers Kane, Holtz and Janssen, who arrived after the music was turned down, said the music was audible from the street when they arrived. T. 677-78, 684, 533. Officers Meyer, Polyak and Dargay could not recall the music- Their inability to recall music is not surprising given the number of loud parties they respond to and the long (over 4 years) delay between the time of the party and the hearing. However, their inability to remember music suggests that the music was not extraordinarily loud when they

arrived. If it was still the "loudest party in years", it is not likely that they would have forgotten whether music was being played at that time.

Debra Wilbert ultimately pled guilty to a misdemeanor violation of the noise ordinance. She is not estopped from denying a violation in this proceeding under the doctrines of collateral estoppel or res judicata. A guilty plea is not given Les judicata or collateral estoppel effect. Glen Falls Group Ins. Corp. v. Hoium, 200 N.W. 2d 189 (Minn. 1972). A guilty plea is admissible as an admission or statement against interest, but it is not given a conclusive effect. Hoium supra; Kvanli in Village of Watson, 139 N.W.2d 275, 279 (Minn. 1975). Hence, a person who has pled guilty may explain the plea and offer additional evidence. In this case, therefore, Debra Wilbert's guilty plea operates only as an admission and should be given little weight in this proceeding. Debra Wilbert testified that she spent \$2300 in attorneys fees prior to the time the three misdemeanor citations were set for trial and pled guilty to the noise ordinance violation only because she could not afford to pay the costs of going to trial to defend herself. Her statements in this regard were persuasive and it is concluded, therefore, that her guilty plea should be given little weight in determining whether or not the ordinance was violated.

On the basis of the record, the Administrative Law Judge is persuaded that the volume of the music was excessive when Fletcher first arrived, and although reduced after Fletcher shined his light into the interior of the Wilberts' home

it remained plainly audible outside the Wilberts, property line. The guests testified that the volume was reduced and such action is a typical response. It is hard to imagine how any conversation could have taken place if the music continued to remain at the level of the "noisiest party in years" or that Debra Wilbert would deny that the music was loud, as Fletcher asserted, If the music was at that magnitude. Also, the guests could underestimate the volume when Fletcher came to the door, not realizing that the music could readily escape out of the house through the open windows and doors in the Wilberts' home, or having been accustomed to a louder volume, not realize how loud the music was after it was reduced.

Fletcher's testimony concerning the noise level at the Wilbert home supports the conclusion that while he was at the door the volume was not deafening. Fletcher did not specifically deny that the music was turned down after his arrival, and he never told Wilbert to turn the volume down.

If the music was patently excessive when he was at the door, he would have told her to turn it down to stop the violation and to carry on an audible conversation. Moreover, Fletcher clearly implied that if Debra Wilbert would have provided identification to him when he requested it, he would have issued a citation to her and left. T. 937-38, 952. If Fletcher would have been content to issue a citation without entering the house or requiring the noise level to be reduced, he must not have felt that it was still the noisiest party in years but was at an arguably tolerable level.

DID DEBRA WILBERT SHOUT AT FLETCHER ON HIS ARRIVAL?

When Fletcher initially arrived at the Wilbert home he testified that he shined his spotlight on the home to check his address and announce his presence. When he did so, he testified that Debra Wilbert shouted: "Fucking bastard, turn off that light." Fletcher testified he knew Debra Wilbert shouted at him because his spotlight made her face visible. Debra Wilbert and

the guests who testified denied that Debra shouted at Fletcher.
Those denials
are not persuasive.

Fletcher testified that Debra Wilbert's comments were so
unusual he
recorded them in his police report. It is unlikely that Fletcher
would falsify
his report on this issue. The comment is consistent with and
helps explain why
Fletcher promptly decided to break up the party. Further, the
comment Debra
Wilbert made when Fletcher shined his light into her home is
consistent with
her subsequent behavior and reflects the same state of mind.
Debra Wilbert
clearly believed that the police had no right to be at her home or
to interfere
with her party and she refused to cooperate with them at any
point. Her
hostility to the police and the profanities she uttered when they
were at her
door is consistent with the hostility evinced by the
comment Fletcher
attributed to her and it is concluded, therefore, that
Fletcher's testimony
regarding the comment must be credited.

WAS RACE A SUBSTANTIAL FACTOR IN SERGEANT FLETCHER'S DECISION TO FORCIBLY
ENTER THE WILBERT HOME?

The Complainant argued that the forcible entry of the
Wilbert home was
unreasonable, unnecessary and unusual. The Complainant's position
is based on
the premise that the entry violated the Fourth Amendment of the
United States

Constitution and the usual procedures followed by St. Paul police officers. Under the Fourth Amendment warrantless arrests in the home are unreasonable absent exigent circumstances. *Coolidge v. New Hampshire*, 403 U.S. 443, 474-475, 91 S.Ct. 2022, 2042-2043, 29 L.Ed.2d 564 (1971); *Krause v. Commissioner of Public Safety*, 358 N.W.2d 481, 483 (Minn. Ct. App. 1984). Hence, the Fourth Amendment prohibits the police from making warrantless nonconsensual entries into a suspect's home in order to make routine felony arrests. *Payton v. New York*, 445 U.S. 573, 583-603, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). As noted by complainant, warrantless arrests for misdemeanor offenses are particularly hard to establish under the 'exigent circumstances' doctrine. In *Welsh v. Wisconsin*, 466 U.S. 740, 751, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), the court addressed this principle, stating, in part as follows:

Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause for arrest is relatively minor. Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. When the government interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such an arrest only with a warrant issued upon probable cause by a neutral and detached magistrate. [citations omitted].

The Complainant argues that the forced entry into the Wilbert home was not justified by exigent circumstances and was, therefore, unreasonable. Since

Fletcher acted unreasonably, the Complainant concludes that his actions are evidence of a discriminatory motive. There are several problems with this argument.

The Complainant cited no cases applying the doctrine of exigent circumstances to statutes authorizing police officers to forcibly enter homes to make arrests when a misdemeanor is committed in the officer's presence.

In 1985, Minn. Stat. 629.34 (1984) authorized arrests in the home without a warrant under specified circumstances. It read in part as follows:

Subdivision 1. Peace officer. A peace officer may, without warrant, arrest a person:

(1) For a public offense committed or attempted in his presence;

To make such an arrest the officer may break open an outer or inner door or window of a dwelling house if, after notice of his office and purpose, he shall be refused admittance.

The "Public offenses" for which an arrest without a warrant is permitted under the statute include all violations of municipal ordinances that are punishable by fine or imprisonment. State v. Sellers, 350 N.W.2d 460, 462 (Minn. Ct. App. 1984), citing State v. Cantieny, 34 Minn. I . 24 N. W. 458 (1885).

The general rule is that unless a police officer's authority to break into a home is limited to felonies, an officer may break into a home where he has probable cause to make an arrest for a misdemeanor committed in his presence. 6A C.J.S., Arrest 55b., p. 129 n. 59 and p. 130. In Pahlen v. Commissioner of Public Safety, 382 N.W.2d 552 (Minn. Ct. App. 1986), it was held that a police officer in "hot pursuit" of a driver who had been speeding constituted an exigent circumstance authorizing the police officer to run into the driver's home to apprehend him. In that case the court found that the police officer had probable cause to believe that the driver committed a public offense in his presence. Accord., State v. Koziol, 338 N.W.2d 47 (Minn. 1983). Contra King v. City of Fort Wayne, Ind., 590 F.Supp. 414 (N.D.Ind. 1984). The Minnesota courts have not had an opportunity to address the applicability of the statute to noise ordinance violations or considered the circumstances, if any, when a forcible entry to make an arrest for a noise violation constitutes an exigent circumstance. However, in Mann v. Mack, 202 Cal.Rptr. 296, 155 Cal. App. 3d 666 (1984), the court held that a police officer who had probable cause to arrest an individual for a noise ordinance violation committed in a garage was authorized to enter the open door of the individual's residence to effect his arrest where there was reasonable cause to believe the individual was attempting to evade the officer.

There is no doubt that the Legislature is free to authorize at home warrantless misdemeanor arrests within the limitations imposed by the Fourth Amendment, but the Administrative Law Judge is not persuaded that it is

necessary to decide if any noise ordinance violation committed in the presence of a police officer constitutes an exigent circumstance authorizing the police officer to enter the home to make an arrest under Minn. Stat. 629.34. Even if the forcible entry of the Wilbert residence violated Fourth Amendment standards, the violation would have little, if any, weight in determining whether or not the Wilberts' race was a substantial factor in Fletcher's decision to enter. The reason for this is that St. Paul police officers generally believe that they have authority to forcibly enter houses to make arrests for noise violations committed in their presence and do so. Hence, even if Fletcher's forcible entry violated the Fourth Amendment, the violation, standing alone, sheds little light on his motives. This is particularly true given the absence of any evidence regarding the instructions, if any, given to police officers about forcible entries. There is no evidence, for example, that the police have been instructed to avoid forcible entries to make arrests for noise violations or other misdemeanors. On the contrary, the Police Manual suggests that officers may forcibly enter homes to make misdemeanor arrests under Minn. Stat. 629.34. Section 15003 of the Police Manual states that statutes valid on their face may be enforced. Finding 42. The language of the Police Manual is consistent with court decisions. Michigan v. De Filippo, 443 U.S. 31 (1979). The issue to be decided in this case is not whether the Fourth Amendment was violated but whether Fletcher forcibly entered the Wilberts' residence because of their race. The racial question can be resolved on the basis of the evidence in the record and should not be resolved on the basis of constitutional principles which have not been fully explored and argued and which do not address motivation.

The Complainant also argued that the conduct of the police officers at the Wilbert home was unreasonable because the Respondent had no written policies to guide them in handling noisy parties. The lack of written guidelines is regrettable and surely provides a ready mechanism for discrimination. Nonetheless, in determining whether a human rights violation occurred, the police department's failure to adopt written guidelines says little about the state of mind of the officers who were required to handle those parties without policies to guide them. Consequently, except perhaps when determining what relief is appropriate, the lack of guidelines has little if any relevance. The focus, therefore, must be on the motives of the officers whose conduct has been questioned -and the extent to which they departed from usual practices and procedures.

In 1985, the police department had no specific written guidelines for dealing with noisy parties. The procedures followed in any given case were left to the individual police officer's discretion. As a result, practices varied. As a general rule, however, the first time the police were dispatched to a noisy party the host, if cooperative, would only be warned to reduce the noise and advised that if the police returned the party would be terminated and a citation might be issued. T. 379-80, 406, 527, 547, 594, 616. Some officers routinely terminated parties the second time they were dispatched. T. 404. On the second call some also arrested the owner. T. 560. Others only issued a citation on the second call and only arrested the owners on the third call. T. 379-80, 594. Practices regarding the issuance of citations to guests also varied. Polyak indicated that guests are only ticketed when they are instructed to leave and refuse. T. 831. Janssen follows the same practice. T. 527. Likewise, Officer Kane stated that when the police "go in" all guests are usually tagged because a prior warning has been issued. T. 664. One officer who testified almost never issues citations or makes arrests. In the

eight years that officer Dennis Meyer was on patrol in the Dale-University area, he could recall making no arrests and issuing only two citations in connection with noisy parties. T. 616. Similarly, during his 12 years on the force, Officer Kuehl never charged anyone with allowing a noisy assembly. T. 552-53. other officers have issued more citations and made more arrests. officer George Meyer testified, for example. that he has issued numerous citations and made numerous arrests at noisy parties. T. 737.

Although the police generally issue a warning the first time they respond to a loud party, there are exceptions to that general practice. The initial police action will vary with the circumstances encountered. The type of party as well as the time of day and the loudness of the party will affect the action taken. T. 403-404. Even when the hosts are cooperative some officers will break up loud parties on their initial response if it is late (i.e. . 3:30 a.m.). T. 404. Parties may also be broken up on the initial response when there is a manpower shortage making a return difficult (Ex. 33), when the home has a history of prior complaints (T. 375, 379), when guests are fighting as the police arrive (T. 602) or when teenagers are involved (T. 673-74). Moreover, when the host/owner is uncooperative, the party will sometimes be terminated on the initial visit. T 404-05, 526-27, 560, 569, 595, 672-73, 831.

The "spirit" rather than the "letter" of the ordinance is usually applied. If the noise level is within reason, no action is normally taken. T.

679. however. the Police become stricter in the early morning hours. T. 679, 404. Some officers accommodate hosts who do not want them to enter their homes. Both Kuehl and Rogers testified that they do not enter the home if the owner objects. T. 407, 569. Even when guests display a defiant attitude by shouting obscenities or throwing bottles at officers, they avoid confrontation. they do not insist on entering the home but ask the owner to come outside where a warning is issued. T. 671.

The Complainant argued that Fletcher's decision to terminate the Wilbert party and forcibly enter the home to do so rather than simply issuing a warning was inconsistent with usual procedures and evinces a racial bias. However, based upon all the evidence in the record, and after careful consideration of the evidence presented, it is concluded that the Complainant has failed to show, by a preponderance of the evidence, that Fletcher's actions and decisions were racially motivated.

Fletcher's initial decision to terminate the Wilbert party was not inconsistent with the procedure he normally follows. He testified that he usually insists that a loud party be terminated after 1:30 a.m. T. 973. officer Rogers said he would probably do the same thing at 3:30 a.m. T. 404. Moreover, when guests are uncooperative, the police are more likely to terminate loud parties, even on an initial call. T. 527, 560, 569, 595, 831. In this case, the Wilbert party was loud, the police were initially dispatched at a very late hour, and Debra Wilbert was hostile and uncooperative, refusing to provide identification or permit the party to be broken up. The Administrative Law Judge is persuaded that Fletcher has a stricter approach to noisy parties than some other officers. One might expect that in any given group of police officers there would be variations in the procedures followed, some being stricter than others.

Fletcher's decision to terminate the Wilbert party does not seem unusual given his policy and the surrounding circumstances. A complaint had been

received, the party was much too loud, and it was unusually late. When he arrived, he could tell that it was not a small gathering and he was greeted with a hostile remark. Under these circumstances his decision to break up the party, which he believed he had authority to do, is not surprising. Although it may have like midday to the guests, who would normally be working at 3:30 a.m., it was very late.

After Fletcher got to the door, the volume of the music had been reduced, but it was still too loud, and he discovered that the hostile comment was made by the owner. During his initial conversation with Debra Wilbert, she did not ask for his forbearance or promise to keep the noise down.

Instead, she was uncooperative. She denied that the party was loud, refused his request to enter and refused to provide identification. It is not surprising that Fletcher decided to arrest her at that time.

Debra Wilbert testified that Fletcher never mentioned the complaint about her party or told her the music was too loud. She also testified that Fletcher never told her why he wanted her license or what the problem was. The basic thrust of her testimony is not believable. She testified, in essence, that during the course of a quiet party Fletcher appeared at her residence, demanded identification and entry without explanation, and forcibly entered her home when his demands were not met. That is an unlikely scenario.

The record shows that the police received a noise complaint concerning the Wilbert party and that several squads responded to it. If the party had not been too loud when Fletcher arrived he would have had no authority to take any action or any reason to do so. It is unlikely that he would have decided to fabricate a noise violation to break up a quiet party. Hence, it is reasonable to conclude that the party was too loud when he arrived.

When Fletcher went to the door, it is not unlikely that he would fail to state why he was present. It is difficult to imagine a conversation taking place without the subject of noise being mentioned or discussed. It is equally unlikely that Fletcher failed to explain why he wanted Wilbert's driver's license after she allegedly made repeated requests that he do so. It is more likely that Wilbert did not listen to Fletcher's explanation or did not hear it. Throughout her conversation with Fletcher, music was playing and other people were talking to her.

The Complainant also argued that the manner in which Officer Holtz handled a noisy party on Dayton Avenue contrasts sharply with the manner in which the Wilbert party was handled. At 1:00 a.m. on October 16, 1986, Holtz was dispatched to the Dayton residence to investigate a noise complaint. Ex. 33. Music played by a live band at the party could be heard from the street and at nearby residences when Holtz arrived. Holtz entered the dwelling without knocking through an open door and located the owner, who denied the party was too loud. During Holtz's conversation with the owner, two other officers (George Meyer and a K-9 officer) arrived. The three officers decided to break up the party due to a manpower shortage making a return visit difficult. The owner, who was drunk, objected to their decision. Several guests also objected and they gathered around and argued with the officers.

The guests at the Dayton party were white, "older people" who Holtz described in response to a complaint the owner later filed as drunk,

argumentative and unwilling to listen. Before the guests were dispersed, the owner told the officers that she would get rid of the guests and she began pushing the three officers out of her home. Her actions were dismissed as the "gesture" of a drunk with no harm intended. During this occasion, the K-9 officer did not bring his dog into the residence. T. 729.

The Administrative Law Judge is not persuaded that a comparison of the two parties is meaningful. The Dayton party involved older persons; the band packed up as soon as they were told of the noise violation; no forcible entry was involved; and the owners did not refuse to cooperate with any requests made by the police. There simply are not enough similarities between the two parties to draw any conclusions about Fletcher's intent.

Complainant attempted to show that Fletcher has a bias against black people because one of his family members was the victim of a criminal assault committed by a black person. The evidence presented on this issue is speculative at best and does not establish bias. There is no evidence that Fletcher has ever been accused of racial bias or that he had ever engaged in any racially discriminatory behavior. His record rebuts any inference of bias raised by the Complainant.

Complainant also suggested that Fletcher's bias is reflected in the number

of police officers called to the Wilbert home. The evidence shows that at least seven officers forcibly entered the home and that at least five officers came in later. That is, no doubt, a large number given the actual size of the party. However, the number of police officers used does not persuasively evince bias. Fletcher, being a sergeant, may have been in a position to obtain more back-up than a regular patrol officer. Moreover, there is no evidence regarding the number of officers commonly used under similar circumstances. Given Fletcher's concern for officer safety, the number of officers used to forcibly enter is more persuasively explained by the behavior and remarks he witnessed before entry than a desire to intimidate or abuse the guests.

Apart from Byrd's treatment, there is little evidence that the officers intimidated the guests. When entry was made no physical damage resulted, no one was bowled over, no guns were drawn, and no guests were abused. Bowman testified, for example, that she had no complaints about the treatment accorded to her and her sister Myron Jordan -testified that he was thrown against a wall when the police initially entered. When he told the officer to take it easy, he was told to shut up and sit down. Jordan was not hurt, but he felt the actions were disrespectful. -Apart from his own experience, and the arrests of the Wilberts and Byrd, Jordan did not observe the police touch any other persons.

There is some evidence that Fletcher suspected that illegal activities were taking place inside the Wilbert home. Such a suspicion could explain Fletcher's (decision to enter the home, the size of his back-up, the manner of entry, the use of a police dog, and the way the officers scattered about the house after entry. Fletcher denied any such suspicions, but he made two vague statements suggesting otherwise. T. 888, 915. Also, there is some unreliable evidence that a search was made after entry. T. 312-313. However, evidence that Fletcher may have suspected illegal activity in the house is insufficient

to support a finding that Fletcher forcibly entered the house because of his suspicions. No one who testified at the hearing saw the police conduct a search of the premises, other than to look for guests, saw Cannefax use Bandit to make a search or presented any reliable evidence that a search was conducted. If Fletcher suspected drug use in the house, for example, it is doubtful that he entered the home with any reasonable expectation of uncovering it due to the relatively long time he was at the door. Consequently, even if Wilbert's uncooperativeness aroused some suspicions in Fletcher's mind, there is no persuasive evidence that his suspicions were a factor in his decision to enter the home or that any suspicions he had were related to her race rather than her actions.

In sum, it is concluded that Sergeant Fletcher's decision to forcibly enter the Wilbert home to close down the party and arrest Debra Wilbert resulted from his decision to enforce the noise ordinance and Debra Wilbert's hostile and uncooperative attitude and was not due to her race. Enforcement measures escalated as events progressed, and the final entry of her home resulted because Fletcher wanted to enforce the law. Fletcher clearly wanted to avoid a forcible entry. He spent at least seven minutes attempting to cure the violation and avoid a forcible entry. He was even content to issue a citation, in lieu of breaking up the party, if Debra Wilbert had furnished some identification, in order to avoid the risks cocommitant with a forcible entry. However, at no point were his efforts successful. Although Debra Wilbert denied that a noise complaint was ever mentioned and stated that she had no

idea why Fletcher was at her door, that testimony is unpersuasive. Debra Wilbert must have known why Fletcher was at her door and she failed to cooperate. Fletcher chose not to walk away. The Administrative Law Judge simply is not persuaded that his decision to stay and enforce compliance with the noise ordinance was racially motivated.

There is evidence tending to support Debra Wilbert's testimony and the Complainant's evidence contained some inconsistencies. However, on essential points, the inconsistencies probably resulted from faded memories and differing perspectives. Complainant has simply failed to establish, by a preponderance of the evidence, that Fletcher's decisions were racially motivated. That is not to say that the Administrative Law Judge agrees with the manner in which the Wilbert party was handled. However, Fletcher did not have the opportunity for calm deliberation. He was required to make a series of prompt decisions in a tense and hostile situation. While he may have overlooked some alternatives to a forcible entry, the evidence suggests that any omissions were not attributable to racial factors or a desire to harass the Wilberts.

DID OFFICER POLYAK USE EXCESSIVE FORCE IN ARRESTING DEBRA WILBERT BECAUSE OF HER RACE?

To establish a *facie* showing that Wilbert's arrest was accompanied by the use of excessive force due to her race the Complainant must show that under the circumstances that existed in her home following the forcible entry, Polyak's actions constituted the use of excessive force and, based upon all the circumstances, an inference exists that the excessive force used was based on her race.

On the basis of the evidence in the record, the Administrative Law Judge is not persuaded that a *prima facie* showing of excessive force based on Debra Wilbert's race has been established. It was shown that Debra Wilbert was the member of a protected group. However, there is no evidence that the force used

was excessive or, even if it was, that it was based on her race. At
the time
of the events in this case the use of force by police officers was
governed by
Minn. Stat. 609.06 which read, in part as follows:

Reasonable force may be used upon or toward the person of
another without his consent when the following
circumstances exist or the act of reasonably believe them
to exist:

(1) When used by a police officer or one assisting him
under his direction;

(a) In effecting a lawful arrest;

(d) In executing any other duty imposed upon him
by law

This basic statutory provision was incorporated in 15C0.04 of the
St. Paul
Police Department Manual. See, Finding 43.

The force Polyak used to arrest Debra Wilbert was consistent
with the

provisions of the Police Manual. Polyak was required to transport her to the police station by himself. The Police Manual required that Wilbert be handcuffed in that situation. It also required that unruly and belligerent prisoners be handcuffed. At the time Fletcher ordered Polyak to arrest Wilbert she was unruly and belligerent. She was still shouting at the police and her behavior could have incited the guests or her husband to become involved in altercations with the police. Polyak was clearly cognizant of that possibility and decided to remove Debra Wilbert from the home as quickly as possible to calm things down.

Debra Wilbert's shoulder hurt when Polyak removed her from the home and she complained about her shoulder and the tightness of the handcuffs. Under the Police Manual, Polyak was required to place the handcuffs on her bare wrists. When he did so, it appears that he complied with the requirement that handcuffs should only be tight enough to prevent escape. Although Debra Wilbert later complained that the handcuffs were too tight, it appears that the handcuffs became tighter due to the movements she made to alleviate the shoulder pain she was experiencing. There is no evidence that the handcuffs were too tight when Polyak originally put them on her wrists. Likewise, there is no persuasive evidence that Polyak deliberately held Debra Wilbert in a manner which required her to walk on her tiptoes or to cause pain to her shoulder. It is likely that the manner in which she was required to walk resulted from her efforts to avoid shoulder pain. Although Police should have reexamined the handcuffs to check their tightness, the Administrative Law Judge is not persuaded that his failure to do so was racially motivated. The manner in which Polyak acted simply does not seem at variance with what one would normally expect under the circumstances and clearly was not shocking or unreasonable. Consequently, the Administrative Law Judge is not persuaded that a prima facie showing of excessive force has been established or even if it

was, that the Complainant has sustained its burden of proof. Although Debra Wilbert experienced some pain, her prompt removal was necessary and medical treatment was offered to her.

WAS DEBRA WILBERT SUBJECTED TO DISPARATE TREATMENT AFTER SHE WAS ARRESTED AND PLACED IN POLYAK'S SQUAD?

After Wilbert was placed in Polyak's squad car, she was not calm, quiet or submissive. She was yelling at guests to bring her shoes to her and was making loud inquiries and comments about a caretaker for her children and the pain in her shoulder. Her behavior irritated at least two officers. One came to Polyak's squad car and suggested that Debra was a whore. Another threatened to mace her if she did not shut up. During this time an officer, perhaps the same one who made the humiliating and threatening comments to Wilbert, complained, in a loud voice, about the "niggers" and "bitches" at the Wilbert home. Although the comments were not directed at Wilbert, they were apparently made with Wilbert in mind. These statements raise a prima facie showing of adverse treatment based on race.

The evidence shows that Polyak was on patrol by himself the night of the party and would not have had a partner who would normally be in his squad. T. 824-825. Also, at the time Debra Wilbert was removed from her home, the officers present were busy checking out the house, controlling guests and writing citations. There is evidence in the record, however, that some

officers were sent outside to get their tag books. T. 537. Hence, an opportunity existed for them to stop by Polyak's squad and address Debra.

Respondent argued that Debra Wilbert's testimony about the comments made to her should not be believed. Respondent relies on Polyak's testimony, the unlikelihood that other officers would be outside the house so soon after the entry, and the unlikelihood that so many different officers would have made insulting remarks to her. Respondent also pointed out that racial epithets are never used because, apart from being inappropriate, they trigger violence. T. 839.

Polyak testified that Debra Wilbert was taken to the police station to be booked as soon as she was placed in his squad car (T. 842) and that he was departing as another male was being removed from the house. T. 842. He denied that he printed any messages to Debra on the vehicle's computer, that any other officers were outside the home during the time Debra was in his vehicle and that any racial epithets were used by police officers.

Debra testified that one officer suggested she was a whore from the Belmont and that another called her a bitch and threatened to mace her if she didn't shut up. Her testimony was credible. Myron Jordan heard Debra loudly warn someone not to call her names when she was outside. Either statement could have caused such a response. Moreover, Debra was yelling loudly when she was outside. Any officer outside at the time could have threatened her to keep her quiet. Also, the statements made were of the duration one would expect from an officer passing by. For all these reasons, it is concluded that the statements were made. Consequently, it must be decided if the statements, under all the circumstances, establish a prima facie showing of disparate treatment.

Olivia Odell testified that she heard one or more officers outside the house using the words "nigger" and "bitch". At that time, the officers were

standing near Polyak's squad car. T. 792-793. At the hearing, Wilbert could not recall anyone using racial epithets. However, when she filed her initial telephone complaint with the City's department of human rights she reported that the police made remarks about "niggers." Ex. 17. This evidence is insufficient to establish that racial epithets were directed at or overheard by Debra Wilbert and they are not, therefore, separately actionable. If anyone had called Debra Wilbert a "nigger" or any other racial epithet, or if she had heard any such remarks it is unlikely that she would have forgotten. Her telephone complaint alleging the use of epithets, while in evidence, is not known to be based on personal knowledge and does not support a finding that she was the victim of racial epithets. However, Odell's testimony, which is believable, adds a racial tone to the other remarks being made to Debra Wilbert at that time and raises an inference that the remark about being a whore and the threats to mace her resulted, in substantial part, from her race.

The Respondent attempted to rebut hre prima facie case. However, its evidence fell short, and on the basis of the entire record it is concluded that Debra Wilbert was subjected to humiliating innuendos and unnecessary threats as it result of her race. It is unlikely that police officers generally make comments of the kind made to Debra Wilbert. That they were made to her suggests that there is a connection between black women and whores. The Human

Rights Act was designed. in part, to eliminate racial slurs of that nature.

Although Debra Wilbert's testimony on some points was rejected, the Administrative Law Judge is not persuaded that she lied about events outside her home. Her testimony about those events was consistent with Byrd's experience and was credible.

WAS MARVIN BYRD SUBJECTED TO THE USE OF EXCESSIVE FORCE WHEN HE WAS ARRESTED AND LATER TRANSFERRED FROM ONE POLICE VEHICLE TO ANOTHER?

Marvin Byrd testified that while officer Whitman was writing out a citation he was jumped from behind by officer Major, for no apparent purpose, and in the process was bitten by a police dog, handcuffed and taken to a squad car. Byrd alleged that the only thing he did to provoke the officers was to ask Whitman why he simply didn't ask the guests to leave rather than issue citations to them. Whitman's police report and testimony tell a different story. They indicate that while writing a citation, Byrd became agitated, raised his voice and moved closer to Whitman. At that time. Whitman stated that Byrd attempted to grab his identification cards from Whitman and, when Byrd was unable to do so, Byrd grabbed Whitman's tag book. Whitman testified that he recovered his tag book and a struggle ensued during which time he and officer Major subdued Byrd on a chair in the kitchen, handcuffed him and removed from the residence. During this process, Whitman testified that Byrd was bitten by Cannefax's dog Bandit. Whitman denied that Major grabbed Byrd from behind. Rather. Whitman said he pushed Byrd into the chair after recovering his tag book. Whitman stated that Officer Cannefax was not assisting at that time and that he was shocked when Bandit bit Byrd. Whitman went on to suggest that the dog had bitten Byrd simply because Byrd had landed close to the dog.

officer Cannefax had a slightly different version of the arrest. He said he assisted officer Whitman in attempting to control Byrd and since his efforts

were unsuccessful he "led" Bandit to bite him. According to Cannefax, he knew Bandit would bite Byrd if given the opportunity and Cannefax gave that opportunity to him. Cannefax testified that Byrd was fighting with Whitman and trying to avoid arrest. According to Cannefax, Byrd's arms were "flailing" about and Whitman was not able to control him. Consequently, Cannefax said he used Bandit to bring the matter to a speedy conclusion.

Officer Whitman's police report (Ex. 26) is not entirely consistent with his testimony. His police report does not mention that Byrd grabbed Whitman's tag book and testimony that he did so simply cannot be credited. The act of grabbing a tag book is inherently more serious than grabbing identification cards. If Byrd had grabbed Whitman's tag book, it is unlikely that he would have omitted that fact from his report.

Although Cannefax's version of 'the events leading to Byrd's arrest are somewhat different than Whitman's version, their testimony is compatible. The differences are not significant and are probably the result of faulty memories. Based on their testimony, which is more probable, it is concluded that Byrd was interfering with Whitman's attempts to issue a citation and was resisting Whitman's efforts to sit him down. Byrd's denial of any wrongdoing was unpersuasive. It is not likely that he was only attacked because he

questioned Whitman's decision to issue a citation rather than telling the guests to leave. Nonetheless, it is concluded that the Complainant made a prima facie showing that Bandit's use constituted excessive force and raises an inference of discrimination.

As a general rule the force used by a police officer must be reasonable. Police officers are not required to wait until they are struck before using physical force. They can use force to overcome physical resistance or threatened force. Agee v. Hickman, 490 F.2d 210, 212 (8th Cir. 1974). However, in each case the amount of force used must be reasonable, and force used simply to injure, punish or discipline an individual is prohibited. Putnam v. Gerloff, 639 F.2d 415, 421 (8th Cir. 1981); Feemster v. Dehtjer, 661 F.2d 87 (8th Cir. 1981); United States v. Harrison, 671 F.2d 1159 (8th Cir. 1982). The use of police dogs is part of the continuum of force police officers are permitted to use. Blais v. Town of Goffstown, 406 A.2d 295 (N.H. 1979).

The Association's guidelines do not permit dogs to be used in misdemeanor situations; that is, to apprehend persons who have committed misdemeanors.

T. 500. However, the Association's guidelines do not specifically address the use of dogs to protect people from assaults. In Blais, the court approved a police officer's decision to order his dog to attack a woman who had grabbed the officer around the throat while he was fighting with her husband. The City permits dogs to be used in crowd control situations under its use of force guidelines, and permits dogs to attack, without command, when the dog or the handler are assaulted. T. 422, 500. It makes no sense to allow a police dog to attack a person without a command to protect itself or its handler, but not allow a dog to attack a person on command when a third party is assaulted. If dogs can be used to protect people from assaults, a handler should be permitted to use a dog whenever an assault is imminent and before the first blow is struck. Agee v. Hickman, supra.

With these principles in mind it is necessary to examine Cannefax's actions to determine the existence of a prima facie showing of excessive force raising an inference of discrimination. The Administrative Law Judge is persuaded that a prima facie showing was made. It consists of the following elements: (1) Byrd is a protected class member, (2) he was attacked by a police dog at the "order" of its handler, (3) at the time of the attack Byrd was not assaulting anyone and had not threatened to do so, and (4) Byrd had not been told that he was under arrest or warned that the dog would be used if he did not follow directions. The Respondent articulated a legitimate nondiscriminatory reason for permitting Bandit's attack. Cannefax testified that he believed it was necessary to bring Byrd's "struggle" or "fight" with Whitman to a speedy conclusion because Whitman was unable to control Byrd, and potential weapons were available in the kitchen.

Although Cannefax, reluctantly characterized Byrd's involvement with Whitman as a fight (T. 479), the only specific recollection he had is that Byrd was "flailing" his arms. T. 470. Whitman's police report states that no blows were struck (Ex. 26) but that there was a "struggle" to control Byrd's movements. T. 338. Cannefax said he could not remember if Byrd's fists were closed. T. 470, 478. This evidence does not establish a fight, but does establish a struggle during which Whitman was attempting to grab Byrd and sit him down while Byrd was resisting his efforts to do so. The Administrative Law

Judge is not persuaded that Byrd had begun to assault Whitman but a reasonable person might have concluded that a fight could erupt.

The record does not indicate why Cannefax did not threaten Bandit's use if Byrd did not settle down or actually "turn the dog on" -- and let him growl and bark at Byrd -- as the police do in crowd control situations. It is possible that the latter option was unavailable due to the number of people in the kitchen. Also, it might have made an unstaable situation worse. However, there is no persuasive reason why a warning should not have been given. Under Section 150.04 of the Police Manual, force may not be used unless other reasonable alternatives have been exhausted or would clearly be ineffective under the circumstances. One reasonable alternative to Bandit's use would have been a warning that the dog would be used if Byrd did not sit down.

Byrd, like many individuals, is afraid of dogs, and a threat of the dog's use would no doubt have accomplished Cannefax's objectives.

PK warning apparently was not given because Cannefax perceived a need for prompt action. Potential weapons were available and other guests were more likely to become involved in Byrd's situation or in situations of their own as Byrd's struggle continued. Also, Byrd's struggle with Whitman could easily have turned to blows. However, a warning is not time consuming and Byrd had made no movements toward any potential weapons in the kitchen, threatened any violence, adopted a fighting stance, or attempted any punches. Under the circumstances, therefore, it is concluded that there was no immediate need to use the dog and that Bandit's use involved unreasonable force.

Although excessive force was used, it does not follow that it was racially motivated and the Administrative Law Judge is not persuaded, on the basis of the evidence available, that Byrd's race was not a motivating factor. It appears, instead, that the dog's use resulted from bad Judgment attributable to the lack of any discernable guidelines and turmoil in the kitchen area.

Cannefax was a credible witness and the Administrative Law Judge is persuaded that the reasons he gave for his actions were genuine.

The Complainant argued that Cannefax's testimony was not credible and that Byrd's bite was accidental. Moreover, in Complainant's view, the excessive force used in connection with the dog involved Cannefax's decision to bring Bandit into the home and not just the decision to let him bite. Those arguments are not persuasive. Bringing a dog into a home, like wearing a weapon, does not involve force. Force comes in using, not in having available.

There may be good policy reasons for not bringing dogs into homes. Some people like Byrd, are fearful of them, others may have allergies, and many would find it dirty or offensive. However, the City must make those policy decisions, and at the time of this incident, officers, like Cannefax, had discretion to bring a dog into Wilbert's home.

There is no evidence that Cannefax's decision to bring Bandit into the Wilbert home was racially motivated. When he arrived at the Wilbert home, six police cars were outside and loud voices could be heard inside. He could assume his help was needed under these circumstances. After all, he had received a back-up call. His decision to enter the home with the dog raises no discriminatory inferences. It was permitted under City policies and there is

no evidence that Cannefax was even aware that the people Inside were black when he took Bandit out of his vehicle.

WAS BYRD PHYSICALLY ABUSED WHILE IN CUSTODY BECAUSE OF HIS RACE?

After Byrd was arrested and handcuffed he was taken to a squad car outside Wilbert's home by Officer Whitman. After placing Byrd in the back seat of the vehicle, Officer Whitman returned to the house and resumed issuing citations to other guests. While sitting In back of the squad car , Byrd was able to light a cigarette even though his hands were handcuffed behind his back: a seemingly difficult task that Byrd persuasively demonstrated he could do. While smoking the cigarette an unidentified officer came to the squad car and addressed Byrd stating: "Nigger [or coon] who told you you could smoke in my car?" At that time the officer physically removed Byrd from the vehicle, placed him in a choke hold, and proceeded to take Byrd to Whitman's squad car. The whole episode was observed by Olivia Odell who testified that Byrd was being beaten on the legs with a night stick during this time and had his head banged on the top of Whitman's squad car several times before he was thrown into it. She was outraged by their behavior. Byrd, who felt like he was being suffocated, does not remember being beaten on the legs or sustaining a head injury. Nonetheless, fie was scared by the treatment he received. Consequently, when Whitman returned to his squad car to transport Byrd downtown, Byrd was not sure if he was going to a police station or a beating and he was mad. On the way to the station he asked Whitman to take his cuffs off and give him a fighting chance.

The Respondent denied that Byrd was treated in the manner alleged while being moved from one squad car to another, but Whitman could remember little about what happened. Whitman's police report states that Byrd had to be "resubdued" while being moved from one squad to another, but it is not clear that Whitman was present throughout the transfer. Byrd knew who Whitman was,

but after he was booked. and even at the time of the hearing, stated that he had no complaints about Whitman. Therefore, Whitman's report about the need to "resubdue" Byrd may have come from other sources. That would explain Whitman's inability to recall what happened. However, even if Whitman was present at some point, he may have interpreted Byrd's reaction to the strangle hold as an attempt to flee, which it also might have been because Byrd was clearly afraid that the police intended to hurt him.

The City generally failed to present any evidence showing that it was necessary to "resubdue" Byrd nor did it identify the actions he took that made such an action necessary. The Respondent suggested, however, that Byrd's statements were not truthful because Byrd could not identify the person who put a strangle hold on him and offered testimony from Whitman that Byrd did not seem scared but appeared to be angry when he asked Whitman to remove his cuffs so that they could handle the matter man-to-man. On the basis of the entire record, however, it is concluded that Byrd was deliberately and unnecessarily subjected to physical abuse while being transferred from one squad car to another in front of the Wilbert home because of his race. Byrd's testimony about this incident was generally persuasive, believable and consistent. Consequently, his version of the events, with some exceptions, has generally been credited. Although Byrd was unable to identify the person who mistreated him outside the Wilbert home, his inability to identify that individual is not

surprising. Nearly four and one-half years elapsed from the time of the incident to the time of the hearing. Memories necessarily faded during that time. This is evidenced by the fact that many police officers, who are trained to identify individuals, could not recognize Byrd or Wilbert. It is not surprising, therefore, that Byrd might not remember the officer who abused him outside in the dark that evening Byrd saw a large number of new faces and over time, Ms recollection of those involved in specific events could likely erode.

There is no evidence that Byrd was beaten on the legs with a night stick, as Odell alleged, and her testimony on that point must be rejected. Byrd might not remember being beaten, because his thoughts were no doubt on breathing, but evidence of such a beating would have become apparent later. However, there is no evidence that Byrd obtained treatment for leg pains. developed any bruising, or noticed any injury. Byrd did seek treatment for vision problems before he was released from jail, which lends credence to Odell's testimony that Byrd's head was repeatedly banged against a squad car. Nonetheless, Byrd offered no testimony supporting Odell's observation and it is concluded that her testimony on that point should not be credited. She must have misconstrued what was actually happening.

DAMAGES AND OTHER RELIEF

A. Compensatory Damages.

Minn. Stat. 363.071, subd. 2 (1984) authorizes the award of compensatory damages to the victims of discrimination. In this case, the record shows that Debra Wilbert sustained wage losses of approximately \$770 resulting from time spent on court appearances, in consultation with attorneys and departmental investigators and at the hearing. She seeks reimbursement for all those lost wages and, in addition, seeks reimbursement for the \$2300 she spent to retain counsel to defend against the misdemeanor citations brought against her as a

result of her party and the \$100 fine she ultimately paid. Most of those costs should not be reimbursed by the Department. Debra Wilbert violated the noise ordinance and failed to cooperate with police officers trying to deal with that violation. Hence, the attorney fees she paid in connection with the misdemeanor charges, as well as the fine she actually paid, should not be reimbursed. However, the wage loss she incurred to attend the hearing should be reimbursed in the amount of \$450. That is, 60 hours work at \$7.50 per hour. Although the hearing involved some issues on which Wilbert did not prevail, reimbursement of all her wage loss at the hearing is an appropriate alternative to trebling a portion of her wage loss under Minn. Stat. 363.071, subd. 2 (1984).

Marvin Byrd requests reimbursement of out-of-pocket costs of \$777, being the cost he incurred to come to the hearing from his base in Germany, the \$100 fine he paid when he pled guilty to a misdemeanor charge, \$78 for three days lost work while in jail or in court as a result of his arrest, and \$20 for the pants that were torn when he was bitten by Bandit. The Administrative Law Judge is persuaded that Byrd is entitled to reimbursement of his round-trip airfare to attend the hearing in the amount of \$777. However, Byrd should not be reimbursed for the \$100 fine paid when he pled guilty to a misdemeanor charge or for his wage loss while in jail because his conduct resulted in his

arrest. Although excessive force was used against him,, his arrest was not unjustified. Also, Byrd should not be compensated for the pants that were torn when he was bitten. The value of the pants cannot be reimbursed because the damage that occurred did not arise from a discriminatory act.

There is no evidence of Byrd's wage loss during the hearing or his other necessary expenses while he was away from home. There must have been some expenditures and he lost 17 days, accumulated leave time. T. 132. Since none of them will be compensated, it is concluded that his other compensatory damages (\$777) Should be trebled under Minn. Stat. 363.071, subd. 2 (1984).

B. Mental Anguish and Suffering.

Minn. Stat. 363.071, subd. 2 (1984) authorizes an award to the victim of discrimination for mental anguish and suffering. Both Marvin Byrd and Debra Wilbert were humiliated, embarrassed and degraded by their inappropriate treatment, and both of them are entitled to reimbursement for the mental pain and anguish they felt. Minneapolis Police Department v. Minneapolis Civil Service commission, 402 N.W.2d 125 (Minn. Ct. App. 1987); Department of Human Rights v. Spiten, 424 N.W.2d 815 (Minn. Ct. App. 1988); State, by Cooper v. , 434 N.W.2d 494 (Minn. Ct. App. 1989). Recovery for mental anguish and suffering is not limited to situations involving egregious facts or unusually severe mental distress and humiliation. State, by Cooper v. Mower County Social Services, supra; Department of Human Rights v. Spiten, supra. What is required is evidence supporting a finding that the charging party has in fact suffered damage under circumstances Justifying an award. State, bY Cooper v. Mower County Social Services, supra. The award may be based on approximate and predictable anxiety, humiliation and mental suffering experienced by other members of the charging party's family. Department of Human Rights v. Spiten, supra.

In this case it is concluded that the fear, humiliation and mental suffering experienced by Marvin Byrd justifies an award of \$8,000.

Debra Wilbert's humiliation and mental suffering were also substantial. However, a great deal of the anguish she experienced resulted from the forcible entry into her home and her arrest, which were not racially motivated. Her award, therefore, must be limited to the humiliating statements and threats that were made after she was taken out of her home. In this case the Administrative Law Judge is persuaded that she should receive compensation in the amount of \$2500 for the pain and suffering she experienced as a result of those statements.

Complainant argued that Debra Wilbert's award should reflect the anxiety and suffering she sustained when she lost her home. She alleged that foreclosure proceedings were brought as a direct result of her arrest because she had to use her savings to pay attorneys fees. Although there is no doubt she experienced anxiety and mental suffering as a result of the foreclosure, there is inadequate evidence in the record to link the foreclosure to the expenditures she made to defend against the criminal charges brought against her. Even if such a linkage had been made with persuasive evidence, an award would not be appropriate because Debra Wilbert did, in fact, engage in a misdemeanor to which she pled guilty and her arrest was directly related to her own uncooperative actions. More importantly, since her arrest was not based on her race but on her behavior, no award would be appropriate in any event.

C. Punitive Damages.

Minn. Stat. sec. 363.071 , subd. (1984) authorizes an award of punitive damages in an amount of not more than \$6000. The statute requires that punitive damages be awarded pursuant to Minn. Stat. 549.20. In 1984, section 549.20 read, in part, as follows:

Subdivision 1. Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a, willful indifference to the rights or safety of others.

Subd. 2. Punitive damages can properly be awarded against the master or principal because of an act done by an agent only if:

- a. the principal authorized the doing and manner of the act, or
- b. the agent was unfit and the principal was reckless in employing him, or
- c. the agent was employed in a managerial capacity and was acting in the scope of employment, or
- d. the principal or managerial agent of the principal ratified or approved the act.

In this case, there is clear and convincing evidence that the discriminatory treatment of Marvin Byrd and Debra Wilbert displayed a willful indifference to their rights or safety. However, punitive damages are not authorized under subdivision of the statute because there is no evidence that the discriminatory actions were authorized, ratified or approved by the police department, that the officers who committed them were known to be unfit, that the City was reckless in employing them or that any of the discriminatory actions were committed by a police officer employed in a managerial capacity. It is clear that no managerial employee was involved in discriminatory conduct. Fletcher was the only person who might have been employed in a managerial capacity, but he did not make any of the remarks or threats for which Debra Wilbert is entitled to compensation and was not involved with Bryd at all. Since the officers who perpetrated the discriminatory acts are unknown, and since it is not known if any investigation was undertaken there

is no basis for finding that those acts were authorized, ratified, or approved.

D. Civil Penalty.

Under Minn. Stat. 363.071, subd.2, the Administrative Law Judge is required to order any respondent found to be in violation of the Human Rights Act (HRA) to pay a civil penalty to the state. The amount of the civil penalty is to be calculated taking into account the "seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the respondent." A police officer's violation of human rights is a matter of grave public concern.

Discriminatory police conduct destroys the stability of the community, undermines law enforcement objectives and violates public policy. Moreover, In this case the violations committed were intentional and the Respondent has the financial resources to pay a substantial civil penalty. Given the likely costs the Complainant has incurred to prosecute these cases, and considering the fact that Complainant did not prevail on all claims, it is concluded that the Respondent should pay a civil penalty of \$4000 with respect to the complaint filed on behalf of Marvin Byrd and a civil penalty of \$1000 with respect to the complaint filed by Debra Wilbert.

E. Other Affirmative Relief.

Minn. Stat. 363.071, subd. 2 (1984) requires the issuance of an order directing a respondent found to have violated the HRA to cease and desist from the unfair discriminatory practice found and to take any "affirmative action" found to be necessary to effectuate the purposes of the HRA. In this case the Complainant has requested an order requiring the Respondent to adopt a comprehensive training program approved by the Complainant for all police officers to prevent further racial discrimination in the provision of police services. That request should be denied at this time. The record does not establish that racial prejudice is endemic in the St. Paul Police Department or that there has been a history of repeated problems. It does show, however, that there are some police officers who harbor prejudicial beliefs or attitudes. This with no doubt be a concern the Respondent will address. However, it does not, at this point, require the Respondent to adopt a comprehensive training program. Further incidents of (discrimination may make such an order appropriate. At this time, however, the Respondent should be permitted to take appropriate action on its own. However, the order must necessarily require the Respondent to cease and desist from using demeaning epithets and unreasonable and unnecessary physical violence or threats of

violence against minorities. Since the Respondent, itself, is not out on the street, the Respondent should be ordered to issue a directive to each officer reminding them of their obligations under the Human Rights Act and informing them that the use of demeaning remarks and violence or threats of violence because of a person's race is prohibited.

J.L.L.