

Arbitration between:

Fraternal Order of Police/MPD Labor Committee,
Union,

and

Metropolitan Police Department,
Employer,

regarding the suspension of Officer K.

FMCS Case No. 06-01868

BEFORE: PAUL GREENBERG, Arbitrator

Appearances:

For the Metropolitan Police Dep't, Washington, D.C.:

Brenda Wilmore, Esq., *Director, Labor Relations Division, Washington, D. C.*

For the Fraternal Order of Police, MPD Labor Committee:

William B. Sarvis, *Washington, D.C.*

DECISION

This case involves the suspension of Officer K. (Grievant) for off-duty conduct. The Metropolitan Police Department (MPD or Department) suspended Officer K (Grievant) for 30 days for allegedly violating the MPD's General Order prohibiting "conduct unbecoming an officer." Grievant contested the Department's suspension order, and this arbitration followed. Grievant is represented by her collective bargaining representative, the Fraternal Order of Police (FOP or Union). She has been on the police force for approximately 16 years.

The primary conduct that gives rise to the MPD's decision to discipline Grievant involves an incident of alleged harassment that took place at a Wal-Mart store in Bowie, Maryland, on July 28, 2004. The exchange involved Grievant and D.M., an acquaintance of Grievant's who worked at the store. In addition, there are allegations Grievant made harassing phone calls to D.M.'s mother, S.M.

A. Background

Many of the background elements that provide context to the incident are not disputed, although there is sharp disagreement regarding Grievant's involvement in the alleged harassing conduct, *i.e.*, the phone calls and the Wal-Mart incident. The following narrative is assembled both from witness statements in police reports (found at Joint Exhibit (JX) 2), as well as the in-person

testimony of witnesses at the arbitration hearing.

1. Grievant, her husband and the relationship with the M. family

In July 2004, Grievant was experiencing significant problems in her marriage. Her husband of many years was dating another woman, and had fathered a child out-of-wedlock. Grievant characterizes the other woman as her husband's mistress. Grievant and her husband separated during this period, and later divorced.

Grievant and her husband had been friends for many years with the M. family. The closest friendships in the relationship were between Grievant's estranged husband and Mr. M. Although Grievant's ties to the M. family were not as close as her husband's, she too had participated in various life cycle events with the M. family over the years. Grievant's ties to the M. family included a long-running relationship with D.M., a daughter. D.M. was a young child when Grievant first became acquainted with the M. family, but D.M. is now in her 20s.

Sometime in early 2004, Grievant learned that S.M. (D.M.'s mother) had babysat the out-of-wedlock infant while Grievant's husband went out on dates with his lover. Because Grievant viewed S.M. as a friend, she viewed the babysitting of the infant as wrong and disloyal to her.

2. The incident at the Wal-Mart store

On July 28, 2004, Grievant visited the Wal-Mart store and had an altercation with D.M., who was working in the store. During the course of the altercation D.M. made a call to the Prince Georges County (PG) Police Department complaining of harassment. The County police came to the store and investigated the incident. Grievant and D.M. provide differing versions of the event.¹

Grievant's account – Grievant states she had a dental appointment on the morning of July 28, 2004. After the appointment, she went to the Wal-Mart store around 11:00 AM to shop and attempt to retrieve a driver's license she thought she had left when she cashed a check during a prior shopping trip.

Upon entering the store, Grievant saw D.M., who was working that morning. Grievant acknowledges that she approached D.M. and initiated a conversation about S.M.'s babysitting her husband's out-of-wedlock child. As part of this conversation, Grievant expressed her disapproval of S.M.'s actions, her feelings of hurt, and her sense of betrayal by a friend. Grievant says her

¹ D.M. did not testify at the arbitration hearing. However, she made a report to the P.G. police investigator, Sergeant Shawne Waddy, and gave a statement to MPD Detective Wayne Marable. These materials are included in the record.

Since this incident occurred, Sgt. Waddy was promoted to the rank of Lieutenant, and held this rank when she testified at the hearing into this grievance. In this Decision, she is addressed using the title she held when she investigated the Wal-Mart incident in July 2004.

conversation with D.M. was in a soft voice.

According to Grievant, D.M. responded in an extremely loud manner. Grievant states D.M.'s response prompted Grievant to end the conversation and continue with her shopping, because Grievant did not have a great deal of time before she would report to work for her evening shift. She picked up her purchases and went to the check out line. After completing the purchases, Grievant testifies she went to the customer service desk to inquire about her missing driver's license. While Grievant was standing in the customer service line, D.M. came to the customer service counter. According to Grievant, D.M. made a phone call while at the customer service counter and told the person on the other end of the phone that Grievant was still in the store.² According to Grievant, while D.M. was on the phone she made disparaging references to Grievant and used profanity. At some point, D.M. felt it necessary to apologize to the other customers waiting in the customer service line and explain that she (D.M.) does not normally talk to customers in the manner she was exhibiting toward Grievant at that time.

Customer service could not locate Grievant's driver's license.³ After this incident at the customer service desk, Grievant states she sought out the store manager to complain about D.M.'s conduct. The manager invited Grievant to write a statement memorializing what had happened, and suggested Grievant sit in the store cafeteria. Ultimately, Grievant wrote a seven-page report about the incident.

While Grievant was working on her complaint statement to Wal-Mart against D.M., Sgt. Waddy of the PG Police Department entered the store and approached Grievant. Apparently believing Sgt. Waddy was there to intervene on her (Grievant's) behalf, Grievant told Sgt. Waddy that police assistance was not needed. In turn, Sgt. Waddy advised Grievant that she was present because of a harassment report filed by *D.M.*, and Sgt. Waddy needed to complete an incident report as the result of D.M.'s complaint call, particularly because the incident involved another police officer (Grievant).

Grievant believes the confrontations at the Wal-Mart were a set-up by D.M. to create problems for her (Grievant). Both in her written statements and in her testimony, Grievant states that when D.M. became loud and belligerent, Grievant attempted to de-escalate the situation by walking away. Grievant believes D.M. already had called the police *prior* to coming to the customer service counter, and the incident at the counter was contrived to provoke a response by Grievant that would make her (Grievant) look like the aggressor. Ultimately, Grievant was at the Wal-Mart store for about 1-1/2 hours – speaking with D.M., shopping for items, going through the check-out process,

² Sometime during Grievant's visit to the store, D.M. called the PG Police Department complaining of harassment by Grievant. It is unclear whether D.M.'s telephone call from the customer service desk was her police complaint.

³ The record includes a photocopy of a new Maryland driver's license that was issued to Grievant August 2, 2004, just a few days after the incident at the Wal-Mart store. JX 11.

going through the customer service desk in connection with the lost driver's license, drafting her complaint statement against D.M., and interacting with Sgt. Waddy.

D.M.'s account – D.M. did not testify at the hearing. In her statements to police investigators, D.M. confirms Grievant came to the Wal-Mart and initiated a conversation with her about Grievant's marital problems and the babysitting matter. D.M. states she repeatedly asked Grievant to walk away and leave her alone, but Grievant became louder. D.M. states she (D.M.) attempted to end the initial confrontation by walking away, but Grievant followed her.

D.M. states she contacted the store manager about the situation, and asked for permission to leave the sales floor to get away from Grievant. The manager gave her permission to leave the floor. D.M. then called the police, viewing this new incident at the store as a continuation of harassing behavior that had begun earlier with phone calls to her mother, S.M. (The phone call incident is discussed below).

In D.M.'s view, Grievant made efforts to prolong her stay in the store. According to D.M., after picking up her purchase items Grievant first went to Register 8, then backed out of the line and went to another register. Grievant then went to customer service to raise questions about the lost driver's license, which D.M. believes was a contrivance by Grievant to prolong her stay in the store and harass D.M.

D.M. was not stationed at the customer service counter during this time period, but she was called over to take a call. Grievant was waiting in line to ask about her missing driver's license. According to D.M., while Grievant was waiting in the customer service line Grievant began making disparaging comments about D.M., saying D.M. was "nasty" and "trifling" and characterizing the M. family as "scum" and "trash." D.M. states she asked Grievant to stop talking about her family, but Grievant kept making comments and continued to get louder. D.M. realized the situation looked bad to the other customers standing in line, and D.M. issued an apology and explained that the dispute involved a personal relationship.

Other witnesses – Although they did not testify at the arbitration hearing, the record includes statements given to police investigators by two other Wal-Mart employees who were present in the store on July 28.

Lakisha Holland states she was working the customer service desk as a cashier around 11:00 AM. While processing a customer return, she needed the assistance of a customer service manager (CSM) for an override. D.M. responded to her call for a CSM. According to Holland, while D.M. was processing the transfer a woman waiting in line (Grievant) began disparaging D.M.'s mother, S.M. Holland reports D.M. responded to the comments by telling Grievant to stop talking about her mother. Holland states she urged D.M. to "cut it off . . . just leave it alone. Don't say anything else." In Holland's view, the situation was unprofessional. Holland states Grievant continued trying to provoke D.M. Holland urged D.M. to walk away. According to Holland, when D.M. left the counter, Grievant followed her. Holland states both Grievant and D.M. were loud.

Store manager Aaron Robbins did not witness the events, but confirmed he received an internal call from D.M. at some point advising him of a problem and asking permission to leave the sales floor.

3. The “phone harassment” allegations

In addition to the complaint about the July 28 incident at the Wal-Mart, D.M.’s complaint to the PG police included allegations Grievant had made harassing phone calls to D.M.’s mother, S.M.

In her statements to police investigators, D.M. alleged that a couple of months before the Wal-Mart incident Grievant telephoned S.M.’s home. D.M.’s younger sister (age 12) answered the call, and Grievant falsely identified herself as “Danielle.” When S.M. took the phone, Grievant proceeded to complain about the babysitting incident. D.M. states S.M. told Grievant to get off the phone and not call back. According to D.M., Grievant called back repeatedly – perhaps seven times – until the family blocked Grievant’s phone number. D.M. states that her family repeatedly has asked Grievant to leave them alone. These requests have been made directly to Grievant, and also have been made indirectly via Grievant’s estranged husband.

Grievant acknowledges she telephoned S.M. once to register her concerns about the babysitting incident. During the phone conversation with S.M. the phone line went dead, and Grievant was not sure whether S.M. had hung up. Grievant admits she called back several times to reestablish the phone conversation, but when she concluded S.M. intentionally had hung up she (Grievant) did not call again. Grievant states it was never her general practice to talk on the phone with S.M. and she did not normally see S.M. anyway. She notes she has never had a phone number for D.M.

4. Sgt. Waddy’s interactions with Grievant, D.M., and the Metropolitan Police Department

Sgt. Waddy testified at the arbitration hearing, and recounted her report to the Wal-Mart store in response to the complaint from D.M. She initially met D.M. outside the store, and received her account of being harassed by Grievant, who allegedly followed her throughout the store disparaging her family.

Because it had taken some time to respond to D.M.’s initial call to the PG police, Sgt. Waddy was surprised to learn Grievant was still at the scene. Sgt. Waddy spent about 30 minutes at the store meeting with witnesses. She described D.M. as calm, and testified D.M. believed Grievant had come to store to cause trouble.

Sgt. Waddy met with Grievant in the Wal-Mart cafeteria and reviewed what had happened. She describes Grievant as calm and pleasant at that point, but Sgt. Waddy states she perceived Grievant as very stressed as the result of the incident in the store, the situation with her marriage, the out-of-wedlock child, her feelings of betrayal, etc.

According to Sgt. Waddy, “harassment” is a misdemeanor crime in Prince Georges County. In Sgt. Waddy’s view, at the time she did not believe any actionable “harassment” had taken place in connection with the Wal-Mart incident, and Grievant was never charged with harassment by County authorities. However, D.M. also had described the prior phone calling matter, and D.M. also expressed concern about possible further escalation of the matter and the fact that Grievant was a police officer and had access to a firearm. Sgt. Waddy advised D.M. of her right to apply for a Temporary Peace Order to restrain Grievant.

After completing her incident report (*see* JX 2), Sgt. Waddy contacted the MPD about the incident at the Wal-Mart store. Under PG Police Department General Orders, whenever a reported incident arises in the County involving an out-of-jurisdiction police office (such as Grievant), the officer’s employing police force (*i.e.*, the MPD) must be notified of the event. In contacting the MPD, Sgt. Waddy was fulfilling this mandate. In addition, however, Sgt. Waddy states she was concerned about Grievant’s stressed condition and felt Grievant might need some help and therefore wanted to bring this concern to MPD officials.

5. D.M.’s legal efforts to restrain Grievant’s conduct

On July 30, 2004, D.M. submitted a “Petition for Peace Order” to the Maryland District Court in Upper Marlboro. Citing the Wal-Mart store incident and the phone calling incidents, D.M. alleged she felt threatened by Grievant and noted Grievant had a police badge and weapon. A “Temporary Peace Order” was issued by the court that day, barring Grievant from contacting D.M. or visiting D.M.’s place of employment, *i.e.*, the Wal-Mart store. This TPO was the result of an *ex parte* proceeding, without notice to Grievant or input from her.

A hearing into D.M.’s legal action to restrain Grievant was scheduled for August 6, 2004. Grievant was in attendance, but D.M. did not appear. According to D.M., she (D.M.) had a closing on her home that day and was unable to get to the court. The court dismissed the TPO without further action.

B. Procedural history

Following Sgt. Waddy’s call notifying the Department of the Wal-Mart incident, Detective Marable, Special Investigations Unit, was assigned to investigate the matter. He interviewed Grievant, Sgt. Waddy, D.M. and Lakisha Holland and compiled relevant supporting documents. In his investigative report, “Findings,” Det. Marable concludes:

This report establishes that [D.M.] made an allegation of being criminally harassed by [Grievant.] . . . [D.M.’s] allegation is supported by the following facts:

- 1) [D.M.] provided a detailed statement in which she identified [Grievant] as the person who harassed her at her work place.

- 2) Ms. Lakisha Holland corroborated [D.M.'s] account of the harassment allegation.
- 3) Prince George's County Police Department Sergeant Waddy completed a police report regarding the incident and classified the report as "Harassment."
- 4) Sergeant Waddy described [Grievant] as possibly emotionally unstable at the time of her investigation.
- 5) District Court of Maryland Judge Barron found sufficient cause to issue a Temporary Peace Order against [Grievant].
- 6) [Grievant] admitted to initiating the conversation that precipitated the incident.

Therefore, based on the preponderance of the evidence, I find that [Grievant] displayed conduct unbecoming a Metropolitan Police Officer and that the allegation of harassment is **SUSTAINED**.

JX 2, p. 9.

[Det. Marable's investigative report also includes a page entitled "Biographical Information" relating to Grievant. This "Biographical Information sheet includes mention of a prior disciplinary incident in December 2003 in which Grievant was charged with neglect of duty. The Union notes – and the Department confirms – the December 2003 discipline was reversed in December 2005 in a decision issued by an administrative judge of the Office of Employee Appeals (OEA). JX 2, JX 9.]

By memo dated November 30, 2004, the Department served notice on Grievant proposing to suspend her for 30 day. The Notice of Proposed Adverse Action included the following charge and specification against Grievant:

Charge No. 1: Violation of General Order Series 1202, Number 1, Part I-B-12, which provides: "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or agency's ability to perform effectively, or violation of any law of the United States or any law, municipal ordinance, or regulation of the District of Columbia." This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.

Specification No. 1: In that on July 28, 2004, you entered the Bowie, Maryland, Wal-Mart Department Store, and you confronted [D.M.]

about personal issues. [D.M.] told you that she did not want to discuss the matter at the workplace. As [D.M.] tried to walk away from the confrontation, you followed her and continued a verbal assault against [D.M.] and her family. Your actions resulted in a police report being filed for "Harassment," with you named as the offender.

JX 3. Grievant challenged the proposed suspension in a detailed letter to Assistant Chief Shannon Cockett dated December 16, 2004. JX 4. The Assistant Chief sustained the proposed suspension in a Final Notice of Adverse Action issued January 18, 2005, reviewing some of the evidence gathered during the Department's investigation and Grievant's arguments in opposition to the suspension. In part, the Assistant Chief's memo states:

11. In your letter [challenging the suspension], you argue that during the incident in question, you were not acting in the capacity of a Metropolitan Police Officer, and at no time did you make mention of your employment or use your position as a police officer in any way. You also assert that the incident did not affect yours or the agency's ability to perform your police duties effectively, and that the incident was a personal matter that did not bring discredit to the Metropolitan Police Department.
12. When this office proposed a charge of "Conduct Unbecoming," our intent was to cite you under the "violation of any law" provision of "Conduct Unbecoming a Police Officer." Your entire course of conduct was examined, including those actions that resulted in a police report being filed with you named as the offender. You also argue that your conduct was not a violation of law, and you summarize the incident from your point of view.

* * *

21. In reviewing the entire record, there is ample evidence that prior to July 28, 2004, you had been bothering Ms. Moore's family by telephone. When you happened upon Ms. Moore at her place of employment, you engaged in unnecessary and aggressive dialogue with her, and you remained on the premises longer than necessary to further the confrontation. A police officer responded to the scene and classified your conduct as "Harassment" under Maryland law. While you have presented information that allowed this office to better understand the incident, you have not presented arguments that controvert that classification of your conduct.

* * *

This office concludes that a preponderance of the evidence has established that you

are guilty of the charge and specification enumerated in the Notice of Proposed Action.

JX 5. Grievant appealed the Assistant Chief’s Final Decision to the Chief of Police, who denied the appeal. JX 6, JX 7. Grievant then invoked arbitration under the collective bargaining agreement.

ISSUE PRESENTED

The parties framed the issue to be decided as follows:

Whether the Department’s 30-day suspension of Grievant was issued for cause? If so, is the penalty appropriate for the conduct?

RELEVANT PROVISIONS OF THE LABOR AGREEMENT AND DEPARTMENTAL ORDERS

Labor Agreement, Article 12 Discipline

Section 1(b) Discipline may be imposed only for cause as defined in the Comprehensive Merit Personnel Act, D.C. Code §1-616.51.

Labor Agreement, Article 19 Grievance Procedure

E. Arbitration

Section 5: * * *

4. The arbitrator shall not have the power to add to, subtract from or modify the provisions of this Agreement in arriving at a decision of the issue presented and shall confine his decision solely to the precise issue submitted for arbitration.

General Order 1202, Number 1, Part I-A-1

1. It is the policy of the Metropolitan Police Department that members are entitled to:

* * *

f. Progressive discipline; provided, however, that the organizational level of discipline and the progressive sanction imposed may be waived by the Department if the seriousness of the violation warrants.

General Order Series 1202, Number 1, Part I-B-12

Conduct as described below is prohibited and shall serve as the basis for an Official Reprimand or Adverse Action.

* * *

12. Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or agency's ability to perform effectively, or violation of any law of the United States or any law, municipal ordinance, or regulation of the District of Columbia.

POSITIONS OF THE PARTIES

The Union's position – The FOP contests the Department's conclusion that Grievant engaged in harassing or unlawful conduct, and therefore asserts no "violation of law" occurred. In addition, the Union notes Grievant was off duty and out of uniform at the time of the incident at Wal-Mart; did not mention her job as an officer on the MPD force; and there was no publicity surrounding the incident that would caused discredit to the Department.

The FOP also alleges the Department violated the "progressive discipline" requirement of General Order Series 1202, Number 1, Part I-B-12. In this regard, the Union notes the "Biographical History" included in Det. Marable's investigative report (JX 2) includes mention of the December 2003 "neglect of duty" charge, which later was reversed by OEA. The FOP contends the MPD erroneously relied on the earlier charge to enhance the penalty in this case; now that the "neglect of duty" charge has been reversed by OEA, the Union argues progressive discipline policies require a lesser discipline (if any) to be imposed in this case.

The Department's position – The Department argues the evidence supports its conclusion Grievant engaged in harassing conduct, and Grievant's acts are tantamount to "harassment" under both Maryland and D.C. criminal law. This conduct supports the imposition of a 30-day suspension.

DISCUSSION

A. Burden and quantum of proof

In labor arbitrations involving adverse actions, employers normally shoulder the burden of proof in situations where – as here – "just cause" is a prerequisite for imposing discipline.

In standard disciplinary and discharge actions, arbitrators commonly will sustain the employer's action if the "preponderance of the evidence" (the standard of proof applicable in most civil litigation) supports the employer's case. *E.g., Fernald Environmental Restoration Management Co.*, 104 LA 596 (Cocalis 1995); *Rittman Nursing and Rehabilitation Center*, 113 LA 284 (Kelman 1999). Frequently, however, arbitrators will require employers to prove their case under an elevated standard if the charge against the employee alleges conduct that might be punishable under criminal law, or where the charge otherwise involves a failure of morals or conduct that is socially

stigmatizing. *E.g., Vista Chemical Co.*, 104 LA 818 (Nicholas 1995) (employee discharged for alleged sexual harassment); *Yellow Freight Systems, Inc.*, 106 LA 1062 (Briggs 1996) (employee accused of dishonesty); *Georgia-Pacific Corp. Building Products Division*, 106 LA 470 (Hooper 1996) (employee accused of bringing marijuana to worksite); *Chicago Transit Authority*, 110 LA 403 (Wolff 1997) (conductor accused of assaulting passenger).

Under the specific facts of this case, I believe it is appropriate to apply the normal “preponderance of the evidence” standard, rather than a higher quantum of proof.

B. Whether the Department has proven Grievant engaged in conduct unbecoming a police officer in violation of the General Order.

The “conduct unbecoming” charge leveled against Grievant, *supra*, is broadly drafted. One aspect of “conduct unbecoming” under the General Order involves the “violation of any law,” which could include violations of either civil or criminal statutes; in this case, the alleged violation is tied to the misdemeanor criminal charge of “harassment.” In addition, however, “conduct unbecoming” under the General Order also can apply to conduct that does not violate any laws, but which constitutes “acts detrimental to good discipline [or] conduct that would affect adversely the employee’s or agency’s ability to perform effectively[.]” I consider both possible approaches under which Grievant might be found to have violated the General Order.

1. Violation of law

The Department’s “Final Notice of Adverse Action” suggests the agency was focused on possible violation of criminal harassment statutes when it decided to discipline Grievant:

When this office proposed a charge of “Conduct Unbecoming,” our intent was to cite you under the “violation of any law” provision of “Conduct Unbecoming an Officer.” Your entire course of conduct was examined, including those actions that resulted in a police report being filed with you named as the offender.

JX 5, ¶12. Has the Department proven Grievant violated any laws?⁴

Reviewing the record as a whole, I conclude the Department has not proven Grievant violated harassment statutes, because the evidence in the record – and relied upon by the Department when imposing the 30-day suspension – is not strong enough to support the “violation of law” aspect of the charge. I reach this conclusion for several reasons.

Quality of evidence relating to the telephone harassment allegation – The formal rules of

⁴ Nowhere in the record does the Department identify a citation to the specific statutes or regulations that Grievant is alleged to have violated, nor has the text of these statutes been provided.

evidence do not strictly apply in labor arbitration cases. Arbitrators therefore have broad leeway to admit hearsay evidence that otherwise would be inadmissible in court. However, arbitrators normally are cognizant that hearsay evidence may be less reliable than direct evidence. In addition, reliance on hearsay evidence can raise due process concerns, because the person who actually witnessed or participated in the event is not testifying directly and is not subject to cross examination. When the sole evidence relating to a core event at issue in an arbitration is hearsay evidence, this is problematic.

In the “Final Notice of Adverse Action,” the MPD concludes “In reviewing the entire record, there is ample evidence that prior to July 28, 2004, you had been bothering [D.M.’s] family by telephone.” JX 5, ¶21. The primary evidence supporting the telephone harassment claim are the statements made by D.M. to Sgt. Waddy and Det. Marable, as well as D.M.’s Petition for Peace Order filed with the Maryland courts and the subsequent Temporary Peace Order (TPO).

With regard to D.M.’s comments to Sgt. Waddy on July 28 and her later statement provided to Det. Marable, nowhere does D.M. indicate she personally was involved with the alleged harassing phone calls, nor is there any indication D.M. even was present at her mother’s home when the calls allegedly were received. Instead, D.M. states her younger sister initially answered the call from “Danielle,” which then was transferred to her mother, S.M.

Grievant has acknowledged making a phone call to S.M. which was terminated (apparently intentionally), and Grievant also admits making several subsequent attempts to “reconnect” before concluding S.M. did not want to speak with her. In contrast, D.M. reports Grievant (“Danielle”) called repeatedly until the M. family blocked Grievant’s phone number.

Neither S.M. nor D.M. appeared at the hearing in this matter, and it appears S.M. never was interviewed by Det. Marable. The record before me relating to the alleged phone harassment, then is “double hearsay,” *i.e.*, information that S.M. allegedly reported to her daughter D.M., who then reported it to Sgt. Waddy and Det. Marable, who in turn testified at the hearing. Although this Arbitrator normally gives substantial weight to investigative reports taken by police officers, who are neutral participants in the process and experienced, I am in no position to judge the truth or accuracy of what S.M. may have said to her daughter [D.M.] about the alleged phone call(s), nor can I reach any conclusions whether D.M. has been a reliable reporter of the information when making her statements to police.⁵ In my view, the evidence relating to the alleged telephone harassment is too remote to be relied upon for such a key issue.

The MPD’s Interpretation of the PG Police Department Incident Report – Also in the “Final Notice of Adverse Action,” the Department offers this statement in connection with the incident at the Wal-Mart store:

⁵ Sgt. Waddy testified she found D.M. to be a credible witness. Had D.M.’s statements to Sgt. Waddy and Det. Marable about the phone calls been reports of events she personally experienced, I would give greater weight to the information.

When you happened upon [D.M.] at her place of employment, you engaged in unnecessary and aggressive dialogue with her, and you remained on the premises longer than necessary to further the confrontation. *A police officer responded to the scene and classified your conduct as "Harassment" under Maryland law.* While you have presented information that allowed this office to better understand the incident, you have not presented arguments that controvert that classification of your conduct.

JX 5, ¶21 (emphasis added).

While it is true Sgt. Waddy's Incident Report (*see* JX 2) characterizes the "Type of Incident" she investigated as "harassment," it appears this characterization did not reflect a conclusion by Sgt. Waddy that "harassment" *as contemplated by Maryland law* actually had occurred. Under questioning by the Department, Sgt. Waddy provided this testimony at the hearing:

Q: In your experience as a police officer in Prince George's County, did you consider the acts of [Grievant] to be harassment under the laws of Maryland?

A. Well, at the present, from what I observed myself, and especially after speaking with [Grievant], I didn't feel at the time that there were harassment issues. However, I did inform [D.M.] of her rights as a citizen, because of all the mitigating circumstances prior to, that if she or her mother felt they had been harassed it was their right to go down to the commissioner to apply for a warrant because that would have been a misdemeanor not committed in my presence.

Q. And that misdemeanor would have been for harassment?

A. That is correct.

Stated differently, when filing her report on the Wal-Mart incident, Sgt. Waddy used the term "harassment" when completing the box for identifying the "type of incident." This made good sense, because the term reflects generally the allegations being made by the party who requested police assistance, D.M. However, when Sgt. Waddy was asked directly whether she felt a violation of law had occurred, she testified she did not feel the incident rose to that level.

To the extent the Department relied on the materials in Sgt. Waddy's Incident Report to support a finding that Grievant had violated the law, it appears the Department read more into the Incident Report than Sgt. Waddy intended. While I do not fault the Department for its interpretation of the Incident Report, Sgt. Waddy's testimony clearly indicates that while she characterized the incident as a complaint of harassment, Sgt. Waddy personally did not believe the conduct rose to the

level of a law violation. Sgt. Waddy's clarification on this point undermines somewhat the Department's conclusion that Grievant violated laws.

D.M.'s Petition for Peace Order and the resulting Temporary Peace Order – The Petition for Peace Order and TPO were included in Det. Marable's investigative report, and were considered by MPD management when imposing discipline. The weight attached to these documents by the Department is unclear, but the fact that D.M. initiated legal proceedings against Grievant appears to have played some part in the MPD's conclusion that Grievant violated harassment laws.

In this Arbitrator's view, the Petition for Peace Order and the TPO have very limited evidentiary value. Although the Petition is signed by D.M. under oath, the Petition/TPO process is conducted *ex parte*, without providing an opportunity for the respondent (*e.g.*, Grievant) to answer. As noted above, a hearing into a permanent peace order was scheduled; Grievant attended, but D.M. did not. Thus D.M.'s allegations never were challenged and tested in the county courts, nor did D.M. testify at this grievance arbitration.

Although the Petition and the TPO are somewhat relevant because they corroborate D.M.'s belief that harassment by Grievant was occurring in July 2004, these documents by themselves are weak evidence as proof of the underlying events. This further undermines any conclusion by the Department that Grievant violated Maryland or D.C. law.

Because I disagree with the weight the MPD attaches to (a) the phone call allegations, (b) the Petition for Peace Order and TPO, and (c) the Incident Report identifying the Wal-Mart incident as "harassment," I conclude the Department has not proven Grievant violated General Order Series 1202, Number 1, Part I-B-12 under the Order's "violation of any laws" provision.

2. Acts detrimental to good discipline [or] conduct that would affect adversely the employee's or agency's ability to perform effectively

Although I have concluded the Department has failed to prove Grievant violated criminal harassment statutes, "conduct unbecoming an officer" under the General Order also applies to "acts detrimental to good discipline [or] conduct that would affect adversely the employee's or agency's ability to perform effectively." After considering the record as a whole, I conclude Grievant's conduct on the Wal-Mart was improper and sufficiently grave to warrant discipline under this standard.

In her earlier challenges to the proposed discipline, Grievant noted that the disputed conduct occurred off-duty while she was out of uniform, involved a personal matter rather than a confrontation with a member of the general public, and that Grievant did not invoke her status as a member of the MPD force at any time. These claims are not contested anywhere in the record, and are fully credible. Moreover, as Sgt. Waddy acknowledged, the PG Police Department brought the incident to the attention of the MPD because it is standard procedure in the County to advise home police departments of all incidents that occur in the County involving out-of-jurisdiction police

officers. In other words, the decision by the PG Police Department was routine and does not, by itself, reflect a judgment whether a violation of law took place or its seriousness.

The extent of an employer's ability to regulate the off-duty conduct of employees is a long-standing issue in the labor relations field. An employer's legitimate interest in employee off-duty conduct varies a great deal, depending on such factors as the nature of the employer's business, the nature or gravity of the offending off-duty conduct, the affect of the employee's conduct on the employer's standing in the community, the affect of the conduct on the employee's relationship with co-workers, etc. *See, e.g., Hill and Kahn, Discipline and Discharge for Off-Duty Misconduct: What Are the Arbitral Standards?* , 1986 NAA Proceedings.⁶

The standard of conduct that police departments may demand from off-duty police officers is among the highest in the labor relations field, reflecting the fact that police officers are charged with enforcing laws and occupy positions of authority within the community. Has the Department shown that Grievant's off-duty conduct at the Wal-Mart store violated reasonable expectations?

Grievant and D.M. (through her witness statements) portray opposite accounts of the events of July 28. D.M. alleges Grievant came to the store intending to harass her and followed her throughout the store making disparaging comments about her family. D.M. contends Grievant contrived to extend her shopping visit at the Wal-Mart so she could continue the harassment, shifting between register lines and stopping at the customer service desk to inquire about a lost driver's license that was not found at the store. D.M. suggests the driver's license inquiry was part of Grievant's contrivance to extend her stay at the Wal-Mart. In D.M.'s view, Grievant wanted to create problems for D.M. at her jobsite.

Grievant acknowledges initiating the first conversation with D.M. on July 28, but claims the encounter was escalated by D.M. as the aggressive party. Grievant claims she attempted repeatedly to withdraw from interaction with D.M., but D.M. made loud and disparaging comments about Grievant and her marital problems. In Grievant's view, D.M. sparked the confrontation and then called the county police as part of a "set up" to create problems for Grievant.

Having reviewed the record in detail, I conclude and find that the incident at the store was less complicated than either Grievant or D.M. suggest.

Contrary to D.M.'s claim, I find Grievant did not visit the Wal-Mart store for the purpose of creating a confrontation with D.M. It is undisputed Grievant made purchases at the store. With regard to the driver's license incident, the record shows Grievant went to the customer service desk during a period when D.M. was not stationed at the desk; therefore, it is illogical to believe Grievant sought out customer service with the intent of furthering the confrontation with D.M. Moreover, the record shows Grievant was issued a new driver's license several days after the incident, which lends

⁶ Proceedings of the National Academy of Arbitrators are available on-line at Dispute Resolution in the Workplace, <http://www.naarb.org/proceedings>.

support to her claim that she was attempting to locate a lost license.

On the other hand, contrary to Grievant's assertion, I find D.M. did not create confrontations with Grievant on the sales floor or at the customer service desk – and then call the police for assistance – as part of an effort to “set up” Grievant. Whether D.M.'s feelings toward Grievant were a reasonable reaction to poor conduct by Grievant, or instead had been poisoned in some way by the M. family's ties to Grievant's estranged husband, the claim that D.M. would orchestrate the events at the store is not credible. For example, when D.M. contacted the PG Police Department, D.M. could not have anticipated that both she and Grievant would encounter each other again at the customer service desk and have a second confrontation. Moreover, D.M. could not have anticipated that Grievant would be in the store for such a relatively long time, and therefore would be present when Sgt. Waddy arrived. With regard to D.M.'s claim that she attempted to leave the sales floor to avoid contact with Grievant, her statement is corroborated to some extent by the store manager, Robbins.

The record instead shows that both Grievant and D.M. lost their composure and participated actively in public arguing. The eyewitness testimony of LaKisha Holland, who suggested both parties behaved inappropriately, is particularly helpful on this point. Both parties had opportunities to walk away from the confrontations, and neither took the full initiative to do so.

Even if *both* Grievant and D.M. share some culpability for the confrontation at the Wal-Mart store, I find the Department has shown Grievant engaged in “conduct unbecoming a police officer” in violation of the General Order. Several elements of the record are particularly persuasive in reaching this conclusion.

First, by her own admission, it was *Grievant* who triggered the first confrontation by initiating a conversation with D.M. about the babysitting situation and criticizing D.M.'s mother. D.M. was a Wal-Mart employee and on her work shift; as such, D.M. essentially was a captive audience for Grievant, a customer, with a limited ability to avoid her. It is hard to imagine what Grievant hoped to accomplish by criticizing or disparaging S.M. to her daughter, but it plainly was inappropriate for Grievant to engage D.M. about this topic at D.M.'s place of employment. While it may not have been inevitable that the contact would go steadily downhill during the course of Grievant's visit to the store, the negative course of events is not surprising, either.

Second, I find the statement of eyewitness LaKisha Holland to Det. Marable persuasive. Whereas Grievant portrayed herself as the recipient of verbal abuse from D.M., Holland told Det. Marable that she (Holland) prompted D.M. to come to the customer service counter to process a transfer and that the verbal abuse then was initiated by Grievant, who was standing in line. Holland states the incident was escalated by *both* D.M. and Grievant, with Holland urging D.M. to walk away and break off the confrontation. As the lone third-party eyewitness to have submitted a statement in connection with the dispute, I find Holland's account to be particularly helpful in providing an independent view of the events.

Third, I found the in-person testimony of Sgt. Waddy compelling. Sgt. Waddy was physically present at the store immediately after the encounter and interviewed Grievant, D.M. and Holland. In her contemporaneous incident report, she also records comments made by Holland indicating D.M. attempted to break off the confrontation, but was pursued by Grievant. Further, Sgt. Waddy observed that Grievant appeared to be deeply stressed during their discussion of the Wal-Mart events – stressed to the point that Sgt. Waddy was concerned for her welfare and felt Grievant might need some help. Sgt. Waddy impressed this Arbitrator as being very professional and perceptive; her description of Grievant’s fragile emotional condition at the time of the events suggests Grievant’s recollection of what transpired may not be fully accurate.

In sum, I find Grievant exercised extremely poor judgment in choosing to address her private concerns to D.M. at D.M.’s place of employment, and this poor judgment led directly to the confrontation. Even though Grievant was off duty and out of uniform, the incident at the Wal-Mart store legitimately is a matter of concern to the MPD. Police officers have a continuing obligation to meet certain levels of proper conduct while off-duty. While it is understandable Grievant may have been experiencing a great deal of stress related to the problems with her marriage, this does not serve as an excuse for poor conduct. I therefore find the Department had just cause to discipline Grievant for “conduct unbecoming an officer” because she engaged in “acts detrimental to good discipline [or] conduct that would affect adversely the employee’s or agency’s ability to perform effectively.”

C. The appropriate remedy

As discussed above, I have concluded the Department has not proven just cause to discipline Grievant under the General Order’s “violation of law” clause, but nonetheless has proven a violation of the General Order under the “acts detrimental to good discipline” provision. What is an appropriate remedy for the infraction proven?

The Department ordered a suspension of 30 days. In assessing the appropriateness of the proposed penalty, the guidelines articulated by the MSPB in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 303-308 (1981) – the so-called “*Douglas factors*” – are a useful model for assessing aggravating or mitigating conditions.

(1) The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated. The Department reasonably expects police officers to be able to maintain their composure at all times under difficult circumstances. Grievant’s involvement in initiating, continuing and escalating the confrontation in the Wal-Mart store reflects a serious lapse in judgment.

While I do not find that Grievant intentionally set out to create this confrontation or did so maliciously, this was not an accidental or inadvertent event, either. On the other hand, the offending conduct was not directly related to Grievant’s duties or position. Together, I find this factor is

neither an aggravating nor mitigating element when considering appropriate discipline.

(2) *The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.* Grievant is not a supervisor or a fiduciary. While she is a police officer and has contact with the public, the events in question took place during off-duty time and she was out of uniform. I find this to be a mitigating factor to Grievant's benefit.

(3) *The employee's past disciplinary record.* The employee has a clean disciplinary record. This is a mitigating factor to Grievant's benefit.

(4) *The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.* Grievant has been on the force for approximately 16 years. There is nothing in the record suggesting problems with her performance or an inability to get along with co-workers. This is a mitigating factor to Grievant's benefit.

(5) *The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties.* The record is silent on this issue. This is neither a mitigating nor aggravating factor.

(6) *Consistency of the penalty with those imposed upon other employees for the same or similar offenses.* MPD asserts the 30-day suspension is consistent with similar offenses. While this was not contested by the FOP, no comparative evidence was provided showing discipline meted out in similar cases. Moreover, I note that while I have concluded the Department has proven it had cause to discipline Grievant, the proof goes to a different theory of discipline than the specific rationale advanced by the Department. Altogether, this is neither a mitigating nor aggravating element.

(7) *Consistency of the penalty with any applicable agency table of penalties.* MPD states the proposed penalty is within the penalty guidelines, and this is not contested by the FOP. This is neither a mitigating nor aggravating factor.

(8) *The notoriety of the offense or its impact upon the reputation of the agency.* Although the event was observed by other shoppers and employees in the Wal-Mart store, there is no suggestion these individuals realized Grievant was an MPD police officer, nor was there any publicity surrounding the event. There is no evidence the incident had any impact on the Department's reputation. This is a mitigating factor to Grievant's benefit.

(9) *The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.* Although there is no MPD directive specifically prohibiting arguments in stores, police officers plainly are on notice that they are responsible for conducting themselves properly, both on- and off-duty. This is neither a mitigating nor aggravating element.

(10) Potential for the employee's rehabilitation. This event appears to be isolated, and there is no evidence it has been repeated. This is a mitigating factor to Grievant's benefit.

(11) Mitigating circumstances surrounding the offense such as unusual job tension, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter. As Sgt. Waddy observed, the confrontation in the store appears to have been the result of significant emotional distress related to marital problems. As such, it does not appear to reflect Grievant's normal conduct. This is a mitigating factor to Grievant's benefit.

(12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. In light of the serious nature of the offense, it is appropriate that a penalty such as suspension be imposed. However, I find a lesser suspension would serve equally well as a deterrent to future improper conduct. This is a mitigating factor.

Reviewing these factors together, I conclude the Department is justified in disciplining Grievant based upon the stated Charge and Specification. However, I find suspension for 30-days to be excessive for the penalty proven. Instead, I find Grievant shall be suspended for a period of five days.

AWARD

The Department's 30-day suspension order is mitigated. Grievant shall be suspended for a period of five working days.

Paul Greenberg, Arbitrator
Washington, D.C.

June 12, 2006