SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

TIMOTHY FARMER, **HF No. 15 G, 2008/09**

Grievant,

v. **DECISION**

CITY OF RAPID CITY AND RAPID CITY POLICE DEPARTMENT,

Respondent.

The above-referenced matter is a Hearing upon a Grievance filed pursuant to SDCL 3-18-15.2. The Department of Labor conducted a hearing on the matter in Rapid City, South Dakota on October 15, 2009. Grievant Timothy Farmer (Grievant) appeared personally and through his attorney of record, Courtney Clayborne. Attorney Jason Green represented Respondent City of Rapid City and Rapid City Police Department (Respondent). Upon consideration of the live testimony given at hearing, the evidence presented at hearing, and the parties' written submissions, Grievant's prayer for relief is denied.

Issue

Did Respondent violate, misinterpret, or inequitably apply the Negotiated Agreement when Grievant, Timothy Farmer, was terminated from his employment with Respondent?

Facts and Analysis

Grievant has been employed as a police officer with the Rapid City Police Department (RCPD) since August 1, 2005. This was Grievant's first police officer position. Grievant received training at the South Dakota Police Academy as well as the RCPD. Grievant was promoted to a Police Training Officer (PTO) in early 2009.

RCPD trained Grievant on the RCPD Use of Force Policy and the Use of Force Continuum scale. The RCPD Use of Force Continuum scale (from least to greatest) is:

- Officer presence
- Verbal direction

- Empty hand soft (including aerosol pepper spray)
- Empty hand hard (to include electronic control devices)
- Intermediate weapon (extendable baton, canine deployment)
- Less-lethal extended range impact munitions
- Deadly force

The Policy states in pertinent part, "The Rapid City Police Department's officers shall use only that force that is reasonably necessary to overcome resistance from a person being taken into custody, to stop an assault of a third person, in self-defense, or as reasonable and necessary to perform their police functions."

The Negotiated Agreement between RCPD and Grievant, under which both parties operate, states in pertinent part:

> Article 37 Section 37.01 The City has the right to impose discipline upon employees for violations of the City's work rules or for conduct that is detrimental to the Department or the City. The City shall only impose discipline for cause. Discipline may include discharge of an employee.
>
> Article 37 Section 37.05 If it is decided under the grievance procedure that the employee was discharged or disciplined without just cause, he shall be reinstated to his former position without loss of seniority and pay, less any received unemployment compensation payments.

The Negotiated Agreement does not specifically define "cause" or "just cause." The Agreement does specifically allow disciplinary actions to be meted for "violations of the City's work rules or for conduct that is detrimental to the Department or the City."

Grievant was discharged after an internal investigation regarding a complaint of "excessive force" against Grievant by a person he arrested. The initial investigation was conducted by Grievant's superior, Sergeant Peterson. Sgt. Peterson gave his initial findings to Lieutenant Vlieger. Lt. Vlieger recommended that Grievant be removed as a Police Training Officer (PTO); undergo a "fit for duty" examination and follow the recommendations; be removed from the night shift and the north sector; and be suspended without pay.

The matter was transferred up the chain of command to Captain Thrash who made the decision to discharge Grievant. Capt. Thrash looked at Grievant's judgment, tactics, and credibility in coming to the decision to discharge. Grievant appealed this decision to Chief of Police Allender. Chief Allender affirmed the discharge decision of Capt. Thrash. Grievant then appealed the RCPD decision to the City of Rapid City. Mayor Hanks upheld the RCPD decision to discharge Grievant. Grievant made this appeal to the Department of Labor through the Grievance procedure of SDCL 3-18-15.2.

This matter stems from an incident that occurred during the early morning hours of Sunday, March 8, 2009. Grievant was working the North Central area of Rapid City. At 4:45 am, Grievant was dispatched to1620 North 7th Street, the Golden Living Center, an assisted living facility, to respond to an aggravated assault. Grievant found the victim outside the facility being attended to by three nurses, employees of the Golden Living Center. Grievant learned that the victim had been beaten with a baseball bat or a pipe and dropped off by the perpetrators outside the facility. The employees of the facility telephoned 911 to report the assault.

Shortly after receiving the assault call, RCPD sent a dispatch regarding a gang fight in the general vicinity of 1720 North 7th Street involving six males. The other patrol officer working that sector, at that time, had just made a traffic stop. Grievant chose to leave the injured victim at the Golden Living Center, knowing that an ambulance was en route, and proceed to the fight. Grievant believed the fight was connected to the felony aggravated assault that was reported moments before.

Grievant drove about two blocks up the street to the general vicinity of the reported fight. The fight was supposedly taking place in an area between apartment buildings. Grievant saw a light colored sedan in the parking lot of one of the buildings. Two females had just exited the car when he pulled up. The digital video recorder built into Grievant's car and the voice recorder worn by Grievant at that time, recorded the events that took place just thereafter.

Grievant activated his lights and sirens a couple seconds before pulling into the lot behind the females' car. Grievant immediately exited his car and yelled at the two females, "Get on the ground." The women, Martina Martinez and her daughter, Brianna Bear, were walking away from the car when Grievant yelled instructions to them. The two women ignored Grievant's instructions and kept walking away in opposite directions.

Grievant immediately engaged with Bear using "soft hand" techniques and asked her to remain at the car. Martinez started yelling at Grievant and returned to the car to confront Grievant. Martinez yelled at Grievant to stay away from her daughter. Grievant then engaged with Martinez, again using "soft hand" techniques and forced her onto the hood of her car. Grievant made a motion that looked like he was going to handcuff Martinez, but he did not do so. Martinez was telling her daughter to run away. Bear started moving in the direction that Martinez had come from, out of the view of the video camera. Grievant saw backup officers arriving, and made an attempt to signal for the officers to assist with Martinez, but the officers continued driving down the street. Grievant let go of Martinez and chased after Bear who was walking away. Bear yelled at Grievant and told Grievant that she is trying to find her brother. The police car video clearly shows Martinez, after being released by Grievant, going into her car and picking up an item before going in the same direction of Bear and Grievant. Martinez called 911 from her cell phone while she was being arrested and reported that she was being assaulted by a police officer.

At this point in time, other police officers arrived on the scene and were assisting as back-up to Grievant. Martinez was ultimately arrested by Grievant using "empty hard hand" techniques. Charges were not brought against Bear and charges of obstruction against Martinez were ultimately dropped. Martinez made an informal complaint of excessive force against Grievant.

There were no arrests made in regards to a gang fight, as no police officer witnessed the fight or saw suspects of the fight in the vicinity.

Grievant's superiors testified that Grievant used poor judgment and tactics when responding to this call on March 3, 2009. To begin with, it was Respondent's opinion that Grievant should have stayed with the felony assault victim instead of responding to the gang fight dispatch (a misdemeanor). Dispatch had advised that the fight suspects were men in a dark-colored SUV. The nurses at the facility advised Grievant that the suspects, two men and one woman, were walking north on foot toward the apartment buildings at 1720 North 7th Street. Instead of looking for known suspects of the fight or the assault (based upon sex or mode of transportation), Grievant engaged with two females in a light-colored sedan.

Furthermore, after arriving at the location, Grievant chose to engage at a higher level of force than necessary. Respondent was of the opinion that Grievant's initial order for the women to get on the ground was unnecessary, confusing, and not in response to the actions of Martinez and Bear. At the point where Grievant made the order to the women, Martinez and Bear were not engaged in a fight, there was no indication they had assaulted anyone, and Grievant had not seen them engage in any unlawful acts. The two women were arriving at the location of a reported fight, not fleeing. Grievant believed they may have been involved in the aggravated assault, but only because they were in the same general vicinity as the assault. Grievant's superiors testified that an order such as "get on the ground" made without any reason, is likely to be ignored by the general public.

Grievant went "hands on" with Martinez after Martinez approached Grievant pointing and yelling. Lt. Vlieger presented testimony that yelling and finger pointing does not justify going "hands on" with a suspect. It was Lt. Vlieger's opinion that the amount of force used by Grievant was not consistent with the physical threat against him by Martinez or Bear and was greater than necessary.

Grievant could have immediately apprehended or stopped Martinez with the use of soft hand techniques, but failed to handcuff Martinez after forcing her onto the hood of the car. In all, Grievant made four unsuccessful attempts to secure the women, moving from one to

the other and back again. Grievant eventually had to resort to hard hand techniques to handcuff Martinez. Before being handcuffed, Martinez had the opportunity to call 911 to report an assault by a police officer. Respondent believed Grievant's actions were confused and in poor judgment.

Grievant's written report of the use of force was also looked at by Respondent. Grievant justified the use of the force used against Martinez by reporting that Martinez's actions were threatening against Grievant. After viewing the video, Respondent did not believe Martinez's actions matched Grievant's written report. Respondent felt that Grievant had embellished the report in favor of his actions and to justify the amount of force used. Even after meeting with his superiors and reviewing the video and audio tapes with Respondent, Grievant still did not believe he did anything improper in this situation.

After the initial investigation and discipline recommendation by Lt. Vlieger, Respondent reviewed Grievant's full record with the RCPD. During Grievant's tenure with the RCPD (approximately 36 months), prior to this complaint, Grievant had five (5) formal and three (3) informal complaints filed against him. One formal complaint alleging unnecessary force and one informal complaint alleging unnecessary force and unprofessional conduct resulted in disciplinary actions against Grievant. The other unsubstantiated complaints involved excessive force (4), failure to take a report (1), and making an improper traffic stop (1).

The first incident, for which Grievant was disciplined, involved the arrest and booking of Michael Slow Bear. This incident occurred in August 2007 and was captured on videotape. It took place in the RCPD booking room. Grievant had taken the handcuffs off an intoxicated perpetrator, Michael Slow Bear about a minute and a half prior to the incident. The video shows an unrestrained Slow Bear sitting in a chair speaking with Grievant, who is standing in front of Slow Bear. Without any physical provocation by Slow Bear, Grievant grabs Slow Bear and pulls him off the chair, driving Slow Bear's head into the wall opposite of the chair. After Slow Bear regains his footing, Grievant handcuffs the perpetrator with

the assistance of another officer and escorts him from the room. Grievant testified that Slow Bear had made a move towards Grievant. That is not evident on the video submitted. The action by Grievant appears to have been without physical provocation. The video does not have audio and therefore it is unclear whether or not Slow Bear verbally confronted or threatened Grievant.

Slow Bear made a formal complaint of excessive force by Grievant and an investigation was conducted by Lt. Dave Stratton of the RCPD. Grievant was to write a report about the occurrence. Officer Stratton determined that Grievant's report was poorly written and embellished the situation in favor of Grievant. Stratton's report was that Grievant perceived a physical threat against him by Slow Bear when there was no actual threat. A letter of reprimand regarding embellishment of a report was placed in Grievant's personnel file in response to that incident. Capt. Thrash testified that if he had seen the video of this incident in 2007, he would have recommended dismissal of Grievant at that time. Furthermore, Chief Allender testified that he would have given the video recording to the State's Attorney to see if criminal charges should be filed against Grievant. Chief Allender viewed Grievant's actions as an "unprovoked physical assault, especially after reading the report, which I believe is more than a misrepresentation or an embellishment."

Grievant testimony at hearing regarding this incident is, "I was wanting to bring him straight into a holding cell at one point, so I picked him up. He went into a wall at the holding cell area, booking, and other booking officers arrived on scene and helped me get him into a holding cell." Grievant testifies that there was no physical provocation but that Slow Bear made verbal threats. Grievant's testimony does not misrepresent what is seen on the video, but it also does not explain how Slow Bear "went into a wall." Grievant clearly used more force than necessary in that situation.

The second finding of unprofessional conduct was made on August 27, 2008 by Lt. Jegeris. The informal complaint made also alleged excessive force, but that allegation was unfounded. It was found that Grievant used profanity (unprofessional conduct) during the

arrest. Following an investigation, a letter of discipline was placed in Grievant's file for the use of profanity during an arrest.

As the Martinez complaint was the third time in three years that Grievant was disciplined for unprofessional conduct, Respondent felt they had no choice but to discharge Grievant. Respondent, in the Disciplinary Memo, cites RCPD Rules & Procedures as follows:

> 341-01.C.4 states, "At no time shall employees conduct themselves in such manner as to compromise their ability to perform their duties or effectively bring discredit upon the department or impair the effective operations of it."
>
> 341-06.E Use of Force states, "Officers shall not use more force than reasonably necessary to subdue and apprehend a suspect."
>
> Law Enforcement Code of Ethics (Annex A) last sentence of the fourth paragraph states, "I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities."

The discharge ordered by Captain Thrash and affirmed by Chief Allender was appealed by Grievant to the City of Rapid City. The Mayor of Rapid City affirmed the decision as well. Grievant then appealed the discharge to the Department of Labor pursuant to SDCL 3-18-1.1 and 3-18-15.2.

The South Dakota Supreme Court has set the standard by which the Department looks at a formally grieved discharge. The Court stated:

> "The standard for determining whether misconduct rises to the level which justifies discharging an employee is lower than that which determines whether an employee's misconduct will deprive him of unemployment compensation." *Kleinsasser v. City of Rapid City*, 440 NW2d 734, 737 (SD 1989). (citation omitted). According to SDCL 9-14-15, a civil service employee such as Miller "may be removed only pursuant to the provisions of the ordinance." Thus, the issue is whether the admitted misconduct of Miller was sufficient to be considered just cause for termination under the ordinance.

City of Sioux Falls v. Miller, 1996 SD 132, 555 NW2d 368. Similarly, pursuant to the Negotiated Agreement, Grievant may be removed for violation of the "City's work rules or for conduct that is detrimental to the Department or the City. The City shall only impose discipline for cause." "Cause" is a violation of the RCPD work rules or procedures.

In a special concurrence in the *Kleinsasser* case, Justice Henderson wrote, "[SDCL 3-18-1.1] defines a grievance proceeding and expresses the function of the Department. In essence, a complaint filed by a public employee is reviewed to determine if there is a violation of an existing agreement, policy, rule or regulation." *Kleinsasser* at 739 (also cited by the majority in *Cox v. Sioux Falls Sch. Dist.,* 514 NW2d 868, 872 (SD 1994).

Respondent received a complaint by Martinez and conducted an investigation pursuant to the Negotiated Agreement and the RCPD Rules and Procedures. The investigation was performed by three supervising officers, a Sergeant, a Lieutenant, and a Captain. All three supervisors, themselves law enforcement officers with years of training and experience, all felt that Grievant's actions were not justified and the level of force used against Martinez was excessive.

The evidence submitted at hearing clearly show that Grievant employed unnecessary and excessive force when dealing with Martinez, in violation of the RCPD Use of Force Rules and RCPD Code of Ethics. The evidence also shows that Grievant's actions in this matter and in previous matters bring discredit upon the RCPD in violation of the RCPD Rules and Procedures. The evidence shows that despite repeated coaching and training in the appropriate manner of reporting, Grievant embellished his written report to justify his actions and use of force.

Respondent did not violate, misinterpret, or inequitably apply the Negotiated Agreement when Grievant, Timothy Farmer, was disciplined for his conduct on March 8, 2009. Respondent's decision to discharge Respondent was for "cause" and was appropriate and

justified based upon the evidence. The discharge was allowed under the RCPD Rules and Procedures as well as the Negotiated Agreement.

Respondent shall submit Proposed Findings of Fact and Conclusions of Law and an Order, consistent with this Decision, within 10 days from the date of receipt of this Decision. Grievant will then have 10 days to make written objections. The parties may stipulate to waiver of Findings of Fact and Conclusions of Law and if they do so, the parties will submit such Stipulation, along with an Order in accordance with this Decision.

Done this ___12th__ day of March, 2010 in Pierre, South Dakota.

SOUTH DAKOTA DEPARTMENT OF LABOR

_____/s/_____
Catherine Duenwald
Administrative Law Judge