



## **MEMORANDUM**

### **Austin Police Department *Office of the Chief of Police***

**TO:** Joya Hayes, Director of Civil Service

**FROM:** Joseph Chacon, Chief of Police

**DATE:** March 18, 2022<sup>1</sup>

**SUBJECT:** Indefinite Suspension of Police Officer Andrew Upton #7562  
Internal Affairs Control Number 2021-0897

Pursuant to the provisions of Chapter 143 of the Texas Local Government Code, Section 143.052, and Rule 10, Rules of Procedure for the Firefighters', Police Officers' and Emergency Medical Service Personnel's Civil Service Commission, I have indefinitely suspended Police Officer Andrew Upton #7562 from duty as a City of Austin, Texas police officer effective March 18, 2022.

I took this action because Ofc. Upton violated Civil Service Commission Rule 10.03, which sets forth the grounds for disciplinary suspensions of employees in the classified service, and states:

No employee of the classified service of the City of Austin shall engage in, or be involved in, any of the following acts or conduct, and the same shall constitute cause for suspension of an employee from the classified service of the City:

- L. Violation of any of the rules and regulations of the Fire Department or Police Department or of special orders, as applicable.

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<sup>1</sup> Although this suspension is effective more than 180 days after the date of the underlying incident(s), its imposition complies with the mandates of LGC 143.052 and two agreed to extensions (requested/agreed to on February 2, 2022, and on February 17, 2022, by Ofc. Upton/ his representatives) of the 180-day deadline pursuant to Article 18, Section 8 of the 2018-2022 Meet and Confer Agreement. (APD has/had until April 8, 2022, to impose discipline).

The following are the specific acts committed by Ofc. Upton in violation of Rule 10:

On August 11, 2021, at approximately 2:00 am, Austin Police Department (APD) officers were dispatched to a residence for a call titled "Trespass Urgent." The 911 caller, (hereinafter Mr. NL), indicated to dispatch that his *"girlfriend refused to leave [his] house...[and the] female subject is being physical with complainant."* The call type was upgraded to a "Disturbance - Hot Shot." Ofc. Andrew Upton, along with two other officers (hereinafter Officer #1 and 2) responded to the call.

Ofc. Upton made contact with Mr. NL, while the two other officers made contact with the female subject (hereinafter Ms. VS). Similar to many domestic calls, the versions of the incident provided by Mr. NL and Ms. VS differed. However, they both said that they were involved in a physical altercation. Mr. NL told Ofc. Upton that he was struck by Ms. VS, although he had no complaint of pain or injury from the altercation. After Ofc. Upton received this information, he walked over to the area where his fellow officers were gathered. Ofc. Upton told his fellow officers what Mr. NL had said, while Officer #1 relayed to Ofc. Upton that Ms. VS had complained, in part, that Mr. NL pushed her against a wall inside the residence, and she had a complaint of pain in her finger. This information prompted Officer #1 to contact his supervisor, Sergeant Thuy Bayer for guidance.

As Officer # 1 was contacting Sgt. Bayer, Ofc. Upton walked back over to Mr. NL and relayed what Ms. VS alleged he had done to her. Mr. NL let Ofc. Upton know that he was concerned that he would be arrested. Immediately thereafter, Ofc. Upton communicated nonverbally with Mr. NL—which was not discovered until days later—and this nonverbal communication prompted Mr. NL to go inside his residence.

Ofc. Upton then returned to the area of his fellow officers. He conferred with Officer #1, who relayed that Sgt. Bayer had directed the officers to arrest Mr. NL for family violence, based upon the probable cause established at the scene. When the officers went to arrest Mr. NL, he was inside his residence and refused to answer the door when they knocked. There was no arrest made at that time, and the officer and Ms. VS eventually left the scene. The offense was documented as an "Assault with Injury" family violence in an APD incident report.

The follow-up investigation was assigned to the Domestic Violence unit. On August 12, 2021, the assigned detective was contacted by an APD Victim Services counselor. The counselor informed the detective of a conversation she had with Ms. VS. Ms. VS indicated that Mr. NL contacted her after the fact, and he *"bragged to her that one of the officers on-scene had shown him a note. Mr. NL told her that the note told him to go inside his residence."*

The detective reviewed Ofc. Upton's Body-Worn Camera (BWC) and found video footage possibly consistent with these alleged actions. The detective wrote in a supplement, *"Although the video did not show Officer Upton showing the alleged note to [Mr. NL], I believe that the likelihood that it occurred is great."* The detective notified his supervisor, who passed along the allegations to Ofc. Upton's Chain-of-Command.

Thereafter, on August 23, 2021, Ofc. Upton's Lieutenant requested that Internal Affairs (IA) initiate an administrative investigation to determine if any violation of Department policy, Civil Service rules, or state law had been committed by Ofc. Upton. The Lieutenant generated an internal complaint memorandum which reads as follows:

*Officer Upton was dispatched to an Assault Family Violence call. While investigating the call, Officer Upton is alleged to use his notepad to write a message to the suspect of the incident, advising him to go inside his residence to avoid an arrest. Further, when notified by another officer that an arrest should be made, Officer Upton is alleged to have removed the note written to the suspect from his personal notepad. Officer Upton is alleged to have had a lawful detention on the suspect in the Assault Family Violence incident, and further released the suspect when an arrest should have been made.*

## **The IA Investigation<sup>2</sup>**

### **APD Victim Services Counselor's Interview**

The APD Victim Services counselor was interviewed by IA on September 22, 2021. At the time of this incident, she was assigned as the follow-up counselor in the Domestic Violence unit.

The Victim Services counselor recalled being contacted by Ms. VS on the day after the incident. Ms. VS stated to her in this phone conversation the following:

*'This is why I don't like police or why I don't trust police.' And I was like, 'Whoa - whoa, what happened?' And she said that the suspect in the case or like her ex, the other person in the case had called her or they had communicated at some point like after we got off the phone. And she said that he basically told her that the officer on scene interviewing him had like told him to go inside the house and lock the door and don't respond. And she's like, 'He feels like he got away with like hurting me, because of that.' And I was like, 'Oh,' so I provided like additional support and just validation that that's not okay. And then I think we talked just a little bit more about just like basically me trying to be like emotionally supportive of her feeling like upset by that. And then I talked to my supervisor and to [the assigned detective], and then I think I spoke with her [Ms. VS] at least one more time...and just said, 'Hey I reported this to my leadership so you know that I don't think this is okay.'*

IA asked the Victim Services counselor to further explain her understanding of the interaction between Ofc. Upton and Mr. NL. She replied:

*So basically she [Ms. VS] said that she was being interviewed over here by this officer and then I guess Upton was interviewing the male party. And the male party [Mr. NL] told her that the officer wrote on a notepad and showed it to the male to*

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<sup>2</sup> IA's attempts to interview Mr. NL and Ms. VS during this investigation were unsuccessful.

*go inside and so he like read it and just turned around and went inside his home and like shut the door. And I don't think she knew that on scene, I think she just - later he's [Mr. NL] like, 'Yeah it's not even a big deal what happened,' and he kind of like - I think he used that against her to make her feel like if you report nothing's gonna happen to me. So I reported that to [my supervisor] and to [the assigned detective] and he's like, 'Yeah I'll definitely look into that.' So he checked the body cam footage and from what he saw he's like, 'I didn't see what was written,' but he said, 'I can see what she's saying, like it was - the suspect is like looking at the camera and like turns around,' and so he felt that was enough to report to the chain of command. So that's kind of was my understanding of what happened.*

The Victim Services counselor also provided her takeaway from her dialogue with Ms. VS:

*I felt really bad for [Ms. VS]...I wasn't trying to explain [Ofc. Upton's] behavior 'cause I'm like that's - to me that felt shady to be honest.*

### **Assigned Domestic Violence Detective's Interview**

IA interviewed the assigned Domestic Violence detective on October 19, 2021. The detective was not only assigned to conduct the follow-up investigation in this incident, but he was also tasked with preliminarily looking into Ms. VS' claims about Ofc. Upton writing a note to the suspect, Mr. NL.<sup>3</sup> The detective explained to IA that he was contacted by the Victim Services counselor, who apprised him of Ms. VS' claims. He described his understanding of the allegations and elaborated on what he proceeded to do with this information:

*[The Victim Services counselor] went on to say that she had a conversation with the victim, the victim was upset and kinda concerned that, about something she learned after talking to the suspect. The victim said that she talked to the suspect, and he was braggin' about showing a note - or the officer showing her a note - or showing him a note, and I guess were - telling him to go inside the house, and that prevented him from being arrested... And so, I reviewed the report, the initial report from the officers and then talked to my supervisor about it.... [My supervisor] informed me to review the body-worn camera, just to confirm that the incident did happen, the alleged incident. So I reviewed the body-camera of Officer Upton and observed some behavior from both the suspect in this case and the officer that led me to believe that her allegations were probably true.*

After notifying his supervisor, the detective explained the following steps that he took:

*What I decided to do was look at - find the point which the suspect went back into the house, which was [Mr.NL], and then go back from there, just to see if I can see*

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<sup>3</sup> While no formal criminal charges were ultimately pursued against Mr. NL, that does not negate the fact that, on the night of the incident, the on-scene officers had established probable cause against Mr. NL for assault. Ofc. Upton hindered or interfered with that lawful arrest through his intentional actions. He did so in spite of his understanding of the facts on the scene, his training, APD GOs/policy, and state law.

*some sort of interaction with him and the officer, Officer Upton. When I got to that point, I noticed that the conversation was quiet - or there was no conversation...actually, if I remember correctly. And that Officer Upton - it sounded like he was fiddling with some sort of paper or something that was causing a noise that was similar to paper. And then, I couldn't see what he had in his hand or anything like that, the camera didn't show that. And then shortly after, I noticed [Mr. NL] glancing in the direction, I believe it was the right side of Officer Upton, in the direction that Officer Upton was standing, like, glancing intently, tryin' to s-like he was looking at something. And then, Officer Upton then walks away, towards the other officers who were in the street. So based off of seeing that, it made me believe that there was possibly something that was shown to [Mr. NL], like the victim explained, like a note of some sort.*

### **Officer #1's Interview**

IA interviewed Officer #1 on November 4, 2021. Officer #1 recalled that due to the conflicting accounts given by Mr. NL and Ms. VS, he decided to call Sgt. Bayer, so she could make the ultimate decision as to whether an arrest should be made. He recalled that Sgt. Bayer's decision was to "[arrest] *the male*," based upon the probable cause in "*the female's testimony - or statement that he threw her out of the room, threw her against the wall and caused her pain in her hand.*"

Officer #1 explained what happened after the decision was made to arrest Mr. NL:

*"I went back to tell Upton and I guess well by the time that conversation between me and Upton happened, that second conversation, the male had gone inside and locked the door. We tried to make contact and the male didn't answer the door."*

IA asked Officer #1 if he was aware of the allegations that the suspect was shown a note to go inside the home and not to answer the door. Officer #1 indicated he had no awareness whatsoever until the notion was brought up the IA investigator.<sup>4</sup> Officer #1 concluded his interview by stating that if Ofc. Upton took the steps suggested by IA, he had hindered officers in arresting Mr. NL, since we "*Was [sic] unable to make the arrest.*"

### **Sergeant Thuy Bayer's Interview**

IA interviewed Sgt. Bayer on November 22, 2021. Sgt. Bayer recalled her phone conversation where she directed Officer #1 to arrest Mr. NL, based upon the probable cause that officers established while at the scene. Sgt. Bayer stated after she gave this directive:

*"[Officer #1] had called me back and told me that the suspect had gone back in the house and they weren't able to get him to come out. And with that information, I was not pleased because the officer had a detention and my big question was, 'Why*

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<sup>4</sup> IA also interviewed Officer #2. She also expressed that she had no awareness of the actions undertaken by Ofc. Upton, including that he wrote a note to Mr. NL.

*did you let this guy leave? Why did you not detain him?’ So no arrest was made that night, but I did address that issue that I was aware of.”*

Sgt. Bayer expressed to IA that the “issue” that she perceived or had been made “aware of” that she needed to “address” with Ofc. Upton was that he lacked an awareness that he had a lawful detention, based upon reasonable suspicion that Mr. NL had engaged in criminal activity, and he did not take the steps that he should have taken in those situations. Sgt. Bayer indicated that she decided to have a “counseling session” with Ofc. Upton on August 12, 2021, where they were:

*“Just sittin’ down and talkin’ ...about expectations and what he did wrong and that it’s not expected to happen again, that he understood what was going on out there, that he did have that detention. I wanted to ensure that he had the detention, that he knew what it was, that we were clear on it and that he failed to detain the guy.”*

Sgt. Bayer documented the conversation with Ofc. Upton, which read in part:

*“An arrest for family violence should’ve been made. [Ofc. Upton] was dealing with the male party and did not properly detain him during the investigation. The male then left and went back into his house and would not open the door when he knocked on it. I spoke with him tonight about detentions and he acknowledged that he knew he had a detention and that he didn’t do a good job out on the call. He stated that he didn’t have the best attitude on the call. I told him that I expect that not to happen again and that it was poor police work. He acknowledged that he understood.”*

Before Sgt. Bayer had her conversation with Ofc. Upton, she was unaware that he undertook deliberate actions, including writing a note, to hinder Mr. NL’s arrest—even though he knew that his peers had found probable cause to make the arrest.<sup>5</sup> Of further significance, Ofc. Upton made no mention to Sgt. Bayer in the “counseling session” of the fact that he took deliberate actions to hinder the arrest of Mr. NL, including by encouraging Mr. NL to enter his residence to avoid being arrested.

Sgt. Bayer concluded her interview by indicating that if Ofc. Upton took the steps suggested by IA, that it hindered officers from arresting Mr. NL, since “the male subject didn’t go to jail like he should have.” IA followed up by asking Sgt. Bayer if allegations such as these could affect the willingness of victims of family violence to come forward to the police department. Sgt. Bayer replied,

*“Absolutely. They would lose faith in us and have zero trust in our ability to do our jobs.”*

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<sup>5</sup> Sgt. Bayer did not become aware of the allegation that Ofc. Upton, hindered the arrest of Mr. NL, including that he wrote the note, until a week after her “counseling session” with him. Sgt. Bayer gained an awareness after the Chain-of-Command was notified by the Domestic Violence unit of Ms. VS’s complaint.

### Officer Andrew Upton's Interview

IA interviewed Ofc. Upton on December 9, 2021. Ofc. Upton recalled that he understood that Mr. NL and Ms. VS had given differing accounts. He recalled that Mr. NL stated that:

*...[Ms. VS] swung at him, at his face while he was holding the phone. It was a glancing blow, from what he told me, he said it didn't hurt, um, and that he just wanted her out.*

Whereas it was relayed to him by Officer #1 that Ms. VS alleged that:

*[Mr. NL] pushed her and - she said that her finger hurt.*

Ofc. Upton also recalled what Officer #1 relayed to him versus what Mr. NL stated:

*[Ms. VS] told [Officer #1] that she was thrown against a wall and that's what [Mr. NL] said didn't happen. I believe [Mr. NL] said that he was trying to push her out of the house but not, like, throwing her against a wall.*

After speaking to Officer #1, Ofc. Upton returned to Mr. NL and told him what Ms. VS alleged in the physical dispute, including that the dispute was also about the fact that:<sup>6</sup>

*[Mr. NL] wanted to have sex and [Ms. VS] didn't want to.*

Ofc. Upton also told IA that he perceived that Ms. VS:

*didn't want [Mr. NL] to go to jail that night. Um, and - and she was concerned that he was gonna end up being arrested, but she didn't want that to happen.*

With this understanding, he also recalled Officer #1 stating that Mr. NL:

*was - could be a suspect for family violence, assault with injury, that he was going to call our sergeant, Sergeant Bayer for direction on that, to see if it arose to the point where he needed to be arrested.*

Ofc. Upton stated he knew at that time he had a lawful detention of Mr. NL:

*Because [Ms. VS] said that she was hurt and so we were investigating a potential assault with injury, family violence.*

With that understanding, Ofc. Upton said he knew that Mr. NL was not free to leave or go into his home. Ofc. Upton also knew at that time there was a strong likelihood that the need to arrest Mr. NL was imminent, in light of the probable cause and Ms. VS's complaint of pain or injury. With that understanding, he told IA how he felt in that moment:

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<sup>6</sup> This dialogue was captured on Ofc. Upton's BWC.

*I was afraid- I was concerned that he was going to be arrested because of, - 'cause of policy and I was concerned that it wasn't - it didn't best serve justice that night that he go to jail and have arrest on his permanent record. Um, I - I felt that there was, like, a gray at the time, I felt that it didn't arise to the - the point where he should go to jail because of the unclarity of the situation and that if we could make sure that everyone was safe by separating - like, that she didn't live there, she was leaving, he was staying at his house, and I thought that that would be what served justice best that night, it's at the time is what I thought.*

IA then confronted Ofc. Upton with his own BWC footage from the incident:

IA: *Uh, can you tell us what we observed in that segment of the video?*

UPTON: *Um, in that segment of video we saw, um - um, what you don't see is me holding a note up, what we do see is [Mr. NL] leaning in to be able to read the note and then I walked away and went back to [Officer #1].*

IA: *So what did you write on the note?*

UPTON: *I don't remember exactly what I wrote on the note. I believe it said, "Just go inside, you might be going to jail." A- again, I don't recall exactly what it said.*

IA: *It was something similar to those?*

UPTON: *Yes, sir.*

IA: *So why did you write the note?*

UPTON: *Again, I didn't think it would be best for him to be arrested that night and, um, I figured to defuse the situation if they were just separated that it would just fix the - the whole situation for the night.*

IA: *And - in the video it appears as though you're doing it and you're trying to conceal what you're doing.*

UPTON: *Yes.*

IA: *Can you explain to us why you did that?*

UPTON: *Yes, sir. I - I knew it wasn't what I was supposed to be doing. I knew it was a shortcut.*

IA: *Have you ever done something like this before?*

UPTON: *I have not.*

IA: *Did you feel sympathetic with [Mr. NL] on this call?*

UPTON: *Yes, sir...Um, I felt sympathetic to the point where I - I would feel bad that if he had to go to jail...*

IA also asked Ofc. Upton if his actions prevented officers from arresting Mr. NL that night:

IA: *So how did your writing of the note affect the outcome of the incident that night?*

UPTON: *Um, uh, I - being 'cause I wrote that note and I left him unattended, he went inside and we ended up not being able to make the arrest that night.*

IA: *How did your writing of that note align with the guidance provided by Sgt. Bayer about how to handle this call?*

UPTON: *Uh, how did it align with what Sergeant Bayer said?*

IA: *Correct, with the guidance that she gave to make the arrest.*

UPTON: *Well, then it was - we weren't able to make the arrest because he was inside.*

IA then confronted Ofc. Upton with Officer #1's BWC footage from this incident:

IA: *All right, I'm stopping [Officer #1's] body-worn at 20:25. So, in this segment of the video, uh, [Officer #1] states, quote, "Sarge said [arrest] him." Immediately afterward you tear a piece of paper out of your notepad, why'd you do that?*

UPTON: *That was the note, sir. Um, uh, again, I knew that this was a shortcut, something that I shouldn't have done, um, so I - I think, uh, the-probably just a gut reaction, just get rid of it. I - I didn't show it to [Officer #1] he was not involved.*

IA: *What was done with the note?*

UPTON: *I threw it away on scene, there was a trash can on the street.*

Ofc. Upton then revealed his perception that IA already had an awareness of the events, including the specific contents of what the note said from their own investigation<sup>7</sup>:

IA: *What do you think [Mr. NL] told Internal Affairs about the note?*

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<sup>7</sup> As previously noted in footnote #2, IA's attempt to interview Mr. NL and Ms. VS were unsuccessful.

UPTON: *That I showed him a note and that I was telling him to go inside, he seemed to understand.*

Ofc. Upton was then asked about his perception of the victim's feelings upon learning the truth surrounding his actions during this incident.

IA: *What do you think [Ms. VS's] opinion was of this incident as - as they were relayed to her by [Mr. NL]? When [Mr. NL] told her about what happened, and she is a potential victim of family violence...[and]...how do you think these actions reflect...on the department?*

UPTON: *Uh, poorly. Um, it - doing things that are, you know, done in - in secrecy, it is a bad reflection on the department and me personally, all of policing. It's like we're trying to hide stuff and it's not good.*

IA: *And how confident do you think [Ms. VS] might be in the future to contact the police...to report a crime?*

UPTON: *Yes, she - she would have second thoughts, and rightfully so.*

IA: *So, do you believe your actions during this call were appropriate?*

UPTON: *No, sir.*

IA: *And can you explain why?*

UPTON: *Um, they - it's not how we do things. We - everything should be above board. I should have been, um, just honest with everyone, um, and just let the process do what process - walk the process, and not try to unilaterally make - unilaterally make the decision myself on what the outcome should be.*

Ofc. Upton even revealed to IA, why he chose to take the "secretive" actions to "fix" the situation rather than voice his concerns to his peers or supervisor as to why he believed that Mr. NL should not be arrested that evening:

UPTON: *I don't know that it would've changed. I think at the time I doubted that it would change anything, and but just - fixing the outcome myself was - was - I was thinking w- I - I'll just take care of this myself, I didn't wanna get him wrapped up in anything, you know.*

In explaining why he did not voice his concerns to Sgt. Bayer, Ofc. Upton even went on to elaborate:

UPTON: *I don't know why. I don't know, maybe - maybe it's 'cause I - still fairly new on the shift and I di- I didn't trust her, I don't know why. I - I absolutely should've, though.*

Ofc. Upton, then took responsibility and seemingly contradicted himself about Sgt. Bayer, in his final statements to IA as his interview wrapped up:

*I'd apologize profusely, especially to Sergeant Bayer, she's a good sergeant, one of the best patrol sergeants I've worked for. And, uh, I - I - I took - I usurped her power, she - she - and I - I took that away from her and she should been the one to make the decision. Um, and I - I hope I can rebuild trust with her, um, 'cause she's a really great sergeant. But I'd apologize to everyone involved, honestly, um, (unintelligible). I was well out of line, I - I'm embarrassed, I'm embarrassed to have to be here. Um, you know, I - I see the names of the sergeants on the hall and I - I appreciate what all you do and - and some of the sergeants, I'm embarrassed that they had to see me here today, um, uh, and to know that this, you know, is a strike against my credibility is -is disappointing.*

**General Order (GO) Violations Ofc. Upton specifically admitted to:**

- 1) **Failure to Know and Comply 900.1.1 (with Policy and GOs)**
- 2) **Neglect of Duty 900.4.3**

Ofc. Upton concluded his IA interview by acknowledging that he violated APD's Failure to Know and Comply GO [900.1.1], because "*I knew policy, um I knew general orders and I didn't follow 'em...I should have done a lot differently, uh, but, uh, instead I took a shortcut, and I should've listened, given my sergeant the ability - give her the information and let her make that [decision], and I did not.*" Ofc. Upton also acknowledged that he violated APD's Neglect of Duty GO [900.4.3] when it came to the detention of Mr. NL by stating he "*should've kept him detained, I should - done the investigation properly and then followed through, and wherever that investigation leaded - led to and I did not.*"

**Ofc. Upton admitted to facts that show he violated additional GOs:**

- 1) **Acts Bringing Discredit Upon the Department 900.3.2**

When Ofc. Upton was asked what he thought Ms. VS' opinion was after she learned what he did in this incident, he said, she would think "*poorly*" of him doing things in "*secrecy*" and it is a "*bad reflection on the department, me personally, all of policing.*"

Ofc. Upton further acknowledged that as a result of his conduct, Ms. VS would have "*second thoughts*" about contacting the police in the future if she were a victim of a crime. Ofc. Upton went on to elaborate this was a result of his actions not being "*above board*" and the fact that he was not "*honest*" with everyone in this incident.

Ofc. Upton's supervisor, Sgt. Bayer, stated that she could "*absolutely*" see how this could affect the willingness of family violence victims to seek help from the police department, as "[*victims*] would lose faith in us and have zero trust in our ability to do our jobs."

The Victim Services counselor expressed her concerns and empathy for the victim because of Ofc. Upton's actions by saying, "I felt really bad for [Ms. VS]...I wasn't trying to explain his behavior 'cause I'm like that's - to me that felt shady to be honest."

The Victim Services counselor also recounted Ms. VS' thoughts, which show the impression that at least two members of the public (Mr. NL and Ms. VS) have of Ofc. Upton and APD:

[Ms. VS] was like, 'This is why I don't like police or why I don't trust police.'  
...[Mr. NL] feels like he got away with like hurting me, uh, because of that.

Therefore, Ofc. Upton's actions/inactions towards the suspect, which were also discovered by the alleged victim, have likely diminished public trust, confidence, and respect for the Department, particularly in the eyes of Ms. VS. Moreover, Ofc. Upton's actions have been referred to the Travis County Public Integrity Unit. Additionally, some of the above-mentioned actions/inactions Ofc. Upton undertook will have to be disclosed by future County and District Attorneys and will be considered *Brady* material that compromise the trust that some members of the Department, judicial system, or community will have in him in the future, and may compromise his perceived impartiality, integrity, and testimony to serve as a witness in future proceedings.

## 2) Failure to Know and Comply 900.1.1 (with State Law)<sup>8</sup>

### To wit: Texas Penal Code - Sec. 38.05 Hindering Apprehension or Prosecution

- (a) A person commits an offense if, with intent to hinder the arrest, prosecution, conviction, or punishment of another for an offense, he:
  - (2) provides or aids in providing the other with any means of avoiding arrest or effecting escape; or
  - (3) warns the other of impending discovery or apprehension.

Ofc. Upton acknowledged that his actions, particularly warning and guiding Mr. NL, were intended to warn Mr. NL of his impending arrest and thus hinder his fellow officers in arresting Mr. NL. He admitted that his actions then prevented and hindered the arrest of Mr. NL on the night of the incident, even though there was probable cause to do so. Ofc. Upton specifically indicated he was the "cause" of this inability to effect the arrest, as he "wrote that note and [he] left [Mr. NL] unattended, he went inside and we ended up not being able to make the arrest that night...because he was inside."

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<sup>8</sup> It is important to note that even if Ofc. Upton did not violate this criminal law, I still would have made the decision to indefinitely suspend him for any one of the other reasons listed in this memorandum.

Sgt. Bayer concurred with this assessment. She stated the steps taken by Ofc. Upton hindered officers' ability to arrest Mr. NL, despite her order and the probable cause to do so, since *"the male subject didn't go to jail like he should have."* Officer #1 surmised the same by stating that, if Ofc. Upton wrote the note and encouraged Mr. NL to evade officers, then Ofc. Upton's actions did hinder officers as they were *"unable to make the arrest."*

Also, the Victim Services counselor recounted what she was told by Ms. VS, which shows how Mr. NL and Ms. VS felt about Ofc. Upton hindering Mr. NL's apprehension:

*[Ms. VS] said that [Mr. NL] basically told her that the officer on scene interviewing him had like told him to inside the house and lock the door and don't respond. And she's like, 'He feels like he got away with like hurting me, because of that.'*

Therefore, a preponderance of the evidence establishes that Ofc. Upton committed a Class A offense of Texas Penal Code § 38.05 by intentionally hindering apprehension or prosecution of Mr. NL. Ofc. Upton admitted that he committed each element of this offense, as he intended to hinder the arrest of Mr. NL, aided Mr. NL in avoiding arrest, and warned Mr. NL of his impending arrest, because he *"was afraid- I was concerned that [Mr. NL] was going to be arrested."* Ofc. Upton even explained that he did so intentionally, purposefully, or knowingly, as he *"made the unilateral decision to write the note and leave [Mr. NL] unattended, which allowed Mr. NL to go inside, and we ended up not being able to make the arrest that night...because he was inside."*<sup>9</sup>

### **3) Impartial Attitude 301.2**

Although Ofc. Upton specifically denied to IA that he violated the Impartial Attitude 301.2 GO, he admitted to the facts that establish that he did violate this GO. Ofc. Upton admitted he *"felt sympathetic to the point where I - I would feel bad that if [Mr. NL] had to go to jail..."* This *"sympathy"* caused Ofc. Upton to intentionally allow Mr. NL to leave detention, as Ofc. Upton also personally wrote a note to Mr. NL which advised Mr. NL to go inside his residence to avoid an arrest for Assault with Injury - Family Violence. At the time that Ofc. Upton wrote the note, he knew from another officer that *"the female subject had asserted that the male suspect had thrown her against a wall, and she had made an associated complaint of pain resulting from the alleged assault."*

While the suspect expressed a different version of events to Ofc. Upton, he knew his fellow officer was waiting for a decision from their supervisor, which he anticipated was that they would be ordered to follow APD GO's and state law, requiring them to arrest Mr. NL, based upon the probable cause established on scene. Yet Ofc. Upton took actions/inactions that assisted Mr. NL in evading arrest and ultimately prevented APD from arresting him, despite his supervisor's instructions to arrest Mr. NL. Further, Ofc. Upton acknowledged to IA that his actions/inactions could make victims of family violence more reluctant to call the police in the future.

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<sup>9</sup> It is important to note that the Travis County Public Integrity Unit is not privy to or able to utilize Ofc. Upton's Garrity protected admissions to IA.

Ofc. Upton's actions clearly showed "*favoritism*" to Mr. NL and were intended to benefit Mr. NL, which ended up being at the expense of Ms. VS on the night of the incident. Ms. VS' "*right*" to have her assailant arrested was subverted by Ofc. Upton's "*sympathies*" and covert actions on behalf of Mr. NL. State law and GOs also mandate that officers "*show consideration for the welfare of all persons with whom they interact.*" And while in the immediate aftermath, the parties were separated and nowhere near each other, even Ofc. Upton acknowledged that was merely "*a very short-term solution to probably what was a bigger problem.*"

The failure to arrest Mr. NL could have easily placed Ms. VS at further risk of physical harm, and also appeared to empower the likes of Mr. NL over Ms. VS, as Mr. NL subsequently gloated to Ms. VS that Ofc. Upton had helped him evade arrest. As a consequence of this experience, Ms. VS may be demoralized or discouraged from reporting future crimes to police. This very notion was expressed by Ofc. Upton, Sgt. Bayer, and even the Victim Services counselor, the latter of whom stated:

*I think [Mr. NL] used that against [Ms. VS] to make her feel like if you report, nothing's gonna happen to me.*

#### **4) Honesty 900.3.1**

APD's Honesty GO states in part:

Employees will not engage in efforts to thwart, influence, or interfere with an internal or criminal investigation.

Ofc. Upton admittedly thwarted, influenced, or interfered with a criminal investigation in a family violence incident by admittedly and intentionally failing to keep a suspect, Mr. NL, detained until an investigation was complete. Furthermore, Ofc. Upton wrote a note on his notepad to advise Mr. NL, to go inside his residence to avoid an arrest for Assault with Injury – Family Violence, in spite of the probable cause that had been established.

While these actions mirror the previous addressed Texas Penal Code violation, § 38.05 Hindering Apprehension or Prosecution, it is nonetheless also a violation of the Honesty GO, which specifically prohibits the "*thwarting, influencing, or interfering with an investigation.*" And as previously stated, Ofc. Upton admitted that he committed each element, as he intended to hinder Mr. NL's arrest, aided Mr. NL in avoiding arrest, and warned Mr. NL of his impending arrest, because he "*was afraid- I was concerned that [Mr. NL] was going to be arrested.*" Ofc. Upton even explained he did so intentionally, purposefully, or knowingly as he "*made the unilateral decision to write the note and leave [Mr. NL] unattended, which allowed Mr. NL to go inside, and we ended up not being able to make the arrest that night...because he was inside.*"

APD's Honesty GO also states:

Employees will not attempt to conceal, divert, or mitigate their true culpability in a situation.

After Ofc. Upton allowed the suspect, Mr. NL, to be released from detention and wrote the note directing him to go inside his residence to avoid arrest for Assault with Injury - Family Violence, Officer #1 told Ofc. Upton that their supervisor ordered them to arrest the suspect. Immediately after Ofc. Upton was informed of this directive, Ofc. Upton can be seen on BWC pulling out his notepad and ripping out the page on which he had written the message to the suspect. Ofc. Upton admitted that his immediate reaction was to dispose of the note to conceal, divert, or mitigate his culpability in this situation.

In fact, he unknowingly revealed his intentions through his actions captured on BWC. This was discussed in his interview with IA:

IA: *All right, I'm stopping [Officer #1's] body-worn at 20:25. So, in this segment of the video, uh, [Officer #1] states, quote, "Sarge said [arrest] him." Immediately afterward you tear a piece of paper out of your notepad, why'd you do that?*

UPTON: *That was the note, sir. Um, uh, again, I knew that this was a shortcut, something that I shouldn't have done, um, so I - I think, uh, the- probably just a gut reaction, just get rid of it. I - I didn't show it to [Officer #1] he was not involved.*

IA: *What was done with the note?*

UPTON: *I threw it away on scene, there was a trash can on the street.*

APD's Honesty GO also states:

Any statement or omission of pertinent or material information which intentionally misrepresents facts or misleads others through an official statement will be considered a false official statement.

After Ofc. Upton improperly allowed Mr. NL to leave detention, thus enabling him to evade arrest, Ofc. Upton's supervisor, Sgt. Bayer, conducted a counseling session to ensure that Ofc. Upton had a firm understanding of the fact that he had lawfully detained Mr. NL before he allowed the suspect to re-enter his residence. While Ofc. Upton may have been truthful with his supervisor when he stated that he "*didn't have the best attitude on the call,*" Ofc. Upton intentionally omitted any mention of the fact that he not only knew he had a lawful detention (as he should have known as an officer with eight years of experience), but he took deliberate steps to help a suspect, including writing a note and encouraging him to leave his lawful detention to avoid arrest.

This was pertinent information, and Ofc. Upton knew that it would have conveyed the complete picture of the incident. Ofc. Upton should have shared this information with his supervisor, as it would have given her the totality of the circumstances surrounding his actions and inactions. However, Ofc. Upton succeeded in diverting Sgt. Bayer's attention, during their meeting, to his apparent motivation, which enabled him to inconspicuously

keep Sgt. Bayer misinformed or oblivious of the truth.

Ofc. Upton left Sgt. Bayer with the impression that his “*carelessness*” or “*inattention*” allowed Mr. NL to avoid being detained and/or arrested when in fact Mr. NL did exactly what he was told to do by Ofc. Upton. By doing this, he intentionally kept his supervisor in the dark about the true reasons for his misconduct in an apparent effort to prevent APD from addressing it or disciplining him for his intentional acts and omissions.

Ofc. Upton did not admit to his actions—of his own volition—until the truth came to light. In his account to IA—about five months later—Ofc. Upton stated that he had been “*calm*” and “*relaxed*” on this call. If indeed he had been truthful to Sgt. Bayer in saying that he had a “*bad attitude*” on the call, his “*bad attitude*” may have been towards the need to do his job properly and his obligation to comply with APD GOs and state law.

Ofc. Upton’s complete admissions to IA provide further evidence that he intentionally sidestepped the truth by bringing up his “*bad attitude*” in his dialogue with Sgt. Bayer. Moreover, his admission in his Disciplinary Review Hearing (DRH) that he omitted pertinent information in his dialogue with Sgt. Bayer and his admission that he violated the Honesty General Order (by pertinent omission) to me and the Chain-of-Command further substantiates that conclusion.

### **Conclusion**

Ofc. Upton gives me a multitude of reasons to indefinitely suspend him, including any one of the above-mentioned GO’s. His acts of writing the note and purposefully allowing Mr. NL to leave detention alone are grounds for his indefinite suspension. I would have made the decision to indefinitely suspend him even without the other indiscretions and violations listed in this memorandum. Those actions bring discredit to APD, particularly in the eyes of Ms. VS, Mr. NL, and the Travis County District Attorney’s Office Public Integrity Unity.

Those actions also meet the elements of Texas Penal Code § 38.05, Hindering Apprehension or Prosecution, by at least the preponderance of the evidence. Moreover, Ofc. Upton’s actions violate APD’s Know and Comply GO 900.1.1, APD policies, GOs, and state laws which mandate that “*victims of family violence are entitled to the maximum protection from harm or abuse or threat of harm or abuse as permitted by law.*” Also, the Code of Criminal Procedure “*imposes a duty on officers to arrest offenders in every case where permitted by law.*” Through his acts and omissions in relation to this incident, Ofc. Upton expressed his “*bad attitude*”—and his contempt—for these laws and APD GOs. He has demonstrated that he was willing to turn a blind eye towards laws in situations where he personally does not agree with their application. This goes against his training and his professional obligations as a police officer.

Moreover, Ofc. Upton’s actions fly in the face of the APD ICARE values and the departmental expectations of an APD officer, which stress the importance of an officer’s integrity. Ofc. Upton acknowledged that he deliberately showed the suspect the note out of

view of the camera's lens so that he could "*conceal*" his actions. Ofc. Upton clearly chose not to verbalize the direction he gave to Mr. NL—as he knew that if he audibly told Mr. NL to go inside the house, his BWC would have captured this directive, which could have served as evidence in a subsequent employment or criminal investigation. Ofc. Upton then ripped the note out of his notepad and immediately "*threw it in the trash*" to dispose of any evidence of what he did. He left his fellow officers in the dark at the scene as to what he had done, and why Mr. NL remained inside the house as they helplessly knocked on the door, not knowing that Ofc. Upton orchestrated the impediment. Compounding matters, Ofc. Upton left his supervisor in the dark as she tried to counsel him on a basic police concept, while he omitted any mention of the facts that any supervisor in her shoes would have needed to know. Moreover, only after the truth came to light, from another source, Ofc. Upton used the following words to describe his own behavior:

- 1) He was trying to "*fix the - the whole situation.*"
- 2) He was trying to do a "*quick fix*" or "*fix it on his own.*"
- 3) His actions were not "*above board.*"
- 4) His actions were not "*honest.*"
- 5) His actions were "*secretive.*"
- 6) He not only tried to "*hide*" what he did in the first place, but
- 7) He tried to "*get rid*" of any proof of what he did.

Ofc. Upton took things a step further by acknowledging that he has lost the "*trust*" and "*credibility*" that he had prior to this incident. In sum, the actions Ofc. Upton undertook in this case are not only reprehensible and disgraceful, but they are also considered *Brady/Morton/Giglio* material that must be shared with members of the criminal justice system. Unfortunately, by undertaking the actions he took throughout this case, Ofc. Upton cut at the core of his own integrity, which compromises his credibility with his peers, supervisor, the public, and members of his Chain-of-Command. Moreover, it compromises his credibility to testify in judicial proceedings in the future. This also makes him unfit to serve as a police officer, which leaves me with no choice but to indefinitely suspend him.

All officers, including Ofc. Upton are repeatedly placed on notice that a violation of the Honesty GO, by act or omission will result in an indefinite suspension for a first-time offense.<sup>10</sup> And the disciplinary matrix also provides that a sustained violation for a criminal offense, while on duty will result in an indefinite suspension for a first-time offense.

My decision should come as no surprise to Ofc. Upton, who understood the gravity of his actions on the day that he undertook them, as he told Ms. VS the following after they were unable to arrest Mr. NL at the end of this incident:

*Understand that there are times when, you know, things are said to us and we are bound by law and policy to make arrests based on what was said. And if he was outside, we this is one of those times, we would be bound by policy and law to*

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<sup>10</sup> I would have indefinitely suspended Ofc. Upton, even if I did not sustain him for violating the Honesty GO.

make the arrest. If we don't then we lose our job. And we could also get in trouble in - from the legal system.<sup>11</sup>

By these actions, Ofc. Upton violated Rule 10.03(L) of the Civil Service Rules by violating the following rules and regulations of the Austin Police Department:

➤ **Austin Police Department Policy 900.1.1: General Conduct and Responsibilities: Responsibility to Know and Comply**

**900.1.1 Responsibility to Know and Comply**

The rules of conduct set forth in this order do not serve as an all-inclusive list of requirements, limitations, or prohibitions on employee conduct and activities; employees are required to know and comply with all Department policies, procedures, and written directives.

- (a) Employees will maintain a working knowledge and comply with the laws, ordinances, statutes, regulations, and APD written directives which pertain to their assigned duties.
- (b) Employees who do not understand their assigned duties or responsibilities will read the relevant directives and guidelines, and will consult their immediate supervisor for clarification and explanation.
- (c) A lack of knowledge of an APD written directive is not a defense to disciplinary action.

**To wit:**

Texas Penal Code - Sec. 38.05 HINDERING APPREHENSION OR PROSECUTION

Sec. 38.05. HINDERING APPREHENSION OR PROSECUTION (a) A person commits an offense if, with intent to hinder the arrest, prosecution, conviction, or punishment of another for an offense, he:

- (2) provides or aids in providing the other with any means of avoiding arrest or effecting escape; or
- (3) warns the other of impending discovery or apprehension.

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<sup>11</sup> It was not lost on me or the Chain-of-Command that Ofc. Upton was forthcoming with IA and to us during his DRH and that he had no prior disciplinary history. While I appreciate his honesty after the IA case was launched, I however, after consideration of the totality of the circumstances, and mitigating factors, still made the decision to indefinitely suspend him.

➤ **Austin Police Department Policy 900.3.1: General Conduct and Responsibilities: Honest**

**900.3.1 Honesty**

Honesty is of the utmost importance in the police profession. Employees are expected to be truthful at all times in the performance of their duties.

- (a) Employees will speak the truth at all times and reflect the truth in all reports and written communications. Any statement or omission of pertinent or material information which intentionally misrepresents facts or misleads others through an official statement will be considered a false official statement. The following are examples of an "official statement":
  - 1. Documents prepared by an officer in connection with their official duties, including but not limited to incident reports or supplements, sworn affidavits, and citations.
  - 2. Verbal or written statements made by an officer in connection with their official duties to:
    - (a) An investigator conducting an administrative or criminal investigation of the officer or another person's conduct.
    - (b) A supervisor conducting an inquiry into the officer's use of force.
    - (c) A fact finder in an administrative, civil, or criminal proceeding in which the officer testifies.
- (c) Employees will not attempt to conceal, divert, or mitigate their true culpability in a situation, nor will they engage in efforts to thwart, influence, or interfere with an internal or criminal investigation.
- (d) Employees will not use any improper or dishonest means to affect the outcome of any official test, process, or procedure.

➤ **Austin Police Department Policy 900.3.2: General Conduct and Responsibilities: Acts Bringing Discredit Upon the Department**

**900.3.2 Acts Bringing Discredit Upon the Department**

Since the conduct of personnel both on-duty or off-duty may reflect directly upon the Department, employees must conduct themselves at all times in a manner which does not bring reproach, discredit, or embarrassment to the Department or to the City.

- (a) Employees will not commit any act which tends to destroy public confidence in, and respect for, the Department or which is

prejudicial to the good order, efficiency, or discipline of the Department.

- (c) Employees will not engage in any activity in which there is a potential for conflict of interest or the appearance of a conflict of interest with the lawful duties of the employee.
  - 1. "Conflict of interest" includes any activity which would tend to influence a decision, create a bias or prejudice, or create a gain or loss for any person or agency which would favor one side or the other in conflict with the employee's official duties, or which conflicts with the accomplishment of the Department's mission or goals.

➤ **Austin Police Department Policy 900.4.3: General Conduct and Responsibilities: Neglect of Duty**

**900.4.3 Neglect of Duty**

Employees will satisfactorily perform their duties. Examples of unsatisfactory performance include, but are not limited to:

- (a) Lack of knowledge of the application of laws required to be enforced.
- (b) Unwillingness or inability to perform assigned tasks.
- (c) Failure to take appropriate action on the occasion of a crime, disorder, investigation or other condition deserving police attention.
- (d) Failure to respond to any call or to perform any police duties assigned to them by appropriate authorities.
- (h) Failure to follow department standardized training and tactics when it was objectively reasonable to do so.

➤ **Austin Police Department Policy 301.2: Responsibility to the Community: Impartial Attitude**

**301.2 Impartial Attitude**

Employees shall provide equal and fair protection of all rights under local, state, and federal law for all members of the community. Law enforcement will be conducted in an impartial and equitable manner.

In an effort to create an organizational culture that is inclusive and nondiscriminatory, employees shall act professionally, treat all persons fairly and equally, and strive to interact with the community in a positive manner. Employees will perform all duties objectively and without regard to personal feelings, animosities, friendships, financial status, occupation or employment status, sex, disability

status, housing status, mental health or ability, citizenship, language, national origin, creed, color, race, religion, age, political beliefs, sexual orientation, gender identity, gender expression, ethnicity, or social or ethnic background. Employees will endeavor to understand and respect cultural, national, racial, religious, physical, mental, and other differences.

- (a) Employees will not express or otherwise manifest any prejudice concerning any of the categories or characteristics listed in this section in a context or manner that would cause a reasonable person to question the employee's fairness or impartiality related to the performance of their duties.
  - 1. Employees will respect the rights of individuals and will not engage in discrimination, oppression, or favoritism whether by language, act, or omission.
- (b) Employees will be tactful in the performance of their duties, control their tempers, exercise patience and discretion, and shall not engage in argumentative discussions even in the face of extreme provocation.
- (c) Employees will treat all persons with dignity, will be courteous and respectful toward all persons, showing consideration for the welfare of all persons with whom they interact.
- f) Officers shall not encourage, condone, or ignore any of the behaviors described in subsections (a)-(e).

By copy of this memo, Ofc. Upton is hereby advised of this indefinite suspension and that the suspension may be appealed to the Civil Service Commission by filing with the Director of Civil Service, within ten (10) days after receipt of a copy of this memo, a proper notice of appeal in accordance with Section 143.010 of the Texas Local Government Code.

By copy of this memo and as required by Section 143.057 of the Texas Local Government Code, Ofc. Upton is hereby advised that such section and the Agreement Between the City of Austin and the Austin Police Association provide for an appeal to an independent third- party hearing examiner, in accordance with the provisions of such Agreement. If appeal is made to a hearing examiner, all rights of appeal to a District Court are waived, except as provided by Subsection (j) of Section 143.057 of the Texas Local Government Code. That section states that the State District Court may hear appeals of an award of a hearing examiner only on the grounds that the arbitration panel was without jurisdiction or exceeded its jurisdiction, or that the order was procured by fraud, collusion or other unlawful means. In order to appeal to a hearing examiner, the original notice of appeal submitted to the Director of Civil Service must state that appeal is made to a hearing examiner.



JOSEPH CHACON, Chief of Police

3/18/2022

Date

TO WHOM IT MAY CONCERN:

I hereby acknowledge receipt of the above and foregoing memorandum of indefinite suspension and I have been advised that if I desire to appeal that I have ten (10) calendar days from the date of this receipt to file written notice of appeal with the Director of Civil Service in accordance with the provisions of Chapter 143 of the Texas Local Government Code.



Police Officer Andrew Upton #7562



Date