



## MEMORANDUM

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

RECEIVED  
Civil Service Office  
Tuesday, March 24, 2020  
3:34 p.m.

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

**FROM:** Brian Manley, Chief of Police

**DATE:** March 24, 2020

**SUBJECT:** Indefinite Suspension of Police Officer Bryan Black #6315  
Internal Affairs Control Number 2019-1043

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 Bryan Black #6315 from duty as a police officer for the City of Austin, Texas effective March 24, 2020.<sup>1</sup>

I took this action because Officer Black 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 September 12, 2019 incident referenced herein, it involves alleged criminal activity (family violence) and complies with the mandates of LGC 143.052, as amended by Article 18, Section 8(a) of the 2018-2022 Meet and Confer Agreement.

The following are specific acts committed by Officer Black in violation of Rule 10:

On October 1, 2019, Austin Police Department (APD) Communications received a call from Ms. R, a friend of Officer Black's [REDACTED] who stated Officer Black was physically abusing [REDACTED] at their residence located in [REDACTED], Hays County, Texas. Ms. R told APD Communications that [REDACTED] told her [REDACTED] was thrown against a wall and Officer Black had broken doors. Ms. R went on to say that [REDACTED] was in denial and too afraid to report the incident.

The initial outcry by Ms. R precipitated an Internal Affairs (IA) investigation into Officer Black's alleged actions. The ensuing IA investigation uncovered two discernable family disturbances between Officer Black and [REDACTED]. The first occurred on September 12, 2019, and the second occurred on October 1, 2019.

### **The September 12, 2019 Incident**

On September 12, 2019, [REDACTED] was on the phone with [REDACTED] friend, Ms. A, and was telling her [REDACTED] had met someone else. [REDACTED] stated to IA that Officer Black was listening to the phone call and interrupted the conversation by coming into the room, which resulted in an abrupt end to the phone call. [REDACTED] recalled Officer Black yelling and using profanity towards [REDACTED] after hanging up the phone. Around this time, [REDACTED] said Officer Black told [REDACTED] he had cheated on [REDACTED] and [REDACTED] remembered going into the bathroom. [REDACTED] went on to say that during this incident, Officer Black destroyed their [REDACTED] pictures with a screwdriver. Ms. A tried to contact Officer Black and [REDACTED] but did not get an answer. After an hour, Ms. A called the non-emergency number for the Buda Police Department (BPD) and was referred to 911. Ms. A also called a mutual friend and neighbor, to check on [REDACTED]. The BPD dispatched two officers to a *Disturbance-Verbal*. This CAD report indicated a neighbor was the complainant and provided the following information:

*compl heard her friend [REDACTED] and [REDACTED] hus bryan arguing / poss wht jeep suv / bryan works at apd with SWAT and has mult weapons in res*

After BPD conducted their on-scene investigation, the officers notated the following in the CAD notes:

*I did not observed any marks on [REDACTED] I did observe [REDACTED] had been crying and looked concern but advised [REDACTED] was okay. Cont was made with [REDACTED] husband Bryan Black who advised they have been having [REDACTED] problems. He further advised nothing physical had happened.*

At that time, Officer Black told the BPD officers he only had a "conversation" with [REDACTED] which was not true as noted in detail below. Had Officer Black been honest with the officers, either he or [REDACTED] would likely have been required to leave the residence to prevent the further destruction of property and/or potential further physical disturbance between the

█<sup>2</sup> Additionally, Officer Black did not immediately report this incident of a police response, to an APD supervisor.

### The October 1, 2019 Incident:<sup>3</sup>

On or about October 1, 2019, █ placed a telephone call to █, Ms. G, but was unable to reach her. █ left a 12 second voicemail message on Ms. G's phone that said, "Michelle, I need you, call me back, Bryan threw me up against the wall and I don't know what to do. Please call me back." Michelle stated the voicemail was the most awful thing █ could get. This outcry is consistent with a victim of family violence and lends credibility to █ version of the events as described in greater detail in the following paragraphs.

On October 1, 2019, at 14:03, a report was made to BPD for a *Welfare Concern* to "att to make contact with █ █ in regards to a poss aslt from the previous night. Req made on behalf of APD." BPD Detective Connor Fleming initially spoke with █ █ who stated █ did not wish to make a report or statement against Officer Black because he was in, "enough heat with his job." He followed up with █ on October 7 and 8 of 2019 and did not receive an answer either time. He later received a voice mail message from █ stating that █ was not going to make any statements to him regarding this incident. █ refusal to cooperate with BPD is consistent with a victim of family violence. █ did not provide a statement to BPD or IA that contradicted █ initial outcry or absolved Officer Black of the alleged assault. On October 18, 2019, the Assistant Criminal District Attorney (DA) of Hays County, Texas declined to prosecute Officer Black due to a lack of evidence. The fact that the DA chose not to prosecute Officer Black for an assault arising from the October 1, 2019 incident does not mean Officer Black did not commit an assault or violate the Civil Service Rules, particularly where the standard of proof is a preponderance of the evidence.

On October 8, 2019, Detective Fleming conducted an interview with Officer Black at the BPD. Following the interview, Detective Fleming notated the following in his supplemental report: (Note: █ first name has been replaced with '█' in the following excerpts so as not to identify █).

- Therefore, he picked █ up, with one arm under █ back and the other under █ knees, similarly to how someone would carry a child, and took █ to the guest bedroom. Bryan advised he was a few feet from the guest bedroom when █ woke up and began flailing █ arms and legs and he could barely hold on to █ So

<sup>2</sup> All references in this memorandum to Officer Black being dishonest or untruthful refers to his attempt to conceal, divert, or mitigate his true culpability in the incidents cited herein. Those attempts including his omitting pertinent or material information.

<sup>3</sup> It was during her IA field interview of the October 1, 2019 incident that APD learned that BPD had responded to a verbal disturbance at the residence on September 12, 2019. █ was questioned again by IA about that incident during █ interview at IA's office on October 10, 2019. █ declined to speak further about that incident and the interview was concluded not long after.

he ran the last few feet to the guest room's bed and dropped [REDACTED] on the bed.

- [REDACTED] was attempting to enter the master bedroom and broke the locking mechanism on the doors. Once [REDACTED] was inside the master bedroom [REDACTED] grabbed Bryan's face with both her hands and kept telling him to "let me see your eyes." Bryan advised he placed his hand on [REDACTED] chest, above the breast-line and below the neck, and slowly pushed [REDACTED] back while telling [REDACTED] not to touch him.
- Bryan advised [REDACTED] breaking the door upset him and he ripped the broken door off of the wall and broke the door in half. Bryan advised that he told [REDACTED] [REDACTED] was not going to sleep in [REDACTED] bed if [REDACTED] was having a relationship with another man. [REDACTED] said the bed was [REDACTED] from before they were [REDACTED] and [REDACTED] was going to sleep in [REDACTED] bed. Bryan got up and dragged the master bedroom mattress into the living room. He then took the mattress he had prior to [REDACTED] and took it into the master bedroom. Bryan went to sleep and when he woke up in the morning he did not see [REDACTED]

IA conducted multiple interviews of Officer Black following his statement to Detective Fleming. Based upon the evidence gathered during the IA investigation, I have determined the following events occurred on October 1, 2019, which culminated in Officer Black committing family violence assault and being untruthful with BPD, his supervisor, and IA:

- Officer Black and [REDACTED] have been having [REDACTED] problems for a significant period of time.
- Officer Black went to sleep in the master bedroom and would not allow [REDACTED] to sleep in their [REDACTED] bed.
- [REDACTED] climbed into their [REDACTED] bed and Officer Black wrapped his arms around [REDACTED]
- [REDACTED] had been drinking and apparently passed out.
- According to Officer Black, he picked [REDACTED] up and carried [REDACTED] to a secondary bedroom.
- According to Officer Black, while he was carrying [REDACTED] [REDACTED] woke up and began struggling.
- According to Officer Black, he carried [REDACTED] to the secondary bedroom and dropped [REDACTED] on the bed.
- According to Officer Black, he returned to the master bedroom and locked the door.
- According to Officer Black, [REDACTED] tried to enter the master bedroom and he told [REDACTED] was not going to sleep in their bed.
- According to Officer Black, [REDACTED] began kicking the door (French doors) attempting to gain entry to the master bedroom [REDACTED] keys, wallet, and phone were in the bedroom).
- According to Officer Black, [REDACTED] broke the door and entered the bedroom ([REDACTED] admits kicking the door, but states Officer Black opened the door and she did not break it open).
- Officer Black admitted to ripping the door off the hinges and breaking the door in two.
- According to [REDACTED] Officer Black threw their [REDACTED] mattress out of the bedroom and exchanged it for the mattress in the secondary bedroom. According to

██████████ ran into the master bedroom to get ██████████ phone at which time Officer Black picked ██████████ up and threw ██████████ into the guest bedroom (██████████ described it as a “forced scoop” that caused ██████████ feet to leave the ground). Officer Black denied he threw ██████████ into a wall on October 1<sup>st</sup>, but admitted to IA he has pushed his ██████████ against the wall in the past, but he couldn’t recall exactly when that occurred: “I can’t recall the specific time when I’ve actually physically pushed ██████████ up against the wall but it’s - I mean, it’s happened, I can’t think of a time when...”

- ██████████ suffered a bruise on the inner part of ██████████ upper right arm, which is consistent with Officer Black grabbing ██████████ (Officer Black during his IA interview demonstrated how he would grab ██████████ and hold ██████████ against a wall, allegedly to prevent ██████████ from assaulting him). The bruise on ██████████ arm is consistent with how Officer Black demonstrated he grabs ██████████. Ms. R stated that ██████████ told her ██████████ was injured (bruise) during the October 1, 2019 incident. According to Ms. G, ██████████ told her Officer Black caused this injury when ██████████ was thrown against the wall. Ms. G was told by ██████████ that this was not the first time this had happened. She was told by ██████████ that Officer Black had hurt ██████████ in July of 2019. ██████████ added, in the July 2019 incident, he did a similar thing where ██████████ had handprints on both of ██████████ arms.<sup>4</sup>
- ██████████ sent a text message and had a phone conversation with Ms. R on or about the next morning/early afternoon, where ██████████ stated, “Last night...He threw me against a wall flipped our whole bedroom over when I went to sleep.” This text message and conversation are consistent with a victim’s outcry.<sup>5</sup>
- During a second IA interview, ██████████ informed IA that Officer Black had become angry and broken items in the past. ██████████ explained he had broken a dresser, ironing board, and smashed ██████████ phone.
- Ms. R stated that Officer Black was verbally and emotionally abusive towards ██████████ during their ██████████ ██████████ ██████████ also confirmed the emotional and verbal abuse. After substantial prodding, Officer Black admitted during his IA interview that he has been verbally and emotionally abusive to ██████████ in the past. Specifically, IA asked Officer Black if he ever made inappropriate comments toward ██████████. Officer Black stated he and ██████████ have had arguments and called each other names; however, he could not “...think of anything where I’ve, like, you know, belittled ██████████ or, you know, that I would deem inappropriate.” Officer Black went on to say that he and ██████████ have belittled each other and cussed at each other. When confronted by IA he did admit to specific times where he belittled ██████████ in front of others. Officer Black added he has belittled ██████████ work because ██████████ does not understand “the way the world really works.”

IA interviewed Officer Black’s immediate supervisor, Sergeant Robert Driscoll, on December 5, 2019. Sergeant Driscoll was not advised by Officer Black of the incident on September 12, 2019. He became aware of it at a future date and contacted BPD. BPD advised Sergeant Driscoll that they were told by Officer Black and ██████████ that the incident only

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<sup>4</sup> For the purposes of this suspension, the July 2019 incident is not an act for which Officer Black is being suspended, but demonstrates a pattern of ██████████ behavior, rather than a single, isolated incident.

<sup>5</sup> Although ██████████ admits ██████████ had been drinking and may have been intoxicated, a preponderance of the evidence supports the conclusion a criminal assault did occur.

involved a [REDACTED] disturbance so no further action would be taken by BPD (as noted herein, this incident was not limited to just a [REDACTED] disturbance, and the statement by Officer Black to BPD was not truthful and/or consistent with APD's Honesty General Order).

When Sergeant Driscoll spoke with Officer Black about the October 1, 2019 incident, Officer Black was not truthful and only told him:

*"The only thing he told me was, uh, at some point they were in the bedroom and he - he picked [REDACTED] up and took [REDACTED] to another room and then went back into the bedroom and then I guess [REDACTED] woke up and started banging on a door, so he opened the door and that's all he told me. And it's - [REDACTED] was asleep when he picked [REDACTED] up. He picked [REDACTED] up when [REDACTED] was asleep, took [REDACTED] into another room, and laid [REDACTED] on another bed or something and then went back into the master bedroom."*

On October 1, 2019, Officer Black recklessly committed a Class A family violence assault. A preponderance of the evidence (particularly [REDACTED] immediate outcry to [REDACTED] and the bruise to [REDACTED] upper right arm) supports a finding that Officer Black threw/pushed [REDACTED] against the wall and/or caused [REDACTED] bodily injury (pain and/or bruising).

#### Destroying [REDACTED] Cell Phone:<sup>6</sup>

Officer Black told IA that he broke [REDACTED] cell phone after they had an argument. Officer Black explained the reason he broke [REDACTED] cellphone was after he and [REDACTED] had an argument, [REDACTED] decided to leave in [REDACTED] vehicle and accidentally backed into the side of his truck that he was getting ready to sell. Officer Black stated [REDACTED] caused a thousand dollars' worth of damage and refused to pay for it. He explained:

*"...I knew that, you know [REDACTED] cell phone was kind of [REDACTED]; you know, that's - that's [REDACTED] - [REDACTED] a - constantly on that thing, right, that's kind of [REDACTED] pride and joy while I - kinda the same way I looked at my truck. And so I was, like, "Well, you know, you destroyed mine, I'm gonna destroy yours," and I broke [REDACTED] cell phone."*

Intentionally destroying [REDACTED] personal property as a form of retribution is consistent with the "cycle of violence" used to control a victim of family violence.

#### Honesty

As noted earlier, every reference to "dishonesty" or "untruthful" refers to Officer Black's attempt to conceal, divert and/or mitigate his true culpability, including intentionally doing so by omitting pertinent and material from/with the BPD officers that responded on September 12, 2019, to Sergeant Driscoll, to BPD Detective Fleming on October 8, 2019,

<sup>6</sup> After initially telling IA he did not recall destroying any of [REDACTED] personal property, Officer Black ultimately advised IA that this event occurred approximately a year or so ago. Even if this act occurred outside the 180-day window, it is relevant as it shows a pattern of abusive behavior by Officer Black rather than an isolated incident.

and to Internal Affairs (IA) during his two (2) interviews (the first interview occurred on December 18, 2019, and the second interview occurred on January 16, 2020).<sup>7</sup>

On or about September 12, 2019 Officer Black led the BPD officers to believe that he and ██████ were having a “*conversation*” that was not a reportable physical disturbance. Officer Black did not mention to the officers the fact that he was in a “*heated argument*”, that ██████ left the room the argument began in and that ██████ then headed to the kitchen. He later admitted in his second IA interview that he pursued ██████ to the kitchen because he in his words, “*I wasn’t done*” with the argument. As he followed ██████ he claimed that he believed ██████ was going to physically strike him, and he had to physically restrain ██████ arms and pin them until he felt comfortable releasing hold of ██████. He also failed to mention sometime prior to the arrival of the BPD, either ██████ or he angrily destroyed ██████ pictures with a screwdriver during this dispute. Officer Black admitted during his Dismissal Review Hearing these facts are pertinent and material information the responding BPD officers would want to know. He further admitted if he was the responding officer, he would want to know this information as well.

Officer Black was dishonest with IA during his first interview on December 18, 2019, when he advised IA that his statement to the BPD on September 12, 2019 was a true and accurate account. As stated above, he intentionally attempted to conceal, divert, and mitigate his true culpability with BPD by stating he was having a “*conversation*” with ██████ leading them into believing “*nothing physical*” occurred. As noted herein, there was a physical encounter between the two of them during this incident.

On or about December 18, 2019, Officer Black was intentionally dishonest by act and omission during his IA interview regarding the September 12, 2019, domestic disturbance. After investigators asked him to give as much detail as possible regarding the September 12, 2019, incident, he advised IA that ██████ told him that ██████ had kissed another man and he told ██████ he had kissed ██████. He stated that his revelation resulted in ██████ running into the bathroom and that ██████ remained locked inside the bathroom until the BPD arrived. He articulated to IA in his first interview that he and ██████ were having a “*conversation*” that was not a reportable physical disturbance.

He did not mention in the first interview, the fact that he was in a “*heated argument*,” that ██████ left the room the argument began in, that ██████ then headed to the kitchen. He also later admitted in his second IA interview, he pursued ██████ to the kitchen because in his words, “*I wasn’t done*” with the argument. As he followed ██████ he believed ██████ was going to physically strike him, and he had to physically restrain ██████ arms and pin them until he felt comfortable releasing hold of ██████. He also failed to mention sometime prior to the arrival of the BPD either ██████ or he angrily destroyed their ██████ pictures with a screwdriver during this dispute.

During Officer Black’s second IA interview on January 16, 2020, he acknowledged that the account he gave IA about the September 12, 2019 incident was vastly different than the account he gave to IA during his first IA interview on December 18, 2019. Officer Black’s admission to this in the second interview alone warrants his indefinite suspension, as a single

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<sup>7</sup> This is not intended to be an exhaustive list of every act/statement by Officer Black that was an attempt to conceal, divert, or mitigate his true culpability.

violation of the Honesty General Order, calls for an indefinite suspension. Therefore, I would have made the decision to indefinitely suspend him for this violation, independent of the other violations in this memorandum.

Regarding the October 1, 2019 incident, Officer Black's statements to IA [to the BPD Detective and APD Sergeant Driscoll] during his multiple IA interviews were a deliberate attempt to conceal, divert, and mitigate his true culpability. This includes omitting pertinent and material information from his supervisor, as well as the criminal and administrative investigators. In addition, Officer Black continued this mitigating behavior with his chain of command and me during his Dismissal Review Hearing on March 23, 2020.

Officer Black initially told his supervisor, Sergeant Robert Driscoll, on or about October 1, 2019, (On or about the same day as the incident and before being served with the notice of the IA investigation) that the physical contact between [REDACTED] and he consisted of him transferring [REDACTED] who was asleep from their mutual bedroom, to the guestroom by placing [REDACTED] in the guest bed, while [REDACTED] remained asleep. He then returned to his bedroom. He then told his supervisor that [REDACTED] woke up thereafter and banged on the door and he opened the door, letting [REDACTED] in. The account given to Sergeant Driscoll had several pertinent omissions. Also, of note, this account of [REDACTED] return to the bedroom, most closely resembles the account given by [REDACTED] to IA but for the following pertinent omissions.

Officer Black omitted mentioning to his supervisor that [REDACTED] was awake during at least a portion of the transfer and that [REDACTED] kicked, screamed, and flailed [REDACTED] legs not wanting to be placed in the guest room as he took [REDACTED] there. He also omitted any mention to his supervisor that upon [REDACTED] return to the master bedroom, he broke the bedroom door off the hinges and that he then broke the door in half. He also omitted mentioning that he then transferred mattresses from the master bedroom to the guestroom. And he omitted mention of any physical contact between the two of them upon [REDACTED] return to the master bedroom.

While Officer Black initially told IA that the second portion of the physical disturbance between him and [REDACTED] began after [REDACTED] physically broke the door. He omitted mentioning in his initial statement to IA that he broke the door off the hinges and then broke the door in half or that he swapped mattresses from the master bedroom to the guestroom during the dispute. His initial version of the events was that he was closer to the bed and [REDACTED] was closer to the entrance of the bedroom as [REDACTED] came towards him and the bed and [REDACTED] then initiated a physical disturbance.

In his second statement to IA, he stated that he did break the door off the hinges, then broke the door in half and that he removed the door from the bedroom and upon his reentry into the bedroom, [REDACTED] initiated physical contact with him. He then mentioned after the conclusion of this contact, he then swapped the mattresses from the master bedroom to the guest room. He stated to IA in this version that he then went to sleep in the master bedroom and was of the belief that [REDACTED] went into the kitchen to consume alcoholic beverages.

During his statement to the BPD detective, Officer Black told the investigator that he did break the door off the hinges, broke it in half and that he then swapped the mattresses from the master bedroom to the guest room and then [REDACTED] initiated physical contact with him after he swapped the mattresses. He also indicated in this version that he was closer to the

entrance of the bedroom and [REDACTED] was closer to the bed, unlike the original statement to IA.<sup>8</sup>

Additionally, he minimized his true culpability regarding the events, including but not limited to his explanation as to how he “pushed” [REDACTED] in a very controlled manner. During his DRH, Officer Black agreed he made conflicting statements in his interviews regarding whether or not he pushed [REDACTED] but that both statements were true. In one instance Officer Black told me at his disciplinary hearing that he simply held his arm/hand out, but then stated he pushed [REDACTED] backwards to stop [REDACTED] from allegedly assaulting him. Officer Black either pushed [REDACTED] or he did not, both cannot be true.

Moreover, the IA investigator asked Officer Black if he had ever destroyed some of [REDACTED] personal items or effects out of frustration. He initially told IA he did not recall. This is one of several examples of his claiming not to recall and/or omitting mention of information until it was clear that IA had an awareness of some of the specific details. After IA specifically asked if he had ever broken [REDACTED] cell phone, he then gave IA a specific detailed account of how [REDACTED] accidentally scratched his truck with [REDACTED] vehicle and as a means of retribution, he broke and/or damaged [REDACTED] phone because it was important to [REDACTED] and/or [REDACTED] pride and joy.” He was even able to identify that this event occurred approximately a year or so ago.

In another example, Officer Black also advised IA that he has pushed and/or pinned [REDACTED] up against a wall on “more than one” occasion. When asked to describe those occasions, he then advised IA it was only “one” occasion. When IA then asked him to describe the “one” occasion, he advised IA that he did not recall the “one” occasion.

### **Failure to Cooperate with IA**

Officer’s Black’s behavior during his IA interviews reflects the failure to cooperate with IA. Officer Black was not forthcoming during his interviews and the investigators had to repeatedly drag information out of him. Officer Black was not forthcoming unless specifically confronted by IA or he knew/believed IA already knew the information. During his second IA interview on January 16, 2020, Officer Black acknowledged that the account he gave to IA about the September 12, 2019, incident was vastly different then the account he gave to IA during his first IA interview on December 18, 2019. Officer Black was reminded at the beginning of his respective interview(s), that he needed to treat the interview with IA as if it were an interview with the Chief of Police. Moreover, the APD Honesty General Order required Officer Black to be forthcoming with IA, which he was not.

A first time Offense for Failure to Cooperate with Internal Affairs also calls for an Indefinite Suspension. Officer Black’s admission that he gave vastly different accounts of the September 12, 2019, incident during the two IA interviews alone warrants an Indefinite Suspension. Officer Black’s attempted explanation for the different accounts does not absolve him of violating the General Order. Moreover, his explanation was not credible.

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<sup>8</sup> All of these versions and/or statements cannot be true.

### **Failing to Report the September 12, 2019 Incident:**

Officer Black admitted to IA that he failed to immediately notify his supervisor, Sergeant Robert Driscoll, about the September 12, 2019, incident in accordance with APD General Orders.

### **Conclusion**

Officer Black seemingly attacked [REDACTED] credibility throughout the interview process by asserting [REDACTED] was either dishonest or too intoxicated to recollect the events. By simply relying upon Officer Black's statement (and setting aside the things he disputes, including but not limited to [REDACTED] assertions), he gives me ample reasons to indefinitely suspend him. There are a multitude of individual reasons to indefinitely suspend Officer Black based upon his knowing and/or unknowing admissions. I would have made the decision to Indefinitely Suspend him for any of the following reasons independent of each of the other:

- 1) Any one of his violations of the Honesty General Order during the December 18, 2019, IA interview whether it be by act and/or intentional omission.
- 2) Any one of his violations of the Honesty General Order during his January 16, 2020, IA interview whether it be by act and/or intentional omission.
- 3) Any one of his violations of the Honesty General Order during his October 8, 2019, interview with BPD Detective Connor Fleming, whether it be by act and/or intentional omission.
- 4) Any one of his violations of the Honesty General Order during his September 12, 2019, statement to the BPD responding officers, whether it be by act and/or intentional omission.
- 5) Any one of his violations of the Failure to Cooperate with Investigators General Order during his December 18, 2019, IA interview.
- 6) Any one of his violations of the Failure to Cooperate with investigators General Order during his January 16, 2020, IA interview.
- 7) The October 1, 2019 incident constitutes a reckless act of Family violence. An act of Family Violence is an offense for which an indefinite suspension is warranted.

By these actions, Officer Black violated Rule 10.03(L) by violating the following rules and regulations of the Austin Police Department:

- **Austin Police Department General Order 900.1(a) 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.

To wit:

Texas Penal Code 22.01 (a) (1) Assault with Injury - Family Violence

Sec. 22.01. ASSAULT. (a) A person commits an offense if the person:

(1) intentionally, knowingly, or *recklessly* causes bodily injury to another, including the person's spouse;

(b) An offense under Subsection (a)(1) is a Class A misdemeanor...

Sec. 71.003. FAMILY. "Family" includes individuals related by consanguinity or affinity, as determined under Sections 573.022 and 573.024, Government Code, individuals who are former spouses of each other, individuals who are the parents of the same child, without regard to marriage, and a foster child and foster parent, without regard to whether those individuals reside together.

Sec. 71.004. FAMILY VIOLENCE. "Family violence" means:

(1) an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;

➤ **Austin Police Department General Order 900.3.1(c): General Conduct and Responsibilities: Honesty**

**900.3.1(c) 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":

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.

*(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.*

➤ **Austin Police Department General Order 902.4.1: Cooperating with Assigned Investigators**

902.4.1 COOPERATING WITH ASSIGNED INVESTIGATORS

(a) Employees will cooperate with any assigned investigator as if they were addressing the Chief of Police. Employees who fail or refuse to cooperate with an assigned investigator will be subject to disciplinary action, up to and including indefinite suspension.

(b) Honesty is of the utmost importance in the police profession. Employees are expected to be truthful at all times during interviews with investigators as outlined in General Order 900 (General Conduct and Responsibilities).

1. Employees who are found to have given a false official statement are subject to indefinite suspension as outlined in the Discipline Matrix ("Dishonesty - False Official Statements").

➤ **Austin Police Department General Order 908.4(b)(2): Reporting Procedure**

908.4 REPORTING PROCEDURE

(b) Employees shall immediately report to their supervisor, with a follow-up memorandum through the chain-of-command to the Chief, of:

2. Anytime an employee is involved in an off-duty incident that results in a response from any law enforcement agency with the exception of traffic violations, minor collisions, and other minor calls for service where the employee is not considered to be a suspect (e.g. alarm calls, noise complaints); or

(e) Employees failing to provide prompt notice pursuant to this order are subject to discipline.

With respect to the dishonesty charge, Officer Black was dishonest with the BPD officers, who were conducting a criminal investigation where he was the suspect in a family violence incident. He was also dishonest with Sergeant Driscoll, as noted above. These false statements are considered an official false statement, which calls for an indefinite suspension under the Department's Disciplinary Matrix. Likewise, false statements to IA, whether by act or omission, are considered False Official Statements, the penalty for which is also an indefinite suspension under the Matrix. All officers are initially apprised of this policy in the Training Academy and are regularly reminded of APD's stance on dishonesty. If an officer demonstrates that he cannot or will not give a truthful account of an incident, especially one in which [REDACTED] has alleged family violence, I, as Chief of Police, would be remiss in my duties and responsibilities if I allowed such an Officer to be bestowed the power to continue to have the duties and responsibilities that are designed to protect and serve the public. Furthermore, a single dishonest act or statement impugns an officer's credibility and would have to be disclosed to the defense pursuant to Brady v. Maryland and the Michael Morton Act. In addition, the fact that Officer Black engaged in family violence undermines his credibility in a family violence case and would also have to be disclosed. Therefore, after

careful consideration and deliberation with Officer Black's chain of command, I have concluded that indefinite suspend is appropriate.

Note: Either the family violence charge, any one of the dishonesty charges, or the failure to cooperate with IA charge, by itself or in combination, justifies an indefinite suspension.

By copy of this memo, Officer Black 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.

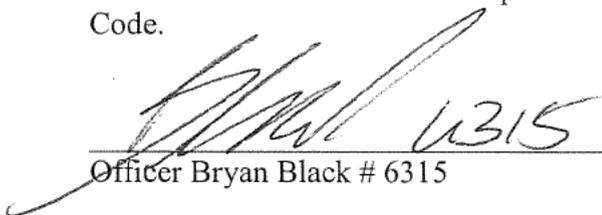
By copy of this memo and as required by Section 143.057 of the Texas Local Government Code, Officer Black is hereby advised that such section and the Agreement Between the City of Austin and the Austin Police Association provide for an appeal to an independent third-party hearing examiner, in accordance 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.

  
BRIAN MANLEY, Chief of Police

3-24-2020  
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.

  
Officer Bryan Black # 6315

3/24/2020  
Date

<p style="text-align: center;"><b>IN THE MATTER OF ARBITRATION</b></p> <p style="text-align: center;"><b>BETWEEN</b></p> <p style="text-align: center;"><b>POLICE OFFICER BRYAN BLACK</b> <b>(Appellant)</b></p> <p style="text-align: center;"><b>and</b></p> <p style="text-align: center;"><b>CITY OF AUSTIN POLICE DEPARTMENT</b> <b>(Employer)</b></p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p><b>Indefinite Suspension</b></p>
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Hearing Examiner: Lynne M. Gomez, selected by the Parties.

**HEARINGS**

Hearings were held in the above matter on November 16-20, 2020 at the City of Austin’s Learning and Research Center in Austin, Texas. The witnesses were sworn and excluded. The Hearings were transcribed and a copy of the transcript was provided to the Hearing Examiner. The Parties submitted post-Hearing briefs, all of which were received by February 22, 2021. The record was closed on February 22, 2021. The Parties were given full opportunity to present testimony and evidence at the Hearings.

**APPEARANCES**

**For the City**

Ricardo Navarro	Special Counsel for the City
Elizabeth Alvarado	Paralegal
Matthew Chustz	Acting Civil Service Administrator
Michael Sullivan	Municipal Civil Service Coordinator
Christopher Davis	APD Lieutenant and IA Investigator, witness
Robert Driscoll	APD Sergeant, witness
Santiago Torres	APD Sergeant and IA Investigator, witness
Brian Manley	Chief of Police, witness

**For the Appellant**

Alyssa Urban	CLEAT Counsel
Jessica Castillejo Dunn	CLEAT Counsel
Bryan Black	Appellant, witness
Will Ray	APD Detective, witness
Ed Black	Appellant’s father, witness
Leah Trogan Black	Appellant’s wife, witness
James (Jamie) Alexander	APD Lieutenant, witness
Katrina Pruitt	APD Lieutenant, witness

## AGREED ISSUE

Did the City of Austin Police Department prove the charged misconduct by a preponderance of the evidence and, if so, was there just cause to indefinitely suspend Officer Black?

## BACKGROUND

The Appellant, who began working for the City of Austin Police Department (“APD”) in October of 2008, was issued an Indefinite Suspension by letter dated March 24, 2020 (the “Suspension Letter”). The Suspension Letter stated, in pertinent part, as follows:

To: Joya Hayes, Director of Civil Service  
From: Brian Manley, Chief of Police  
Date: March 24, 2020  
Subject: Indefinite Suspension of Police Officer Bryan Black #xxxx  
Internal Affairs Control Number 2019-1043

\* \* \*

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 Bryan Black #xxxx from duty as a police officer for the City of Austin, Texas effective March 24, 2020<sup>1</sup>.

I took this action because Officer Black 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.

The following are the specific acts committed by Officer Black in violation of Rule 10:

On October 1, 2019, Austin Police Department (APD) Communications received a call from Ms. R., a friend of Officer Black’s wife, Leah, who stated Officer Black was physically abusing his wife at their residence located in Buda, Hays County,

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<sup>1</sup> Although this suspension is effective more than 180 days after the date of the September 12, 2019 incident referenced herein, it involves alleged criminal activity (family violence) and complies with the mandates of LGC 143.052, as amended by Article 18, Section 8(a) of the 2018-2022 Meet and Confer Agreement.

Texas. Ms. R. told APD Communications that Leah told her she was thrown against a wall and Officer Black had broken doors. Ms. R went on to say that Leah was in denial and too afraid to report the incident.

The initial outcry by Ms. R precipitated an Internal Affairs (IA) investigation into Officer Black's alleged actions. The ensuing IA investigation uncovered two discernable family disturbances between Officer Black and his wife. The first occurred on September 12, 2019 and the second occurred on October 1, 2019.

**The September 12, 2019 Incident:**

On September 12, 2019, Leah was on the phone with her friend, Ms. A, and was telling her she had met someone else. Leah stated to IA that Officer Black was listening to the phone call and interrupted the conversation by coming into the room, which resulted in an abrupt end to the phone call. Leah recalled Officer Black yelling and using profanity towards her after hanging up the phone. Around this time, Leah said Officer Black told her he had cheated on her and she remembered going into the bathroom. She went on to say that during this incident, Officer Black destroyed their wedding pictures with a screwdriver. Ms. A tried to contact Officer Black and Leah but did not get an answer. After an hour, Ms. A called the non-emergency number for the Buda Police Department (BPD) and was referred to 911. Ms. A also called a mutual friend and neighbor to check on Leah. The BPD dispatched two officers to a *Disturbance – Verbal*. This CAD report indicated a neighbor was the complainant but provided the following information:

*Compl heard her friend Leah black (sic) and Leah's hus bryan arguing / poss wht jeep suv / bryan works at apd with SWAT and has multi weapons in res*

After BPD conducted their on-scene investigation, the officers notated the following in the CAD notes:

*I did not observe any marks on Leah. I did observe she had been crying and looked concerned but advised she was okay. Cont was made with her husband Bryan Black who advised they have been having marital problems. He further advised nothing physical had happened.*

At that time, Officer Black told the BPD officers he only had a "conversation" with his wife, which was not true as noted in detail below. Had Officer Black been honest with the officers, either he or his wife would likely have been required to leave the residence to prevent further destruction of property and/or potential further physical disturbance between the couple.<sup>2</sup> Additionally, Officer Black did not immediately report this incident of a police response to an APD supervisor.

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<sup>2</sup> All references in this memorandum to Officer Black being dishonest or untruthful refer to his attempt to conceal, divert, or mitigate his true culpability in the incidents cited herein. Those attempts includ(e) his omitting pertinent and material information.

### **The October 1, 2019 Incident:<sup>3</sup>**

On or about October 1, 2019, Leah placed a telephone call to her sister, Ms. G, but was unable to reach her. Leah left a 12 second voicemail message on Ms. G's phone that said, "*Michelle, I need you, call me back, Bryan threw me up against the wall and I don't know what to do. Please call me back.*" Michelle stated the voicemail was the most awful thing a sister could get. This outcry is consistent with a victim of family violence and lends credibility to Leah's version of the events as described in greater detail in the following paragraphs.

On October 1, 2019, at 14:03, a report was made to BPD for a *Welfare Concern* to "att to make contact with Mrs. Trogan Black in regards to a poss aslt from the previous night. Req made on behalf of APD." BPD Detective Connor Fleming initially spoke with Leah, who stated she did not wish to make a report or statement against Officer Black because he was in "enough heat with his job." He followed up with Leah on October 7 and 8 of 2019 and did not receive an answer either time. He later received a voicemail message regarding this incident. Leah's refusal to cooperate with BPD is consistent with a victim of family violence. Leah did not provide a statement to BPD or IA that contradicted her initial outcry or absolved Officer Black of the alleged assault. On October 18, 2019, the Assistant Criminal District Attorney (DA) of Hays County, Texas, declined to prosecute Officer Black due to a lack of evidence. The fact that the DA chose not to prosecute Officer Black for an assault arising from the October 1, 2019 incident does not mean Officer Black did not commit an assault or violate the Civil Service Rules, particularly where the standard of proof is preponderance of the evidence.

On October 8, 2019, Detective Fleming conducted an interview with Officer Black at the BPS. Following the interview, Detective Fleming notated the following in his supplemental report: (*Note: Leah's first name has been replaced with "Leah" in the following excerpts so as not to identify her*):

- *Therefore, he picked her up, with one arm under her back and the other under her knees, similarly to how someone would carry a child, and took her to the guest bedroom. Bryan advised he was a few feet from the guest bedroom when Leah woke up and began flailing her arms and legs and he could barely hold on to her. So he ran the last few feet to the guest room's bed and dropped her on the bed.*
- *Leah was attempting to enter the master bedroom and broke the locking mechanism on the doors. Once she was inside the master bedroom she grabbed Bryan's face with both her hands and kept telling him to 'let me see your eyes.' Bryan advised he placed his hand on her chest, above the breast-line and below the neck, and slowly pushed her back while telling her not to touch him.*

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<sup>3</sup> It was during her IA field interview of the October 1, 2019 incident that APD learned that BPD had responded to a verbal disturbance at the residence on September 12, 2019. Leah was questioned again by IA about that incident during her interview at IA's office on October 10, 2019. Leah declined to speak further about that incident and the interview was concluded not long after.

- *Bryan advised Leah breaking the door upset him and he ripped the broken door off of the wall and broke the door in half. Bryan advised that he told Leah she was not going to sleep in their bed if she was having a relationship with another man. Leah said the bed was hers from before they were married and she was going to sleep in her bed. Bryan got up and dragged the master bedroom mattress into the living room. He then took the mattress he had prior to marrying Leah and took it into the master bedroom. Bryan went to sleep and when he woke up in the morning he did not see Leah.*

IA conducted multiple interviews of Officer Black following his statements to Detective Fleming. Based upon the evidence gathered during the IA investigation, I have determined the following events occurred on October 1, 2019, which culminated in Officer Black committing family violence assault and being untruthful with BPD, his supervisor and IA:

- Officer Black and Leah have been having marital problems for a significant period of time.
- Officer Black went to sleep in the master bedroom and would not allow Leah to sleep in their marital bed.
- Leah climbed into their marital bed and Officer Black wrapped his arms around her.
- Leah had been drinking and apparently passed out.
- According to Officer Black, he picked Leah up and carried her to a secondary bedroom.
- According to Officer Black, while he was carrying Leah, she woke up and began struggling.
- According to Officer Black, he carried Leah to the secondary bedroom and dropped her on the bed.
- According to Officer Black, he returned to the master bedroom and locked the door.
- According to Officer Black, Leah tried to enter the master bedroom and he told her she was not going to sleep in their bed.
- According to Officer Black, Leah began kicking the door (French doors) attempting to gain entry to the master bedroom (her keys, wallet, and phone were in the bedroom).
- According to Officer Black, Leah broke the door and entered the master bedroom (Leah admits kicking the door, but states Officer Black opened the door and she did not break it open);
- Officer Black admitted to ripping the door off the hinges and breaking the door in two.
- According to Leah, Officer Black threw their marital mattress out of the bedroom and exchanged it for the mattress in the secondary bedroom. According to Leah, she ran into the master bedroom to get her phone at which time Officer Black picked her up and threw her into the guest bedroom (Leah described it as a “forced scoop” that caused her feet to leave the ground). Officer Black denied he threw Leah into a wall on October 1<sup>st</sup>, but admitted to IA he has pushed his wife against the wall in the past, but he couldn’t recall exactly when that occurred: *I can’t recall the*

*specific time when I've actually physically pushed her up against the wall but it's – I mean, it's happened, I can't think of a time when...*"

- Leah suffered a bruise on the inner part of her upper right arm, which is consistent with Officer Black grabbing her (Officer Black during his IA interview demonstrated how he would grab Leah and hold her against a wall, allegedly to prevent her from assaulting him). The bruise on Leah's arm is consistent with how Officer Black demonstrated he grabs her. Ms. R stated that Leah told her she was injured (bruise) during the October 1, 2019 incident. According to Ms. G, Leah told her Office Black caused this injury when she was thrown against the wall. Ms. G was told by Ms. Black that this was not the first time this had happened. She was told by Leah that Officer Black had hurt her in July of 2019. She added, in the July 2019 incident, he did a similar thing where she had handprints on both her arms.<sup>4</sup>
- Leah sent a text message and had a phone conversation with Ms. R on or about the next morning/early afternoon, where she stated, "Last night... He threw me against a wall flipped our whole bedroom over when I went to sleep." This text message and conversation are consistent with a victim's outcry.<sup>5</sup>
- During a second IA interview, Leah informed IA that Officer Black had become angry and broken items in the past. She explained he had broken a dresser, ironing board, and smashed her phone.
- Ms. R stated that Officer Black was verbally and emotionally abusive towards Leah during their marriage. Leah's sister also confirmed the emotional and verbal abuse. After substantial prodding, Officer Black admitted during his IA interview that he has been verbally and emotionally abusive to Leah in the past. Specifically, IA asked Officer Black if he ever made inappropriate comments toward Leah. Officer Black stated he and Leah have had arguments and called each other names; however, he could not "...*think of anything where I've like, you know, belittled her or, you know, that I would deem inappropriate.*" Officer Black went on to say that he and Leah have belittled each other and cussed at each other. When confronted by IA he did admit to specific times where he belittled her in front of others. Officer Black added he had belittled Leah's work because she does not understand "the way the world really works."

IA interviewed Officer Black's immediate supervisor, Sgt. Robert Driscoll, on December 5, 2019. Sgt. Driscoll was not advised by Officer Black of the incident on September 12, 2019. He became aware of it at a future date and contacted BPD. BPD advised Sgt. Driscoll that they were told by Officer Black and Leah that the incident only involved a verbal disturbance so no further action would be taken by BPD (as noted herein, this incident was not limited to just a verbal disturbance, and the statement by Officer Black to BPD was not truthful and/or consistent with APD's Honesty General Order).

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<sup>4</sup> For the purposes of this suspension, the July 2019 incident is not an act for which Officer Black is being suspended, but demonstrates a pattern of abusive behavior, rather than a single, isolated incident.

<sup>5</sup> Although Leah admits she had been drinking and may have been intoxicated, a preponderance of the evidence supports the conclusion a criminal assault did occur.

When Sgt. Driscoll spoke with Officer Black about the October 1, 2019 incident, Officer Black was not truthful and only told him:

*The only thing he told me was, uh, at some point they were in the bedroom and he – he picked her up and took her to another room and then went back into the bedroom and then I guess she woke up and started banging on a door, so he opened the door and that’s all he told me. And it’s – she was asleep when he picked her up. He picked her up when she was asleep, took her into another room, and laid her on another bed or something and then went back into the master bedroom.*

On October 1, 2019, Officer Black recklessly committed a Class A family violence assault. A preponderance of the evidence (particularly Leah’s immediate outcry to her sister and the bruise to her upper right arm) supports a finding that Officer Black threw/pushed Leah against the wall and/or caused her bodily harm (pain and bruising).

#### **Destroying Leah’s Cellphone:<sup>6</sup>**

Officer Black told IA that he broke Leah’s cellphone after they had an argument. Officer Black explained the reason he broke Leah’s cellphone was after he and Leah had an argument, she decided to leave in her vehicle and accidentally backed into the side of his truck that he was getting ready to sell. Officer Black stated she caused a thousand dollars’ worth of damage and refused to pay for it. He explained:

I knew that, you know, her cellphone was kind of her, you know, that’s – that’s her –she a – constantly on that thing right, that’s kind of her pride and joy while I – kinda the same way I looked at my truck. And so I was like, ‘Well, you know, you destroyed mine, I’m gonna destroy yours’ and I broke her cellphone.

Intentionally destroying his wife’s personal property as a form of retribution is consistent with the “cycle of violence” used to control a victim of family violence.

#### **Honesty**

As noted earlier, every reference to “dishonesty” and “untruthful” refers to Officer Black’s attempt to conceal, divert and/or mitigate his true culpability, including intentionally so by omitting pertinent and material [information] from/with the BPD officers that responded on September 12, 2019, to Sgt. Driscoll, to BPD Detective Fleming on October 8, 2019, and to Internal Affairs (IA) during his two (2)

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<sup>6</sup> After initially telling IA he did not recall destroying any of her personal property, Officer Black ultimately advised IA that this even occurred approximately a year or so ago. Even if this act occurred outside the 180-day window, it is relevant as it shows a pattern of abusive behavior by Officer Black rather than an isolated incident.

interviews (the first interview occurred on December 18, 2019, and the second interview occurred on January 16, 2020).<sup>7</sup>

On or about September 12, 2019 Officer Black led the BPD officers to believe that he and his wife were having a “*conversation*” that was not a reportable physical disturbance. Officer Black did not mention to the officers the fact that he was in a “*heated argument*,” that his wife left the room the argument began in and that she then headed to the kitchen. He later admitted in his second IA interview that he pursued her to the kitchen because he in his words, “*I wasn’t done*” with the argument. As he followed his wife, he claimed that he believed she was going to physically strike him, and he had to physically restrain her arms and pin them until he felt comfortable releasing hold of her. He also failed to mention sometime prior to the arrival of the BPD, either his wife or he angrily destroyed their mutual wedding pictures with a screwdriver during this dispute. Officer Black admitted during the Dismissal Review Hearing these facts are pertinent and material information the responding officers would want to know. He further admitted if he was the responding officer, he would want to know this information as well.

Officer Black was dishonest with IA during his first interview on December 18, 2019, when he advised IA that his statement to the BPD on September 12, 2019 was a true and accurate account. As stated above, he intentionally attempted to conceal, divert, and mitigate his true culpability with BPD by stating he was having a “*conversation*” with his wife, leading them into believing “*nothing physical*” occurred. As noted herein, there was a physical encounter between the two of them during this incident.

On or about December 18, 2019, Officer Black was intentionally dishonest by act and omission during his IA interview regarding the September 12, 2019, domestic disturbance. After investigators asked him to give as much detail as possible regarding the September 12, 2019, incident, he advised IA that his wife told him that she had kissed another man and he told her he had kissed another woman. He stated that his revelation resulted in his wife running into the bathroom and that she remained locked inside the bathroom until the BPD arrived. He articulated to the IA in his first interview that he and his wife were having a “*conversation*” that was not a reportable physical disturbance.

He did not mention in the first interview the fact that he was in a “*heated argument*,” that his wife left the room the argument began in, that she then headed to the kitchen. He also later admitted in his second IA interview, he pursued her to the kitchen because in his words, “*I wasn’t done*” with the argument. As he followed his wife, he believed she was going to physically strike him, and he had to physically restrain her arms and pin them until he felt comfortable releasing hold of her. He also failed to mention sometime prior to the arrival of the BPD either his wife or he angrily destroyed their mutual wedding pictures with a screwdriver during this dispute.

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<sup>7</sup> This is not intended to be an exhaustive list of every act/statement by Officer Black that was an attempt to conceal, divert, or mitigate his true culpability.

During Officer Black's second IA interview on January 16, 2020, he acknowledged that the account he gave IA about the September 12, 2019 incident was vastly different than the account he gave to IA during his first IA interview on December 18, 2019. Officer Black's admission to this in the second interview alone warrants his indefinite suspension, as a single violation of the Honesty General Order calls for an indefinite suspension. Therefore, I have made the decision to indefinitely suspend him for this violation, independent of the other violations in this memorandum.

Regarding the October 1, 2019 incident, Officer Black's statements to IA [to the BPD Detective and APD Sgt. Driscoll] during his multiple IA interviews were a deliberate attempt to conceal, divert, and mitigate his true culpability. This includes omitting pertinent and material information from his supervisor, as well as the criminal and administrative investigators. In addition, Officer Black continued this mitigating behavior with his chain of command and me during his Dismissal Review Hearing on March 23, 2020.

Officer Black initially told his supervisor, Sgt. Robert Driscoll, on or about October 1, 2019 (on or about the same day as the incident and before being served with the notice of the IA investigation) that the physical contact between his wife and he consisted of him transferring his wife, who was asleep, from their mutual bedroom, to the guestroom by placing her in the guest bed, while she remained asleep. He then returned to his bedroom. He then told his supervisor that she woke up thereafter and banged on the door and he opened the door, letting her in. The account given to Sgt. Driscoll had several pertinent omissions. Also, of note, this account of her return to the bedroom most closely resembles the account given by his wife to IA but for the following pertinent omissions.

Officer Black omitted mentioning to his supervisor that his wife was awake during at least a portion of the transfer and that she kicked, screamed, and flailed her legs not wanting to be placed in the guest room as he took her there. He also omitted any mention to his supervisor that upon her return to the master bedroom, he broke the bedroom door off the hinges and that he then broke the door in half. He also omitted mentioning that he then transferred mattresses from the master bedroom to the guestroom. And he omitted mention of any physical contact between the two of them upon her return to the master bedroom.

While Officer Black initially told IA that the second portion of the physical disturbance between him and his wife began after she physically broke the door (h)e omitted mentioning in his initial statement to IA that he broke the door off the hinges and then broke the door in half or that he swapped mattresses from the master bedroom to the guestroom during the dispute. His initial version of the events was that he was closer to the bed and his wife was closer to the entrance of the bedroom as she came towards him and the bed and she then initiated a physical disturbance.

In his second statement to IA, he stated that he did break the door off the hinges, then broke the door in half and that he removed the door from the bedroom and upon his reentry into the bedroom, his wife initiated physical contact with him. He then mentioned after the conclusion of this contact, he then swapped the

mattresses from the master bedroom to the guest room. He stated to IA in this version that he then went to sleep in the master bedroom and was of the belief that his wife went into the kitchen to consume alcoholic beverages.

During his statement to the BPD detective, Officer Black told the investigator that he did break the door off the hinges, broke it in half and that he then swapped the mattresses from the master bedroom to the guest room and then his wife initiated physical contact with him after he swapped the mattresses. He also indicated in this version that he was closer to the entrance of the bedroom and his wife was closer to the bed, unlike the original statement to IA.<sup>8</sup>

Additionally, he minimized his true culpability regarding these events, including but not limited to his explanation as to how he “pushed” his wife in a very controlled manner. During his DRH, Officer Black agreed he made conflicting statements in his interviews regarding whether or not he pushed his wife but that both statements were true. In one instance Officer Black told me at his disciplinary hearing that he simply held his arm/hand out, but then stated he pushed her backwards to stop her from allegedly assaulting him. Officer Black either pushed his wife or he did not, both cannot be true.

Moreover, the IA investigator asked Officer Black if he had ever destroyed some of his wife’s personal items or effects out of frustration. He initially told IA he did not recall. This is one of several examples of his claiming not to recall and/or omitting mention of information until it was clear that IA had an awareness of some of the specific details. After IA specifically asked if he had ever broken his wife’s cellphone, he then gave IA a specific detailed account of how his wife accidentally scratched his truck with her vehicle and as a means of retribution, he broke and/or damaged her phone because it was important to her and/or “*her pride and joy.*” He was even able to identify that this event occurred approximately a year or so ago.

In another example, Officer Black also advised IA that he has pushed and/or pinned his wife up against a wall on “more than one” occasion. When asked to describe those occasions, he then advised IA it was only “one” occasion. When IA then asked him to describe the “one” occasion, he advised IA that he did not recall the “one” occasion.

### **Failure to Cooperate with IA**

Officer Black’s behavior during his IA interviews reflects the failure to cooperate with IA. Officer Black was not forthcoming during his interviews and the investigators had to repeatedly drag information out of him. Officer Black was not forthcoming unless specifically confronted by IA or he knew/believed IA already knew the information. During his second IA interview on January 16, 2020, Officer Black acknowledged that the account he gave to IA about the September 12, 2019 incident was vastly different than the account he gave to IA during his first IA interview on December 18, 2019. Officer Black was reminded at the beginning of his respective interview(s) that he needed to treat the interview with IA as if it were

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<sup>8</sup> All of these versions and/or statements cannot be true.

an interview with the Chief of Police. Moreover, the APD Honesty General Order required Officer Black to be forthcoming with IA, which he was not.

A first time Offense for Failure to Cooperate with Internal Affairs also calls for an Indefinite Suspension. Officer Black's admission that he gave vastly different accounts of the September 12, 2019, incident during the two IA interviews alone warrants an Indefinite Suspension. Officer Black's attempted explanation for the different accounts does not absolve him of violating the General Order. Moreover, his explanation was not credible.

**Failure to Report the September 12, 2019 Incident:**

Officer Black admitted to IA that he failed to immediately notify his Supervisor, Sgt. Robert Driscoll, about the September 12, 2019, incident in accordance with APD General Orders.

**Conclusion:**

Officer Black seemingly attacked his wife's credibility throughout the interview process by asserting she was either dishonest or too intoxicated to recollect the events. By simply relying upon Officer Black's statement (and setting aside the things he disputes, including but not limited to his wife's assertions), he gives me ample reasons to indefinitely suspend him. There are a multitude of individual reasons to indefinitely suspend Officer Black based upon his knowing and/or unknowing admissions. I would have made the decision to Indefinitely Suspend him for any of the following reasons independent of each of the other:

- (1) Any one of his violations of the Honesty General Order during the December 18, 2019 IA interview whether it be by act and/or intentional omission.
- (2) Any one of his violations of the Honesty General Order during his January 16, 2020 IA interview whether it be by act and/or intentional omission.
- (3) Any one of his violations of the Honesty General Order during his October 8, 2019, interview with BPD Detective Connor Fleming, whether it be by act and/or intentional omission.
- (4) Any one of his violations of the Honesty General Order during his September 12, 2019, statement to the BPD responding officers, whether it be by act and/or intentional omission
- (5) Any one of his violations of the Failure to Cooperate with Investigators General Order during his December 18, 2019, IA interview.
- (6) Any one of his violations of the Failure to Cooperate with Investigators General Order during his January 16 2020, IA interview.
- (7) The October 1, 2019 incident constitutes a reckless act of Family Violence. An act of Family Violence is an offense for which an indefinite suspension is warranted.

By these actions, Officer Black violated Rule 10.03(L) by violating the following rules and regulations of the Austin Police Department.

- **Austin Police Department Policy 900.31(a): 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.

To wit:

Texas Penal Code 22.01(a)(1) – Assault with Injury – Family Violence

Sec. 22.01. ASSAULT.

- (a) A person commits an offense if the person:
  - (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse; \* \* \*

- (b) An offense under Subsection (a)(1) is a Class A misdemeanor...

Sec. 71.003. FAMILY. “Family” includes individuals related by consanguinity or affinity, as determined under Sections 573.022 (Determination of Consanguinity) and 573.024 (Determination of Affinity), Government Code, individuals who are former spouses of each other, individuals who are the parents of the same child, without regard to marriage, and a foster child and foster parent, without regard to whether those individuals reside together.

Sec. 71.004. FAMILY VIOLENCE. “Family violence” means:

- (1) An act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;

- **Austin Police Department Policy 900.3.1: General Conduct and Responsibilities: Honesty**

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”:

(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.

(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.*

- **Austin Police Department Policy 902.4.1: Administrative Investigations: Cooperating with Assigned Investigators**

902.4.1 Cooperating with Assigned Investigators

(a) Employees will cooperate with any assigned investigator as if they were addressing the Chief. Employees who fail or refuse to cooperate with an assigned investigator will be subject to disciplinary action, up to and including indefinite suspension.

(b) Honesty is of the utmost importance in the police profession. Employees are expected to be truthful at all times during interviews with investigators as outlined in Police 900 (General Conduct).

(1) Employees who are found to have given a false official statement are subject to indefinite suspension as outlined in the Discipline Matrix (“Dishonesty – False Official Statements”).

- **Austin Police Department Policy 908.4(b)(2): Reporting Procedure**

908.4 REPORTING PROCEDURE

(b) Employees shall immediately report to their supervisor, with a follow-up memorandum through the chain-of-command to the Chief, of:

2. Anytime an employee is involved in an off-duty-incident that results in a response from any law enforcement agency with the exception of traffic violations, minor collisions, and other minor calls for service where the employee is not considered to be a suspect (e.g. "alarm calls, noise complaints); or

(e) Employees failing to provide prompt notice pursuant to this order are subject to discipline.

With respect to the dishonesty charge, Officer Black was dishonest with the BPD officers, who were conducting a criminal investigation where he was the suspect in a family violence incident. He was also dishonest with Sgt. Driscoll, as noted above. These false statements are considered an official false statement, which calls for an indefinite suspension under the Department's Disciplinary Matrix. Likewise, false statements to IA, whether by act or omission, are considered False Official Statements, the penalty for which is also an indefinite suspension under the Matrix. All officers are initially apprised of this policy in the Training Academy and are regularly reminded of APD's stance on dishonesty. If an officer demonstrates that he cannot or will not give a truthful account of an incident, especially one in which his spouse has alleged family violence, I, as Chief of Police, would be remiss in my duties and responsibilities if I allowed such an Officer to be bestowed the power to continue to have the duties and responsibilities that are designed to protect and serve the public. Furthermore, a single dishonest act or statement impugns an officer's credibility and would have to be disclosed to the defense pursuant to Brady v. Maryland and the Michael Morton Act. In addition, the fact that Officer Black engaged in family violence undermines his credibility in a family violence case and would also have to be disclosed. Therefore, after careful consideration and deliberation with Officer Black's chain of command, I have concluded that indefinite suspension is appropriate.

Note: Either the family violence charge, any one of the dishonesty charges, or the failure to cooperate with IA charge, by itself or in combination, justifies an indefinite suspension.

\* \* \*

The Appellant appealed the Indefinite Suspension. The appeal/grievance was appropriately processed and remains unresolved. The Parties stipulate that this matter is properly before this Hearing Examiner for Opinion and Award.

#### **POSITION OF THE CITY**

The City makes the following arguments and contentions in support of its position:

This is a civil service disciplinary appeal taken pursuant to Chapter 143, Texas Local Gov't Code ("TLGC") ("Chapter 143"). Officer Bryan Black appeals the Order of Indefinite Suspension issued by Chief Brian Manley on March 24, 2020. This was timely appealed and this matter was heard by an independent hearing examiner ("IHE"), whose review authority is co-extensive with that of the civil service commission. The IHE is tasked with evaluating the evidence presented and determining the truth of the charges leveled by the department head. The issues to be determined in this appeal are the following:

- a. the factual truth of the charges contained in the Indefinite Suspension Order;
- b. the legal sufficiency of the charges; and,
- c. the proportionality of the punishment to the alleged offense.

The Department has the initial burden of proof by a preponderance of the evidence. Judicial rules of evidence do not apply, but general principles of evidentiary rules should be considered particularly in a case like this, in which certain factual findings made by the Internal Affairs ("IA") investigators and Chief Manley depend not only on direct evidence, but also on circumstantial evidence and, more importantly, credibility determinations.

The misconduct allegations against Officer Black set forth in the Indefinite Suspension Order depend on several incidents or events, which can be summarized as follows:

The September 12, 2019 Incident. This incident involved a welfare check by the Buda police department to Officer Black's home after a friend of his wife, Leah Black, called in a concern to the City of Buda's dispatch center.

The October 1, 2019 Incident. This incident involved a welfare check by the Buda police department to Black's home after a different friend of Leah Black called in a concern to the City of Austin's dispatch center.

The December 18, 2019 Compelled Statement (a/k/a First Compelled Statement). This compelled statement occurred within the context of the Internal Affairs investigation itself when Officer Black was providing a Garrity protected statement. The allegation here is that Officer Black had mitigated his true culpability in the prior incidents by not being fully forthcoming and by attempting to conceal, divert or deflect his actions in the underlying incidents identified above.

The January 16, 2020 Compelled Statement (a/k/a Second Compelled Statement). This statement revealed omissions from the first statement and yielded new information and clarifications.

The March 23, 2020 DR Hearing. This Chain of Command review hearing provided Chief Manley and the Chain of Command an opportunity to hear directly from Officer Black and his legal counsel.

The pertinent civil service rules and regulations are the following, which are defined by APD policy: Honesty and Mitigation, Failure to cooperate with IA, Family violence and Duty to report. The Indefinite Suspension Order provides a detailed accounting of the factual basis upon which Chief Manley made the disciplinary decision underlying this appeal. The matter came to the Department's attention on October 1, 2019, and the Internal Affairs (IA) investigation into Officer Black's alleged actions uncovered another incident between Officer Black and his wife, which occurred on September 12 when Buda PD responded to a verbal disturbance at the Black residence. After the first incident, Officer Black told the Buda Police Department ("BPD") officers he was having a "*conversation*" with his wife when, in fact, they were in a heated argument. He also failed to reveal that he had to physically restrain his wife because he believed at one point that she was going to assault him. Had Officer Black been truthful with the BPD Officers the disturbance call likely would have been handled differently. In any event, his insistence at the DRH that he was "truthful" with the BPD did not enhance his credibility with Chief Manley or the chain of command. Additionally, Officer Black did not immediately report this incident of a police response to his supervisor, as he was required to do and which he later agreed he should have done. A different SWAT Officer learned of the BPD call shortly after it happened, and reported it up the chain of command. Sgt. Robert Driscoll, Officer Black's immediate supervisor, was informed of the incident and instructed to check on how Officer Black was doing. They met at a coffee-shop but did not discuss any details about the BPD call. Officer Black never reported the BPD call to his home, which illustrates his pattern of side-stepping, concealing, diverting or omitting information. This mitigation of culpability continued throughout the IA investigation and even into the DRH.

On or about October 1, Leah called her sister, Michelle Gutierrez. Unable to reach her, she left a 12 second voicemail message saying, "Michelle, I need you, call me back, Bryan threw me up against the wall and I don't know what to do. Please call me back." This type of outcry is consistent with a victim of family violence and lends credibility to Leah Black's original version of the events that Chief Manley found to be most credible. Because the underlying incident occurred in a neighboring city, the matter was taken up as a criminal investigation matter by BPD. On October 8, BPD Detective Fleming conducted a CID interview with Officer Black. A copy of the video recording of the BPD interview was provided to APD IA, who had it transcribed. Detective Fleming's supplemental report stated, in part, that Officer Black advised he placed his hand on Leah's chest, above the breast-line and below the neck, and slowly pushed her back while telling her not to touch him. He also advised that Leah breaking the door upset him and he ripped the broken door off of the wall and broke it in half and also dragged the master bedroom mattress into

the living room and moved another mattress into the master bedroom and went to sleep, and did not see Leah when he woke up in the morning. Based upon the evidence gathered during the IA investigation, Chief Manley determined that on October 1, 2019 Officer Black committed family violence assault and was untruthful with BPD, his supervisor, and IA. His determination took numerous factors into account including, but not limited to, Leah's denial of breaking the door (although she admitted she was kicking it), her statement that Officer Black picked her up in a "forced scoop" and threw her into the guest bedroom, and Officer Black's admission to IA that he has pushed his wife against the wall in the past, but could not recall exactly when that occurred. Additionally, Leah had a bruise on the inner part of her upper right arm, which is consistent with Officer Black grabbing her, and Officer Black's demonstration to IA interview how he would grab and hold Leah against a wall, allegedly to prevent her from assaulting him. Moreover, Leah had told her sister that Officer Black caused this injury when she was thrown against the wall, that this was not the first time this had happened, and that he had done a similar thing in July when he left handprints on both of her arms. While the July 2019 incident is not an act for which Officer Black is being suspended, it does demonstrate a pattern of abusive behavior, rather than a single, isolated incident. Although Leah admits she had been drinking and may have been intoxicated, a preponderance of the evidence supports the conclusion a criminal assault did occur on the evening in question. During her second interview, Leah stated Officer Black had become angry and broken items in the past and smashed her phone, and verbal and emotional abuse of Leah was confirmed by her sister and friends and, after substantial prodding, Officer Black admitted he has been verbally and emotionally abusive to his wife in the past. During its investigation, IA learned that Sgt. Driscoll had prior knowledge of the September 12 incident. He had contacted BPD and was told the incident involved only a verbal disturbance, so no further action was taken. He also said that after the SWAT team was made aware of the October 1 incident Officer Black was called into the office but the only thing he told Sgt. Driscoll was that he picked up Leah and took her to another room, and then she woke up and started banging on the door. At the conclusion of the entire investigative process, including the Disciplinary Review Hearing, Chief Manley concluded that on October 1, Officer Black recklessly committed a Class A family violence assault and that a preponderance of the evidence, especially Leah's immediate call to her sister and the bruise on her arm, supports a finding that Officer Black threw/pushed his wife against the wall and/or caused her bodily injury (pain and/or bruising). Contributing to this finding is a related finding about that Officer Black told IA that he broke Leah's cell phone after they had an argument, and in retaliation for her backing into his truck. Chief Manley determined that destruction of his wife's personal

property as a form of retribution was consistent with the “cycle of violence” used to control a victim of family violence. While Officer Black pointed out in the hearing that no physical violence occurred with his wife, the Department policy incorporates the definition of family violence from the Texas Family Code, §71.004(1), which does not necessarily call for physical harm to occur. Conduct that reasonably places a victim in fear of imminent harm can constitute family violence under the statute and the evidence the evening of October 1 easily meets this definition. Thus, Chief Manley’s factual finding that “family violence” occurred on the evening of October 1, 2019 is credibly and reasonably supported by the evidentiary record. To the extent that this fact finding involved making credibility determinations of veracity, Chief Manley had the benefit of the investigative file as well as the ability to hear directly from Officer Black at the DRH. There is nothing arbitrary about Chief Manley’s findings and conclusions, which relied on a preponderance of the evidence, and should be validated as true in this appeal.

The honesty / mitigation charge originated with the compelled statement that Officer Black gave to Internal Affairs on December 18. The IA investigators believed that Officer Black had not been forthcoming in that interview or the second compelled statement, even though the typographical error in the BPD transcript had been identified by that time, and that Officer Black overstated the error as justification for what appeared to be his non-cooperation. Significantly, Austin Police Association (APA) Representative Ray expressed concerns about how Officer Black handled himself in this Q&A session and agreed that there was information that needed to be drawn out of him and that it was appropriate for IA to explore all facets of information from Leah’s friends and family. Every reference to “dishonesty” or “untruthful” contained in the Indefinite Suspension Order refers to Officer Black’s attempt to conceal, divert and/or mitigate his true culpability, including intentionally doing so by omitting pertinent and material from/with the BPD officers that responded on September 12, Sgt. Driscoll, BPD Detective Fleming on October 8, and Internal Affairs (IA) during both of his interviews (December 18 and January 16). Officer Black was dishonest with IA during his first interview by telling IA that his statement to the BPD on September 12 was a true and accurate account although he told BPD he was having only a “*conversation*” with his wife. On or about December 18, Officer Black was intentionally dishonest by act and omission during his IA interview regarding the September 12 domestic disturbance by failing to give as much detail as possible regarding the September 12 incident, and by repeating he and his wife were having a “conversation” when, in fact, he was in a “heated argument” and that he followed her to the kitchen because he “wasn’t done” with the argument. As he followed his wife, he believed she was going to physically strike him, and he had to physically restrain her arms and

pin them until he felt comfortable releasing hold of her. During his interview on January 16, Officer Black acknowledged that the account he had given about the September 12 incident was vastly different than the account he gave to IA during his first IA interview on December 18 and this admission itself warrants his indefinite suspension. Additionally, Officer Black minimized his true culpability regarding the events of October 1, as set forth in the indefinite suspension notice, including but not limited to his explanation as to how he “pushed” his wife in a very controlled manner. During his DRH, Officer Black agreed he made conflicting statements in his interviews regarding whether or not he pushed his wife but that both statements were true. That is not so, as he either pushed his wife or he did not. The IA investigator asked Officer Black if he had ever destroyed some of his wife’s personal items or effects out of frustration. Initially he told IA he did not recall which is but one of several examples of him claiming not to recall and/or omitting mention of information until it was clear that IA knew some of the specific details. In another similar example, Officer Black told IA that he has pushed and/or pinned his wife up against a wall to prevent her from physically assaulting him. But, when asked to elaborate, he claimed “once maybe, have I ever pushed her up against the wall” and he stated that he did not know when that was. IA Investigator Davis explained that when these concerns were reported, a supervisor issued a separate Internal Complaint Memorandum pertaining to concerns about how Officer Black handled the questions and his answers from the compelled statement of December 18 and that he may have provided misleading statement. The Notice of Allegations (NOA) containing all the appropriate notices and allegations outlined the specific areas of concern, two pertaining to the events of September 12 and two others pertaining to the events of October 1. Commander Mason determined that there was reason to believe that Officer Black engaged in misconduct on December 18 in his responses to IA and this resulted in a 2<sup>nd</sup> compelled statement, which took place on January 16. After that, Sgt. Davis completed his IA investigative summary, which provides a thorough and detailed overview of the investigative file.

Officer Black failed to cooperate with IA. He was not forthcoming during his interviews and the investigators had to repeatedly drag information out of him, having to specifically confront him with information it already knew or that he knew/believed IA already had. During his second IA interview on January 16, Officer Black provided a more complete account of the September 12 incident and agreed that the account was “vastly different” from the prior statement. Officer Black attributed that to him being confused and stressed and not understanding the scope of the questioning. Such rationalizations, coming from an experienced law enforcement officer, simply are not credible. Rather, the credible evidence reasonably supports that he well understood the

significance of revealing to the BPD on September 12 that during the course of the evening he had to restrain his wife to keep her from assaulting him. Chief Manley's factual determination that Officer Black had violated the honesty policy by his mitigating behavior on the evening of September 12, 2019 is reasonable and based on objective evidence and should be affirmed. A first time Offense for Failure to Cooperate with Internal Affairs also calls for an Indefinite Suspension and Officer Black's admission that he gave vastly different accounts of the September 12 incident alone warrants an Indefinite Suspension.

Also relevant to the primary honesty / mitigation charge is Officer Black's failure to comply with a duty to report obligation. General Order 908.4(b)(2) requires that employees involved in an off-duty incident that results in a response from any law enforcement agency are to report it to their supervisor, except for "traffic violations, minor collisions, and other minor calls for service where the employee is not considered to be a suspect (e.g. alarm calls, noise complaints)... ." While Officer Black contends that this was a minor call for service where he was not considered to be a suspect this characterization is self-serving. Both of the Blacks intentionally omitted the fact of physical contact between them that evening to the Buda PD officers. At the second Garrity statement, Officer Black admitted that his wife had tried to attack him, and he had to restrain her. He claims that defending himself like this was not "family violence" because it was a "defensive measure." This subsidiary charge, standing alone, would likely not sustain an indefinite suspension but it does support the Honesty / Mitigation charge.

At the Disciplinary Review Hearing ("DRH") both Officer Black and his counsel had the opportunity to restate their position to the full Chain of Command ("the COC"), including Police Chief Manley. The supervisory officers present at the DRH hearing had been provided with a complete copy of the IA file, and had an opportunity to communicate directly with Officer Black and his counsel. Lesser charges for neglect of duty were discussed as some of those participants did not believe Officer Black been dishonest or committed family violence. Lt. Alexander stated he believed an appropriate level of discipline was a 60 day suspension and removal from SWAT, and Lt. Pruitt testified she believed he should be suspended 45-60 days and sent back to Patrol. Lt. Alexander recognized Officer Black did not make it "easy" on the investigators and agreed that Officer Black failed to report the September 12 incident. It is important to note that an APD law enforcement officer cannot be guilty of the neglect of duty subsection I policy, without first violating the honesty policy. The neglect of duty policy only comes into play if an Officer initially violates the honesty policy but the Chief, applying his sole discretion, can sustain the lesser included offense *if* the Chief determines that in the end, the officer took full responsibility for his / her initial violation of

the honesty policy. Officer Black did not convince Chief Manley that he deserved the lesser included offense. Both Lt. Pruitt and Lt. Alexander acknowledge that Officer Black violated the Neglect of Duty policy, which necessarily means that he violated the Honesty policy as well. Chief Manley determined Officer Black had not owned up to trying to mitigate his actions. At the DRH, Officer Black had another opportunity to present his case and he essentially blamed his predicament on his wife, Leah Black, who he described as an alcoholic. Chief Manley testified that, in the DRH, he felt that Officer Black was leaving out pieces of information that were not favorable to him and that he was not honest with the Buda police officer on September 12. Officer Black told the BPD officer that nothing physical had occurred and admitted, during the DRH, that if he had been the responding officer on September 12, he would have wanted to know that information that he did not divulge. Chief Manley testified he found this to be important. Chief Manley acknowledged that in the confidential deliberative process component of the DRH, there was a long discussion about the case. He described that the Chain of Command agreed that Officer Black had “mitigated” but that there was discussion and debate over the neglect of duty charge, the honesty charge, and the discipline associated with these charges. They discussed whether Officer Black had been forthright with IA, meaning giving information rather than making IA keep coming back with questions, as well as not mentioning early on in the interview about tearing the door off the hinges and not telling to the Buda Police Department the September 12 incident was physical. Sgt. Alexander and Lt. Pruitt had concerns about intent or lack of intent in doing so, whether Officer Black was intentionally trying to mitigate his conduct or whether he really did not remember. On the other hand, Assistant Chief Chacon and Chief of Staff Gay both recommended indefinite suspension based on the findings. Even a charge of neglect of duty would reflect that the underlying honesty policy has in fact been violated. According to the disciplinary matrix, a neglect of duty violation in these circumstances would have only affected the level of discipline, not the underlying finding of guilt on the charge. Chief Manley testified that the real question is whether it was honest or neglect of duty, and that there were so many issues with honesty, beginning with the September 12 incident, that honesty was appropriate. He also stated that there were numerous acts of mitigating throughout, with Officer Black not admitting to so many portions of what happened and IA having to ask questions over and over to get information. Chief Manley also determined that Officer Black seemed to attack his wife’s credibility throughout the interview process by asserting she was either dishonest or too intoxicated to recollect the events. All of these factors led Chief Manley to conclude that Indefinite Suspension was warranted. The family

violence charge, any one of the dishonesty charges, or the failure to cooperate with IA charge, standing alone or in combination, justifies an indefinite suspension.

Officer Black argues that the punishment and discipline issued to him is excessive and disparate for the alleged offense(s) considering all the circumstances. His counsel contends that even if Officer Black had not initially complied with the honesty policy he later admitted to contested facts and, therefore, the applicable policy consideration was a neglect of duty violation, not an honesty violation. Officer Black also argues that his conduct is equivalent to that of two other officers, Torres and Eiben. The Disciplinary Matrix reflects that a sustained finding of the honesty policy on the first occurrence carries as discipline an indefinite suspension but that a sustained finding of the neglect of duty policy is fact specific and, therefore, does not necessarily result in an indefinite suspension. Chief Manley distinguished between Officer Black's conduct and the circumstances of Torres and Eiben so this argument should be rejected, as should his reliance on (2) arbitral awards in which a different hearing examiner admonished the APD about how the IA investigators were conducting investigations and alleged investigator bias. The use of findings by a different hearing examiner in a collateral set of cases that are unrelated to the present case is not probative of the truth of the facts in the instant case, and they should be given no weight.

Officer Black's counsel also attacked the adequacy of certain notices. All procedural notifications required by the IA protocols are in the evidentiary record, and any complaint or allegation in closing argument that Officer Black did not receive appropriate notice at each step in the IA investigation is contradicted by the evidentiary record. Even if there was such a deficiency, Article 17, Section 8 requires that Officer Black would have the burden of showing the Commission that a contract violation "substantially impaired" his ability to defend against the allegations of misconduct. There is no such proof and this argument should be rejected. Leah Black's self-deprecating recantation testimony, which was not tendered until the evidentiary hearing in this matter, is entirely new evidence and should be given no weight. It was not made available to the Department investigators prior to the hearing, either to the IA investigators or even to the Chain of Command at the DRH. The Department is statutorily restricted to its original written statement and charges, which may not be amended – see §143.054(c), TLGC – and it is not equitable to allow Officer Black to present new sworn testimony which could have been, but was not, previously presented to the Department for consideration. In any event, Leah Black's testimony lends credence to the concern of her friends and family that she was in an abuse marital relationship.

Between the Compelled Statement of December 18 and that of January 16, the IA Investigators and Black and his legal representatives identified an error in the transcription of the audio-visual CID Statement given to Buda PD, which was at odds with the content of the video recording. However, Chief Manley acknowledged he was aware of this transcription error, which involved a single issue, and was identified and resolved.

Officer Black also raises Chapter 143's general limitations period of 180 days from the date of alleged misconduct within which a disciplinary decision must be implemented. An exception to this general rule exists in situations where the underlying incident involves criminal conduct. Chief Manley imposed the Indefinite Suspension Order in this case on March 24, 2020. Under the general limitations rule of 180 days, this would cover incidents or events going back to September 26, 2019. Therefore, as to the alleged misconduct that occurred on October 1, 2019, and the alleged misconduct that occurred in the IA interview on December 18, 2019 there is no limitations issue. During its investigation, however, IA learned of the September 12, 2019 call by the BPD to the Black's home, thereby bringing the incident within the scope of the investigation. The Indefinite Suspension Order specifically alleges that the September 12, 2019 incident involved alleged criminal activity, that is, family violence. The Meet & Confer Agreement clarifies the discovery rule and provides in pertinent part that "discovered" means the time when a supervisor at the rank of Assistant Chief or above has notice of the potential misconduct. Clearly the September 12 incident carried potential criminal charges. Thus, any argument or suggestion that the events of September 12 are outside the scope of the limitations period should be rejected.

The Hearing Examiner must determine whether the specific charges are true. There is ample evidence in the hearing record established in this case to make such a finding. To the extent that Chief Manley made credibility determinations about Officer Black, with respect to whether his conduct constituted a true honesty violation versus a neglect of duty, Chief Manley's decision was based not only on review of the IA file but also on a direct assessment of Officer Black at the DRH. Officer Black's testimony at the hearing offered nothing new and reflected virtually no true acceptance of responsibility. The evidence established that Officer Black and his wife have a pattern of provoking each other and that such encounters would predictably lead to him restraining her. The size and strength discrepancy is apparent in the evidentiary record. This self-serving characterization of events is neither credible nor reasonable. The investigative file supports a pattern of recklessness in the marital relationship, and Officer Black's attempt to make himself out to be the victim of his wife's assaults should not be credited.

The IA record, and the evidence in the hearing, fully support Chief Manley's factual findings and they should be upheld as true. To do otherwise would require the civil service commission (here, the hearing examiner) to re-characterize and reframe the evidence and to substitute Bryan Black's legal justifications for that of the Chief. Moreover, Chief Manley's decision on liability and on punishment, made after detailed review of the IA record, and after a lengthy consultation with the Chain of Command, was amply and reasonably supported by the investigative record and materials in the matter before him. For the foregoing reasons, the City requests that the Hearing Examiner enter an Award finding as follows:

1. That the underlying material factual matters contained and specified in Police Chief Brian Manley's Order of Indefinite Suspension dated March 24, 2020 are supported by the evidence and are true; and,
2. That the disciplinary suspension of Indefinite Suspension is supported by the policy violations cited, as well as the Disciplinary Matrix applicable to APD law enforcement personnel, and is therefore fair and reasonable; and,
3. That, therefore, Appellant's appeal to the Civil Service Commission on the statutory grounds stated in the Notice of Appeal be DENIED in its entirety and that the Indefinite Suspension Order be sustained.

#### **POSITION OF THE UNION**

The Union makes the following arguments and contentions in support of its position:

The City has not sustained its burden of proving that the indefinite suspension should be upheld. The evidence demonstrates that Officer Black did not engage in the misconduct alleged against him, particularly the dishonesty, failure to cooperate with internal affairs and administrative family violence allegations. The mere fact that the Chief did not believe Officer Black's account of the events is not sufficient to uphold the indefinite suspension, which is unfounded, arbitrary and capricious.

Officer Black was charged with violating multiple rules and Austin Police Department Policies, including 900.1.1 – Responsibility to Know and Comply: Texas Penal Code 22.01 (a)(1) Assault with Injury – Family Violence ; 900.3.1 – General Conduct and Responsibility: Honesty; 902.4.1 – Cooperating with Assigned Investigators; and 908.4 – Reporting Procedure. The City's basis for the suspension is set forth in the Indefinite Suspension Memorandum served upon Appellant on or about March 24, 2020. However, Chapter 143.051 of the Texas Local Government Code places a "for cause" standard for discipline of fire fighters and police officers and the burden of proof lies with the employer to show that the discipline imposed met the statutory and contractual standards for discipline. The basic question is whether the employer's disciplinary decision is fair considering all of the facts and circumstances surrounding the case. This involves

a review of not only whether the officer engaged in misconduct which warrants discipline, but also whether the level of discipline imposed was fair given the officer's offense. Under the just cause standard, the issues are whether the employer's decision was supported by proven facts and whether the particular discipline imposed was fair considering these facts.

The City has failed to prove by a preponderance of the evidence all of the allegations against Officer Black. As to the Family Violence allegations, the charge is based on the Department's belief that Officer Black engaged in family violence on October 1, 2019 allegedly by throwing or pushing his wife against a wall. Officer Black was never arrested or charged with any crime, let alone family violence. Hays County issued him a declination letter based on a lack of evidence. Moreover, there is no proof that Officer Black caused the bruise on Leah's arm and the evidence suggested that it likely resulted from some other activity and did not even occur on October 1. Leah Black herself admitted that Officer Black did not push her up against a wall and that she was not being truthful when she related to her sister and a friend that had occurred. Accordingly, the City has failed to prove by a preponderance of the evidence that Officer Black violated Policy 900.1(a) for committing family violence on October 1, 2019.

The City alleges that Officer Black violated Policy 900.3.1 – Honesty for a number of reasons including its contentions that (1) he was dishonest and/or intentionally misleading with the Buda Police Department and during his IA interviews regarding the events that occurred on September 12, 2019; and (2) he was dishonest and/or intentionally misleading with the Buda PD Detective, Sgt. Driscoll, and during his IA interviews regarding the events that occurred on October 1, 2019. The Department contends that Officer Black violated the Honesty policy by failing to be truthful at all times, intentionally misrepresenting or misleading, intentionally omitting pertinent or material information, and mitigating his true culpability in these incidents. This simply is not true. In fact, all of the sustained honesty allegations are subjective in nature and are not grounded or supported in any conclusive facts and evidence. Many arbitrators have held that to sustain a charge of dishonesty, the City must prove that the employee intended to be untruthful, and that merely being mistaken or unable to remember details about an incident is not sufficient to find untruthfulness. The Department argues that Officer Black was untruthful on September 12 when Buda police officers responded to a call, and to IA when it interviewed him about the incident. The "proof" offered for this charge is that Officer Black described his interaction with his wife as a "conversation" that was not a reportable offense, instead of a "heated argument"; that he did not inform the Buda police officers or IA during the first interview that "anything physical occurred"; and that he failed to mention that the couple's wedding pictures were destroyed. Most of these

allegations of dishonesty are trivial in nature. However, the evidence demonstrated that throughout the course of the investigation Officer Black did admit to all of the details regarding the September 12 incident, and that he explained numerous times to IA, during his second interview, why it may have appeared that he was not being forthcoming or truthful. The City has failed to prove by a preponderance of the evidence that Officer Black was dishonest, in any capacity, regarding the September 12 incident. Using the word “conversation” rather than “heated argument” when speaking to the responding Buda PD officers was not deceptive or an attempt to conceal the heated nature of the circumstances. After all, the Buda police officers were responding to a “verbal disturbance” and knew the couple had had an argument as shown by the body worn camera of the responding police officer when Officer Black refers to a “conversation” and the BPD officer responds, “yeah, that’s what she said, that you guys are just having an argument.” Thus, Officer Black’s use of “conversation” was not dishonest or misleading, and had no impact on what the BPD knew about the situation. Moreover, during his IA interviews, Officer Black never denied having had an argument with his wife on September 12, and told IA that he sometimes uses the words argument and conversation interchangeably. He explained at least four times what he meant by his use of the word “conversation” and that he was referring to a heated or passionate argument, but not necessarily a screaming and yelling match. Clearly, this allegation of misconduct boils down to the Department’s arbitrary disagreement with Officer Black’s inadvertent use of a word, and not any proof of intent to be misleading or untruthful by using the word “conversation.” Officer Black’s use of “conversation” did not violate the Honesty policy.

Officer Black was further sustained on honesty violations because when they asked him if “anything physical” had occurred, he failed to inform the responding Buda PD officers about brief non-assaultive contact between him and his wife during the September 12 and because he failed to mention this same non-assaultive contact to IA during his first interview. Officer Black was not untruthful or intentionally misleading to BPD on scene because they were inquiring specifically as to whether any assaultive contact occurred and it had not. Instead, the brief contact between the Blacks that night was a nonaggressive maneuver to prevent an assault, and that lasted a few seconds. Although Officer Black admittedly failed to inform IA during his first interview about this brief physical contact on September 12, he did voluntarily bring the information to light in his second interview and offered numerous reasonable explanations as to why he failed to offer this information in his first interview. He was consistent throughout the investigation about the fact that he was not intentionally trying to mislead or be untruthful with BPD and that he genuinely believed that the officer’s question about “anything physical?” meant physical violence or assault. During

his DRH, Officer Black conceded that, as a police officer, he can understand why he should have provided all of the details regarding any contact he made with Leah to the responding officers but, at the time, he was not thinking as a police officer. His interpretation of the Buda PD officer's question and subsequent response were supported by numerous individuals that testified at the hearing. Sgt. Driscoll, Sgt. Ray, and Lt. Pruitt all stated that they would have interpreted that question as asking about some kind of physical assault. Lt. Alexander stated that if he had been asked that question under the same that would not even enter his mind because when he, as an officer, asks somebody did anything physical happen he is asking about an assault. Officer Black's actions prevented an assault by his wife and he was not dishonest with Buda PD when he told them that nothing criminal had occurred. That was the truth. While Officer Black did not inform IA about this brief September 12 contact during his first IA interview, he did not intentionally omit it or attempt to conceal pertinent details. The simplest explanation is that he forgot that the contact even occurred that evening because this type of incident had become commonplace in Officer Black's marriage and thus, did not hold a place of great significance for memory purposes. When asked about the September 12 incident during his first IA interview, Officer Black was surprised as he had no idea it was going to be a topic of such interest. The NOA and internal complaint he was provided did not forewarn that he would be discussing any incident other than that of October 1, 2019. As a result, Officer Black did not have time to adequately prepare and reflect on the September 12 so as to be able to convey all of the intricate details that occurred four months earlier and, when asked for all specific details of an incident that he had not even really thought about for months, he relayed as best as he could the information he recollected at that time. Officer Black, who had no prior experience with IA, mistakenly and narrowly interpreted questions about "physical contact" as focused solely on whether he committed an assault on his wife. And he did not. Officer Black has taken accountability for his mistakes, and in no way blames IA for how he interpreted their questions. Nonetheless, poorly interpreting and answering questions during an IA interview does not amount to intentional conduct and certainly does not rise to the level of dishonesty.

Officer Black also was sustained on being dishonest for not informing the responding Buda police officers and IA that, at some point during the September 12 incident, the Blacks' wedding pictures in the office were destroyed. The Blacks' destruction of their own personal property is not in any way related or pertinent to physical violence, particularly as to the October 1st incident that led to the IA investigation being initiated. Regardless, Officer Black did not deny that this event occurred once he was reminded of it. He testified that he did not equate the wedding pictures as a

detail that was pertinent to what he believed he was being investigated for and he just did not think to include it when describing the September 12 incident. It is not unreasonable to believe that he would not remember every detail of the September 12 incident when he was interviewed four (4) months after it occurred. And the evidence did not establish who destroyed the photos. Officer Black and Leah each stated the other did so, and the Department never conclusively determined who did it. Moreover, Officer Black was not given any notice that he would be expected to discuss the details of the September 12 event at the time of his interview and, as his January 16, 2020 interview reflects, he initially believed the pictures were destroyed earlier.

Officer Black also was sustained for being dishonest about the October 1, 2019 incident because he allegedly (1) failed to relay all the details of the incident to Sgt. Driscoll during their brief conversation; (2) failed to mention that he swapped the mattresses or broke the door in his “first recitation” of the events during the December 18 IA interview; (3) failed to get the sequence of events correct during that IA interview; (4) mitigated his true culpability in the manner in which he “pushed” his wife; (5) failed to mention that he broke his wife’s cellphone years ago; and (6) was not forthcoming because he could not provide specific occasions when he may have “pushed” or “pinned” his wife up against a wall in self-defense. At the hearing, the Department put forth absolutely no evidence, besides speculation and conjecture, that Officer Black was dishonest or intentionally misleading regarding any of these allegations. The evidence does not show that Officer Black was dishonest, in any capacity, regarding the October 1 incident. The Department’s allegation that Officer Black violated the honesty policy by omitting pertinent details of the October 1 incident in the account that he provided Sgt. Driscoll while they waited for IA to arrive in the office is preposterous. First, Officer Black was under a direct order and this conversation occurred only because they were sitting in the office waiting for IA to arrive. Sgt. Driscoll did not ask him to convey or otherwise discuss the details of what occurred. Officer Black simply gave him a brief synopsis or outline of the incident and Sgt. Driscoll did not question Officer Black about the incident. Moreover, they have known each other for many years and are personal friends outside of work. They both testified that their conversation that day in the office that day was in a friend capacity, rather than a supervisor/subordinate capacity. Thus, Officer Black was not attempting to conceal or hide any details of the October 1 incident but simply having a brief, casual conversation with a friend. Sgt. Driscoll informed IA during his interview, and testified at the hearing, that he believed Officer Black was being honest and that he has no reason to believe he was intentionally trying to mislead or omit pertinent information during the course of their conversation. Officer Black also was sustained for honesty for his alleged failure to discuss the mattresses and doors during

his “first recitation” of the events during the December 18, 2019 IA interview. However, the arbitrary nature of this allegation is evident because he did discuss both the door and the mattresses shortly after giving his “first recitation” of the events. In fact, according to the transcript of Officer Black’s December 18 interview, his “first recitation” of the October 1st incident ends on line 1326 and then he volunteers the information about breaking the door on line 1351, less than a minute and a half later. And later in the interview Officer Black discussed, in great detail, how and why he moved the mattresses. Although Officer Black did not provide the details about the door and the mattresses in his “first recitation” of the events, it was not any attempt to conceal or mitigate his actions: He simply made the mistake of answering the IA questions focusing solely on the family violence and assault allegations and not the peripheral actions that occurred throughout the incident. In Officer Black’s mind, breaking the door and moving the mattresses were not pertinent details to whether or not he physically assaulted his wife. There are other reasons this occurred. Officer Black is a man of few words by nature, and coupled with being nervous about going into an IA interview and taking the advice of his representatives to be concise and very literal, Officer Black did not perceive that he needed to describe every detail of an embarrassing incident as soon as he sat down for an IA interview. The evidence fails to demonstrate a valid reason to accuse, let alone sustain Officer Black on this allegation of dishonesty.

The Department’s allegation that Officer Black was intentionally being dishonest or misleading by failing to address breaking the door and moving the mattresses, at any point in time, defies logic and common sense as he was provided the opportunity to review the October 8, 2019 Buda PD interview he gave to Detective Fleming as well as pictures of the broken door and mattresses prior to his IA interview on December 18 and confirmed to IA that he reviewed the video prior to starting his interview. Officer Black knew that he willingly provided the information about the door and the mattresses during that Buda PD interview and also knew that IA knew about these actions prior to answering any questions. It makes no sense that he would attempt to conceal or lie about details that he knew the Department already had learned about. Officer Black also was sustained on honesty for mistaking or forgetting the sequence of events on October 1 but he already had informed Buda PD during his October 8 interview that he broke the door and swapped the mattresses, and that his wife then initiated physical contact with him. During his first IA interview on December 18 he stated that he broke the door, his wife initiated contact with him, and then he swapped the mattresses. This distinction or discrepancy as to when the mattresses were swapped is minor in nature, so it is not unreasonable to believe that Officer Black could forget or mix up a few details during his December 18th IA interview. His October 8 BPD interview with

Detective Fleming occurred only a week after the incident, when the details were fresh on his mind. An officer cannot be expected to remember every tiny little detail of an incident that occurred months prior, especially a detail with little, to no, significance, such as whether the mattresses were moved before or after Leah made contact with Officer Black. The Department also argues Officer Black was dishonest because he minimized his “true culpability” in the October 1 incident when he explained that he “pushed” his wife in a controlled manner. However, Officer Black did not minimize his true culpability because he has always maintained that he did not “push” or “shove” his wife in an aggressive or forceful manner. This alleged honesty violation is based wholly on the fact that IA and Chief Manley came to a predetermined conclusion that Officer Black “pushed” his wife up against a wall and nothing short of Officer Black using the word “push” to describe it would have satisfied the Department. As Officer Black testified, he puts his arms out to stop his wife’s advance toward him and simply created distance between them rather than pushing or shoving her. Significantly, Leah testified that she could barely remember the sequence of events and that what she believed was the sequence of events was correct. As Officer Black attempted to explain, he did push his wife’s hands and arms down when she was attempting to touch him and this is consistent with what he told the Buda PD Detective on October 8 as well as during both IA interviews (December 18 and January 16). Throughout the course of the investigation, in both of his IA interviews and during his DRH, Officer Black explained that he did not want to use the word “push” to describe his actions because a “push” is usually associated with a violent or aggressive shove and that is not the action that he took that evening or the perception that he wanted portrayed. During his second IA interview he agreed that he “pushed” his wife because, as he testified, after being asked the same question repeatedly throughout that interview it “was pretty obvious” that IA wanted him to use that word to describe his actions, so he did so despite trying to describe what actually occurred. Lt. Davis relied heavily on the video footage of the October 8 Buda PD interview to support the assertion that Officer Black “pushed” his wife on October 1, claiming that Officer Black was making a “pushing” movement with his hands while he was describing this incident to the Buda PD Detective. The video does look like Officer Black was making push-like motions but he expressly informed IA he talks with his hands and he expressly explained all of his hand gestures on the video and how they relate to what he was articulating. At the hearing, while reviewing the video of the BPD interview, Lt. Davis admitted that Officer Black was making the same “pushing” hand motions even when he was no longer talking about “pushing” or making physical contact with his wife. However, he attempted to justify that Officer Black was being dishonest about a “push” occurring based on the significant difference in size between

Officer Black and his wife, and that she might have interpreted Officer Black's actions as a "push". This speculation is wholly irrelevant. In essence, Officer Black only agreed that his actions on October 1, 2019 amounted to a "push" because of Lt. Davis' insistence that he do so, but he still explained the "push" as a controlled movement to physically redirect her and create distance between them. Officer Black has consistently conveyed that there was contact between him and his wife that night but he and the Department have different interpretations of the word "push." This does not mean Officer Black was being dishonest about his actions on October 1 or that he was attempting to mitigate "culpability." Moreover, his failure to mention the cellphone incident was not dishonest. He simply did not recall that he had broken his wife's cellphone several years earlier until he was reminded of the incident. Officer Black had no reason to volunteer information about the broken cellphone, as it was completely unrelated to the October 1, or even the September 12, incident. Officer Black would have no reason to attempt to conceal the broken cellphone because, prior to being reminded about the cellphone, he voluntarily admitted that he had broken things in the house when he was angry and, when reminded specifically of the cellphone, he admitted that had occurred. At most a few seconds elapsed between when he was asked about destroying property and when he admitted he did break the cellphone.

Officer Black also was alleged to have violated the honesty policy because he did not remember specific instances of pushing or pinning his wife against a wall, a topic that came up due to a significant discrepancy in the transcript in the Buda PD transcript which erroneously stated that Officer Black "remembered" pushing his wife up against the wall. During the first IA interview, on December 18, Lt. Davis highlighted the mistake. Although Officer Black continued to deny that he pushed his wife up against the wall, Lt. Davis and Sgt. Torres insisted that he told Buda PD he had done so, and demanded a further explanation for the discrepancy. The transcript of that interview reflects Officer Black's confusion during this entire line of questioning, but he consistently stated he did not push his wife up against the wall. He then was confronted with a transcript that purports to show that he told the Buda PD Detective a few months earlier that he remembered pushing his wife up against a wall. Officer Black's inability to articulate a specific date that he may have pushed or pinned his wife up against the wall was honest and he refused to make up a date or incident in which such an action allegedly occurred. Despite being thoroughly confused, Officer Black conceded perhaps it occurred at some point in time because the transcript of the Buda PD interview stated he said he remembered doing this. Discovering that the transcript incorrectly stated he "remembered" it should have dispelled any concerns for IA regarding this allegation but,

sadly, it did not. But for the transcript discrepancy, this allegation of dishonesty would have never even occurred.

The City also claims that Officer Black violated Policy 902.4 because he was not forthcoming during his IA interviews. This allegation is based on the same, or similar, issues supporting its honesty allegations. However, the evidence fails to show Officer Black intentionally failed to cooperate with IA or to be forthcoming. Instead, he did his best under the circumstances to be as forthcoming as possible and to cooperate fully although there were multiple factors that may have indicated otherwise. An IA interview is a high pressure setting and the nature of this particular investigation was quite difficult for him to convey, especially because he is a private person and having to relay information about his personal life and marital problems was particularly embarrassing. Officer Black is not an exceptionally talkative person normally, as confirmed by witnesses who explained he is not a man of many words. Additionally, Officer Black was interpreting most of the questions asked of him far too narrowly, as he admitted in his second IA interview, and he forgot some details or honestly did not think of them at the time. While the incidents at issue may be significant for most people, they unfortunately were fairly common occurrences in the Blacks' marriage at the time. He did a poor job of answering questions and explaining himself during his IA interviews, and admitted this during his interviews and at the Hearing, even acknowledging he understood why Lt. Davis and Sgt. Torres would feel like he was not being forthcoming at times or get frustrated with him. Nonetheless, this does not mean he was intentionally not being forthcoming or failing to cooperate with IA. The City has failed to prove by a preponderance of the evidence that Officer Black failed to cooperate with IA.

The City also claims that Officer Black violated Policy 908.4 – Reporting Procedure by failing to report the September 12, 2019 incident to his supervisor. While true that Officer Black did not report the September 12 incident to his supervisor, he did not violate Department policy since he was not required to report this specific incident. At the hearing Officer Black testified that he believed that it was not a reportable offense since it was a minor call for service where he was not considered a subject and, thus, did not have to report it. Lt. Alexander testified that he believes the best practice would have been for Officer Black to report the incident but, based on the way the policy is written, he understood why Officer Black did not. And if this had been a reportable offense, Officer Black's chain of command would have addressed it further because Sgt. Driscoll reviewed the incident shortly after it occurred and spoke with Buda PD about it. All of this information was relayed to Commander Mason, who ultimately made the decision that there was

no reportable offense. Nevertheless, the Department decided months later it was a policy violation but that is not proven by a preponderance of the evidence.

The indefinite suspension decision was based on an inadequate and faulty Internal Affairs investigation. The City of Austin is subject to Chapter 143 of the Texas Local Government Code, as well as a Meet and Confer Agreement that provides additional protections to police officers, particularly throughout an administrative investigation. Article 17, Section 4 of the Meet and Confer Agreement requires the Department to put officers on notice of alleged misconduct and allow them the opportunity to prepare to address such alleged misconduct. It provides: "Not less than forty eight (48) hours before the Officer who is the subject of an investigation provides a statement to an investigator, the Officer shall be provided a copy of the complaint(s). . . . In the event that the complaint(s) does not contain all allegations of misconduct under investigation, not less than forty eight (48) hours before the investigator begins the initial oral or written interrogation of the Officer, the investigator must inform the Officer in writing of the additional allegations being investigated." The Department failed to comply with these requirements for both of the IA interviews which not only is a blatant violation of Officer Black's contractual rights but also put him at a severe disadvantage to adequately defend himself against these allegations and also contributed to IA's perception that Officer Black was not being forthcoming with certain details of past incidents.

All of the administrative documents provided prior to his December 18 interview, including the internal complaint and the Notice of Allegations, only identified the October 1 incident as the alleged misconduct being investigated. Thus, it is no surprise he could not recollect and articulate all details of the September 12 incident. At the hearing, Lt. Davis admitted that he was investigating the September 12 incident, had planned on discussing it during the first interview and spent at least half of the interview focused on it, so the Notice of Allegations should have included the September 12 incident. Had Officer Black known that, too, was being investigated, he would have better remembered and explained the details and his answers would not have seemed evasive or deceptive. Article 17, Section 4(d) of the Meet and Confer is intended to provide the subject officer the opportunity to reflect on any inconsistencies and prepare for the interview. Officer Black's rights were violated as relates to the January 16 IA interview because the Notice of Allegations and internal complaint provided to him only mentioned possible misleading statements about whether or how he pushed his wife. There was no mention of alleged dishonesty or inconsistent information as it relates to the sequence of events on October 1, the wedding pictures, or other insignificant details which lead to Officer Black being sustained on in violation of the honesty policy. Lt. Davis admitted at the hearing that he knew about all of these things prior to the

January 16, 2020 interview but he chose not to inform Officer Black which prevented him being better prepared to answer and could have avoided a lot of the confusion. Although Lt. Davis denied violating Officer Black's contractual rights, Chief Manley agreed that there likely are ways that a violation of an officer's contractual rights could impact discipline and admitted that if IA knew about the physical contact and the details of the September 12 incident prior to the first IA interview, then they likely should have included that in the Notice of Allegations. Although this contractual violation does not absolve Officer Black of all of these allegations of misconduct, it should be considered based on the intent behind these provisions. Additionally, Article 18 Section 8 of the Meet and Confer provides that if the Department or any investigator violates any of the provisions of this Article or of Section 143.312 while conducting an investigation, the violation may be considered in the disciplinary appeal hearing if the violation substantially impaired the Officer's ability to defend against the allegations of misconduct. Had these violations not occurred, there is a great likelihood that Officer Black would not have appeared to be misleading or evasive or not cooperating. Thus, these violations impacted Officer Black's ability to defend himself.

The Department also disciplined Officer Black in violation of the 180-day rule as it relates to allegedly being dishonest with the Buda Police Department. In footnote 1 of the discipline memorandum, the Department alleges that even though the indefinite suspension is effective more than 180 days after the September 12, 2019 incident, it involves alleged criminal activity and therefore complies with Article 18, Section (a)(2). This is a gross misinterpretation of the contract. There was no "alleged criminal activity" related to that incident; no crime occurred and Officer Black was not accused of or investigated for any crime. Indeed, the Department did not even conclusively find that Officer Black had committed alleged family violence on September 12 despite the fact that they sustained him on alleged family violence for the October 1 incident. Even if Officer Black was allegedly dishonest to the responding Buda police officers on September 12 he was not indefinitely suspended until March 24, 2020, which is more than 180 days later.

The main reason why IA believed Officer Black was being deceptive throughout this investigation is based on a single word missing from the Buda PD transcripts. While Officer Black still made mistakes during the IA interviews and did a poor job of articulating his positions, he likely would not have been accused of dishonesty and indefinitely suspended but for this serious error. Lt. Davis admitted at the hearing that this transcript discrepancy was a major reason he informed the chain of command about inconsistencies during Officer Black's first interview. Lt. Davis believed Officer Black had pushed his wife against the wall because that is what the transcript stated. The subsequent NOA issued to on January 9, 2020 includes an exact quote of the

transcript discrepancy and all of the cited alleged inconsistencies relate to whether he pushed his wife and what he told Buda PD. Additionally, a large portion of the first interview consisted of dozens of adversarial questions based on the transcript error, all of which led to Officer Black's confusion and pressured him into providing different answers. But for the transcript error, many of those questions would not have been asked and Officer Black's answers would not have seemed evasive or deceptive. Lt. Davis admitted that, based on the transcript, he expected Officer Black to admit he had pushed his wife. As a result, Lt. Davis' interview tactics changed to more accusatory and confrontational because he believed Officer Black was lying. He stated he asked Officer Black 20-25 times whether he pushed his wife up against the wall, yet he refused to accept his answer even though Officer Black tried to explain his confusion. At one point, he even cut Officer Black off mid-sentence and said, "I'm terrible at words games. . . . I'm terrible at 'em, that's why I don't play 'em, but [in the Buda PD transcript] you said, 'I remember pushing her against the wall.'" He refused to accept any answer or explanation from Officer Black short of him admitting that he pushed his wife, since that is what the BPD transcript reflected. At another point during one of Officer Black's explanations to this same question, Lt. Davis responded: "I mean, what are we talkin' about? It was pretty clear . . . about what you stated right here, I mean, I'm reading – it says, 'I – I just grabbed her and I stopped her and I remember pushin' her up against the wall.' I mean, that's pretty clear – clear language in English, you know, to me when I read that." He and the Department refused to acknowledge the significance of this transcript discrepancy and how it drastically affected the outcome of this investigation and subsequent discipline, but other witnesses recognized the contrary. IA Investigator Sgt. Torres acknowledged how significant the Buda PD transcript was during the December 18 interview and agreed that the transcript error was "a big deal" that explains some of the alleged dishonesty and evasive answers. Sgt. Ray referred to the transcript discrepancy as a "monumental flaw" and equated it to "a piece of the puzzle being removed without his knowledge." Lt. Alexander testified that he believed the transcript discrepancy made a difference as to what occurred in the first interview because it appeared to have confused Officer Black, and that is what led to the series of questions that began to question his candor. Most compelling is Officer Black's own testimony about how confused he was and how impossible it felt for him to provide an answer that did not appear evasive or deceptive because the truth he was telling contradicted what he allegedly told Buda PD. The error in the transcript fundamentally altered the dynamics of this interview and it would be remarkably unfair for Officer Black to lose his job based on an administrative mistake like this, which IA should have caught. These errors influenced the investigation to Officer Black's detriment and resulted in subjective findings.

To establish just cause, the City must prove it conducted a thorough investigation into the incident and the investigation should, at minimum, include examining all investigatory leads and conducting personal interviews with witnesses. A conscious disregard of important witness statements and/or evidence would constitute an inadequate and less than thorough investigation. As Chief Manley recognized, the role of the IA investigator is to uncover the truth regarding the allegations against the subject officer, not to frame the facts in a manner that best fits a predetermined conclusion. The investigation conducted into the allegations against Officer Black woefully failed to meet these standards. IA failed to interview pertinent and relevant witnesses, instead conducting a one-sided investigation to support a pre-determined conclusion that he committed family violence against his wife. This deprived Officer Black of due process.

IA ignored the fact that every person -- other than Officer Black -- who was interviewed during the investigation provided glaring discrepancies and inconsistent information. Lt. Davis acknowledged that Leah gave about a half dozen different versions of what happened. Her friends and family also gave different accounts of what allegedly occurred on both incident dates because Leah also had provided conflicting accounts to them. IA focused only on "discrepancies" perceived in Officer Black's version of the events rather than informing the chain of command of the other witnesses' unreliable testimony and conflicting accounts. A major flaw was IA's failure to interview vital witnesses, Deanna Black and Ed Black, Officer Black's sister and father, although IA was given their contact information. Ed Black was present the day after the October 1 incident and had first-hand knowledge about Leah's physical condition that day and would have told IA he did not see any bruises on her and she did not complain of any pain or state Officer Black had pushed her. IA also failed to interview Deanna Black although Leah Black informed IA three (3) different times that Deanna was the first, and only, person she actually spoke with immediately after the October 1 incident and to whom she had relayed the details of the incident. Lt. Black testified he believed that Ed and Deanna Black might be "too sympathetic to Officer Black's account" but apparently had no concerns that Leah's sister, Michelle, or friends would be "too sympathetic" to Leah's account. As Chief Manley recognized, failing to interview a witness that potentially had vital or pertinent information could change the outcome of his decision related to discipline because an administrative investigation should be conducted in an impartial manner and never with a predetermined conclusion. The investigation was one-sided in nature and its objective was to support a predetermined conclusion that Officer Black committed family violence. All of the information IA obtained came from Leah's side, and almost all of that was second and third hand information, based on what Leah had told them and what they had shared with each other. Thus,

the investigation relied on subjective and biased information and was fundamentally unfair and one-sided. IA made no effort to obtain anything from Buda PD's criminal investigation or to collect all of the information that was readily available regarding the October 1 incident. Officer Black's attorney provided IA Hays County's declination letter and the report written by Detective Fleming at BPD. Indeed, Officer Black's first IA interview was conducted before IA had reviewed or even attempted to obtain the BPD report that had been completed on October 10 and was readily available. IA also failed to obtain other available documentary evidence, such as text messages Leah sent her father the morning of October 1 that discussed the incident but said nothing about Officer Black throwing her "up against a wall." Lt. Davis testified this would have been good information to have in the investigation. IA investigators cannot be expected to uncover every single piece of information or evidence related to a specific act of misconduct, but they should attempt to do so. However, it seems like IA neglectfully or intentionally failed to do that.

The IA investigators employed coercive and inappropriate Interview tactics to elicit information that would support their predetermined conclusion that Officer Black committed family violence and then was subsequently dishonest about it. Leah Black testified that she felt pressured to speak with IA and that they did not explain her rights or options. She made clear she did not know how she sustained the bruise underneath her arm but testified that she felt like Lt. Davis was trying to force her to say that Officer Black caused it. She described her interviews as an "interrogation" and felt IA was trying to "get something out of her" or thought she was hiding something. IA investigators allowed Leah's parents to be present during the interview without considering their presence may have influenced how Leah answered questions. They also encouraged her to speculate and fill in the blanks when she stated she did not remember what had occurred. Officer Black was subjected to these same leading and coercive tactics. It is clear that IA already had decided that Officer Black "pushed" Leah on October 1 and would accept no explanation that did not include the word "push." This persisted throughout both interviews and Officer Black explained dozens of times the action that he took on October 1 was putting his hands on Leah to stop her and so she would go backwards. During the second interview, Officer Black finally conceded that it was a "push" because that was the only word IA would accept. Leading and coercive questions and statements have no place in an impartial investigation. IA spent hours manipulating the facts and only seeking information that supported its foregone conclusion. The IA Summary presented was not impartial or neutral. While the IA Summary was not the only document considered by the chain of command during their deliberations, it likely is the most important document in the file. The manner in which the IA Summary was written supports IA's

predetermined conclusion that Officer Black committed family violence and was dishonest. It failed to point out the inconsistencies in all of the accounts gathered and does not mention that all of the witnesses had talked to each other and shared information amongst themselves, which Chief Manley testified he was not aware had occurred. The IA Summary highlights only what put Officer Black in a negative light and supports its predetermined conclusions. The most concerning aspect of the IA Summary is that the transcript discrepancy is quoted, word-for-word, within the document as if it is part of the facts, but fails to quote the audio interview of Officer Black saying he did NOT remember pushing Leah, instead simply directing the reader to “please review audio-video at 9:39:35.” IA’s failure to discover the discrepancy itself is an administrative error. The Department has exhibited a pattern and practice of conducting inadequate IA investigations and subjectively and wrongfully sustaining on allegations of misconduct. IA’s failure to be impartial and objective has been recognized by another Hearing Examiner in at least two (2) other cases, Pfaff and Petraitis. When disciplining an officer, particularly for allegations as serious as dishonesty or family violence, Chief Manley should rely on more than subjective opinions as to whether the misconduct did occur. There is no conclusive proof or evidence that the alleged violations actually occurred. Chief Manley disregarded the recommendations of Officer Black’s entire direct chain of command and, instead, chose to believe an intoxicated individual, ignored Detective Fleming’s assessment that Officer Black was truthful and overlooked fundamental investigative flaws that were pointed out to him at the DRH.

The indefinite suspension decision was excessive and not consistent with progressive discipline. Officer Black was treated differently than other officers who have been similarly situated. In the past, Chief Manley has sustained officers, whose alleged untruthfulness conduct was far more egregious than Officer Black’s, on lesser charges to avoid indefinitely suspending them. Alejandro Torres and Blaine Eiben were proven to be dishonest, but were ultimately only sustained on Neglect of Duty violations, Policy 900.4.3(i) – Neglect of Duty. The Department’s disciplinary matrix reflects that a first occurrence for Neglect of Duty (misleading statements) does not automatically call for indefinite suspension. Chief Manley differentiated between these cases based on his subjective belief that Officer Black did not appropriately admit to misleading and mitigating, although Officer Black was never intentionally and directly untruthful. Lt. Pruitt and Lt. Alexander recommended sustaining on Neglect of Duty, not Dishonesty, and giving Officer Black 45 to 90 days off and sending him back to patrol to send a message to the Department that Officers need to pay attention to their wording and be extremely forthcoming in IA.

Officer Black was denied progressive discipline or any corrective action under the “just cause” standard. He had no substantive prior discipline. Officer Black’s personnel file reflects that throughout the entirety of his 11-year career with APD, he has never been disciplined outside of a few oral and written reprimands for vehicle operation infractions. He also has received plenty of merits and commendations over the years, and most of his annual performance reviews show that his performance exceeded expectations. Officer Black guarantees that similar issues will never again occur. He fully understands and has taken full accountability for his actions and behaviors and recognizes how his personal life could potentially shed a negative light on the Department. Officer Black testified about the steps he personally has taken to better himself including, but not limited to, anger management classes and relationship counseling, which he and Leah take individually and together. They have cut out toxic individuals who only caused strife and division in their marriage and are learning to communicate in a healthy manner. Leah has recognized that her alcohol use was a major problem that contributed heavily to their problems and no longer uses alcohol as a crutch. Officer Black admits he made many mistakes through the course of his marriage and in this administrative investigation, but guarantees he has learned from those mistakes, is making changes for the better and that no similar incidents will ever happen again.

Officer Black respectfully requests that his appeal/grievance be sustained in all respects, that he be reinstated to his job as a Police Officer with the Austin Police Department and that his records show no break in service as a peace officer with the Austin Police Department. He also requests he be awarded full back pay, vacation time, sick time and all other attendant benefits and emoluments of his position as a Police Officer that he would have enjoyed had he not been terminated, including health benefits; and that the City be ordered to remove from personnel files with the City of Austin and the Austin Police Department, including files in the Internal Affairs Division (IAD), all documents relating in any manner to the incident giving rise to this arbitration. The City also should be ordered to submit the required documentation to TCOLE showing that Officer Black has had continuous service from March 2020 with no break in service. Lastly, Officer Black requests all other relief, at law or equity, to which he has shown himself to be justly entitled. Should the Hearing Examiner determine there were violations of Civil Service Rules and/or Departmental Policy, and that some discipline is warranted, the preponderance of the evidence failed to show Officer Black deserved an indefinite suspension and a more reasonable and fair discipline should be issued based on the facts as presented in this hearing.

## **OPINION**

### **FACTS**

The preponderance of the credible evidence demonstrates the following:

The Appellant had worked for the Austin Police Department (“APD”) for approximately twelve (12) years at the time of the events leading to his indefinite suspension and was a Senior Member and Sniper for the SWAT team. Officer Black had no previous discipline other than a few reprimands for vehicle operation infractions or any experience with Internal Affairs (“IA”). Officer Black described himself as a private, reserved person who generally uses “fewer words” than others. This was confirmed by his wife and father, as well as those witnesses who worked with him, including Sgt. Driscoll, who described Officer Black as stoic, reserved and quiet and as someone who is “better in one on one situations.” Sgt. Driscoll believes Officer Black is honest and testified that he has no reason to think he was intentionally trying to mislead or omit pertinent information during the course of their conversation.

Officer Black and his wife, Leah Trogan Black (“Leah”) had been together for about seven (7) years and married for four (4) as of the fall of 2019. Their marriage was in terrible condition and they were on the brink of divorcing. The evidence suggested that their marital problems were due, in large part, to Officer Black’s failure to communicate with his wife, who admittedly sought solace in alcohol consumption and seemingly constant telephone and text communications with her friends and family which, she admits, often were exaggerated to garner sympathy. Their marital strife had been ongoing for some time and the Blacks’ mutual mistreatment of each other had become “normal.” By the time of the events underlying issuance of the Indefinite Suspension, the Blacks’ marriage had reached “rock bottom” and they were on the brink of divorce. All of the charges against Officer Black are based on his conduct during interactions with his wife on September 12 and October 1, 2019 and his communications, or lack thereof, with the Buda PD, IA and Chief Manley and others.

The chronology of events underlying Officer Black’s indefinite suspension is not in dispute. It is for the most part accurately stated in the Suspension Letter as well as in the Parties’ positions, which are set forth at length due to the thoroughness of their post-Hearing briefs. The factual bases for the Hearing Examiner’s decision will be discussed while addressing the Parties’ arguments. However, the evidence demonstrated that some of the more significant “facts” cited in the Suspension Letter, on which Chief Manley relied in determining Officer Black should be indefinitely suspended, were misconstrued or not proven by credible evidence.

## ARGUMENTS

### Family Violence and Honesty Allegations

The most egregious misconduct<sup>9</sup> charged against Officer Black – Honesty and Family Violence – are based on allegations that he physically abused his wife and was not truthful when describing what had occurred to the IA investigators and others. Some of Leah Black's actions -- such as her failure to cooperate with the BPD investigation, her reluctance to talk to IA and her comment that her husband "was in enough heat about his job" as well as her testimony denying<sup>10</sup> that any physical abuse occurred could be construed as being consistent with a victim of family violence. However, her conduct also is consistent with someone who is attempting to rectify a situation that, in her words, snowballed out of control based on exaggerated and misleading statements she made to others and at times when she admittedly was intoxicated. The evidence persuades the undersigned that, but for the sustained Family Violence and Honesty charges, which are so interrelated as to be virtually inseparable, Officer Black would not have been indefinitely suspended. However, based on the totality of the credible evidence presented, the undersigned must conclude that the truth of the Family Violence charge has not been proven.

It is undisputed that Bryan and Leah Black mistreated each other verbally and emotionally, particularly at and shortly before the events underlying this discipline. Their mutual abuse included cursing, name-calling, belittling comments and other inappropriate conduct toward each other. Officer Black's alleged misconduct came to the Department's attention when Leah left a voicemail message for her sister<sup>11</sup> stating that "Bryan threw me up against the wall" during an incident that occurred on or about October 1. However, the credible evidence failed to prove that Officer Black

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<sup>9</sup> This is not intended to suggest that sustained violations of other policies, including Policies 902.4.1, Cooperating with Investigators and 908.4 – Reporting Procedure, do not constitute serious misconduct. Indeed, a first time offense of refusing to cooperate with IA can result in indefinite suspension per the APD Matrix. In the instant matter, however, the failure to cooperate charge was based in part on IA's reliance upon certain "facts" that, as will be discussed herein, were not proven by the credible evidence and Officer Black's seemingly evasive or misleading responses when being questioned by IA.

<sup>10</sup> The undersigned knows that victims of domestic abuse often deny that the abuse occurred. Perhaps the City foresaw this happening during the Hearing and argues that her "self-deprecating recantation testimony" should be given no weight, noting that it is new evidence not previously disclosed to the City. The City's argument would be persuasive if reliable and persuasive evidence had indicated that Officer Black in fact had physically assaulted his wife. As will be addressed, there was no such evidence.

<sup>11</sup> The voicemail stated what it stated. However, Leah's sister, Michelle – who lived in Phoenix and had no firsthand knowledge of what occurred other than that she received the voicemail message -- provided other information about Officer Black that proved to be false and was extremely prejudicial. For example, she claimed he had installed cameras "all over the house" because he was "paranoid" and "vindictive." Although she was "adamant" he did this, IA's investigation showed that the only camera installed at the Black home was a Ring or similar camera doorbell. This suggests either that Leah grossly misrepresented Officer Black's conduct what she spoke with her sister, or that Michelle gave IA incorrect information because she imagined danger that did not exist.

physically “threw” his wife against a wall, or anywhere else, on October 1 or at any other time. Officer Black did tell Leah, who was intoxicated, not to get into their bed, and he did pick her up while she was sleeping or passed out; tossed or dropped her on the guest bedroom bed; broke the French door(s) to the bedroom after Leah banged on or kicked it open; and rearranged the mattresses.<sup>12</sup> Their behavior was inappropriate and childish. However, the evidence failed to prove Officer Black’s actions constituted an assault under Texas Penal Code 22.01(a)(1) or Family Violence as defined by Section 71.004, as cited in the Suspension Letter, as it did not demonstrate that Officer Black threw Leah against a wall<sup>13</sup> or otherwise physically assault her. Had he done so, some injury other than a small bruise on the inner part of her upper right arm, which IA noted and to which Chief Manley referred, should have been visible. The undersigned does not believe that a bruise on the inside of someone’s arm would result from being “thrown against a wall” because other bruising and, possibly, injury such If the inside of Leah’s upper arm made contact with a wall one would expect some other injury – such as a sprained arm or dislocated shoulder -- to be present as well as significant bruising. Despite IA’s belief that it could have resulted from being “grabbed” and held tightly that seems improbable because, had that occurred, corresponding bruises on the fronts and sides of her arms also would be apparent. Leah repeatedly told IA and still maintains she does not know how she acquired the bruise on the inside of her upper right arm, suggesting it also could have come from working out, or falling down or running into something when she was intoxicated<sup>14</sup> or some other reason.

Moreover, Leah’s multiple, and often conflicting, descriptions<sup>15</sup> of what occurred are not supported by the preponderance of credible evidence. The evidence demonstrated that, for some time prior to the underlying events, she habitually telephoned and texted friends and family members to complain about Officer Black and the problems in their marriage and that she often did so while intoxicated.<sup>16</sup> She admitted that she did this because she was seeking attention and

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<sup>12</sup> This exact sequence may not be accurate, as both of the Blacks’ descriptions of what occurred varied in some details that this Hearing Examiner considers of minor significance. Moreover, Officer Black did not deny the details of that incident, originally giving them to BPD Detective Fleming, although his recall of the sequence may not have been exact when he was questioned by IA several months later..

<sup>13</sup> Some of her communications at or about the time of the incident referred to being “thrown out of” the couple’s bedroom. The undersigned believes her reference to being “thrown out of” the bedroom meant that Officer Black picked her up and removed her from their bedroom, which he admitted doing.

<sup>14</sup> According to Leah, that was not an uncommon occurrence.

<sup>15</sup> The undersigned recognizes that a victim of domestic abuse may engage in this type of behavior but, in the absence of other probative evidence, the characterization of Leah as such a “victim” is speculation.

<sup>16</sup> While Chief Manley felt that Officer Black was attempting to mitigate his culpability, in part, by claiming that Leah was an “alcoholic” it is undisputed that she drank alcoholic beverages to excess on multiple occasions, if not daily, and that she often became so intoxicated she would bump into furniture, fall down and pass out. Although the evidence did not reflect that she has been diagnosed with alcoholism, it clearly demonstrated

sympathy. This calls into question the accuracy of the information provided to IA by Leah's family members and friends, who readily admitted they had no firsthand knowledge of the incidents IA investigated. Thus, the "facts" gathered by IA for the most part were not factual but rather a compilation of what Leah had told them and what they then discussed among themselves.

Chief Manley put great weight on Leah's voicemail to Michelle, which he considered her "initial outcry" of physical abuse. However, he did not have the opportunity to consider whether other information might have shown something different. Specifically, IA did not interview Ed Black (Officer Black's father) or sister, Deanna, both of whom could have shed light on the accuracy of Leah's claim about being thrown against a wall. IA assumed that Mr. Black and Deanna were being suggested as character witnesses but the evidence showed they could have offered significant information bearing on the alleged Family Violence. For example, Mr. Black testified he went to the Blacks' home the next morning and that, while Leah appeared "upset", she did not appear to be physically injured and she did not say she was bruised or in pain. And Deanna Black was the first person Leah spoke with following the incident. Thus, perhaps she received Leah's "initial outcry" and what Leah told her immediately after the incident may have been significant to clarify the "throwing" allegation and what caused the bruise on the inside of Leah's upper arm. The information Mr. Black and Deanna could have provided was not available for Chief Manley's consideration. However, it would have been relevant in determining whether Family Violence occurred and Leah's credibility, both of which significantly impacted the Honesty allegations against Officer Black. In this regard, Chief Manley testified that, in deciding on an indefinite suspension, he was concerned about Officer Black's honesty during his interaction with the Buda PD on September 12. Officer Black told the responding officers that nothing "physical" happened, and then told IA and Chief Manley that he had been honest with the Buda PD officers. Chief Manley disagreed, not only because he believed something "physical" had happened but also because of Officer Black's initial denial, then admission, that he had "pushed" his wife. Officer Black testified that he interpreted the Buda PD's reference to "anything physical" to mean that they were asking about any aggressive/violent actions. This was not entirely unreasonable, as shown by the testimony of various witnesses (including Lt. Alexander and Lt. Pruitt) and, at the time he said nothing "physical" had happened, Leah already had told the responding officers she and Officer Black had argued but nothing physical happened and they observed no visible marks on either of them. The Buda PD visit should have been reported, as Officer Black conceded during

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that she behaved as an alcoholic. As a result, the undersigned does not interpret Officer Black raising that issue as an attempt at mitigation but, instead, to explain the underlying events as well as his frustration and her self-described "foggy" perception of certain issues.

the DRH, and he recognized that, had he been the responding officer, he would have wanted to know about any physical contact, whether aggressive/violent or not. The City argues that Officer Black is a trained police officer and that he omitted or concealed that information from the Buda PD officers. Nevertheless, the evidence failed to prove that Officer Black engaged in any “physical” conduct that could be construed as assaultive and/or Family Violence. As to Chief Manley’s determination that Officer Black was dishonest concerning whether or not he pushed his wife, the totality of the credible evidence prevents the undersigned from concluding that the action Officer Black took to stop Leah from touching him constituted a “push” or other action within the purview of Texas Penal Code 22.01(a)(1) or Section 71.004. Officer Black testified, and had told IA and Chief Manley, that he did put his hands on Leah to create distance and prevent her from touching him after he told her to leave him alone. Based on the totality of the credible evidence, the undersigned is persuaded that this action was defensive in nature and not the type of aggressive and forceful “pushing” IA perceived during its investigation. Nevertheless, Officer Black did eventually agree with IA that he “pushed” Leah. However, that occurred after many, many pages of back and forth questioning<sup>17</sup> about the “push” with IA repeatedly making clear to Officer Black that, no matter how he described his actions, they still constituted a “push.” IA’s insistence on using the word “push” finally succeeded in Officer Black agreeing that the movement could be considered a “push” although he has steadfastly maintained it was not aggressive or violent. Although Officer Black did eventually agree with IA that a “push” had occurred, the evidence prevents the undersigned from concluding that he admitted pushing his wife in violation of the Penal Code or that his acceptance of IA’s characterization of his movements reflect dishonesty. Rather, it appears that Officer Black ultimately agreed to the term “push” -- despite its negative connotations, which he disputed at all times and even after agreeing to its use -- because IA would not accept what he was trying to explain. Significantly, however, IA’s relentless questioning about the “pushing” incident was based on an error in the transcript of Officer Black’s interview with Detective Fleming of the Buda PD transcript. However, the evidence prevents the undersigned from concluding that Officer Black’s agreement to the word “push” amounts to an admission of Family Violence or dishonesty, such as by attempting to change the substance of what he has consistently said. Moreover, the extensive IA interviews’ dialogue which preceded his eventual use of “push” is not reported in the IA Summary.<sup>18</sup> Had that information been considered, Chief

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<sup>17</sup> Lt. Davis testified he probably asked Officer Black at least 20-25 times during both interviews whether he had “pushed” his wife despite Officer Black’s repeated attempts to explain what he meant by “push.”

<sup>18</sup> The undersigned recognizes that the IA Summary is just that, and that IA is not and cannot be expected to include every utterance and other piece of information gathered during an investigation. She also recognizes

Manley may have determined that Officer Black's adoption of the word "push" was not an "admission" of Honesty and Family Violence allegations meriting indefinite suspension. The same can be said about Officer Black's "agreement" during the second IA interview that his recollection of the September 12 Incident was "vastly different" from what he had stated during his first IA interview. The transcript of the second interview reflects that he was asked if he agreed that "a part of (his) recollection to – that (he) just provided is – is, uh, vastly different than – than what you told us on December 18, 2019" and he responded, "yes, sir." (See January 16, 2020 Compelled Statement, lines 452-456). However, the first NOA did not identify the September 12 incident as a topic about which Officer Black would be questioned on December 18 so it is understandable that he might not have clearly recalled every detail of what had occurred several months earlier, or that he would be able to provide more specific detail after being advised by the second NOA that he would be questioned about what occurred on September 12. Under these circumstances, the undersigned concludes that Officer Black's response to the "vastly different" question fails to evidence deceit or intentional omission, as the Summary suggests.

But most significant, in this Hearing Examiner's opinion, is the fact that IA's focus on the "pushing" allegation -- which, in large part, resulted in Chief Manley's indefinite suspension decision based on Honesty and Family Violence -- arose due to the erroneous transcription of Officer Black's interview with Buda PD Detective Fleming. When questioned about the September 12 incident Officer Black was asked if he was holding his wife up against the wall. He responded no but said done that in the past

(w)hen she's come at me I've, like, grabbed her and, like – like, held her and said like, 'Stop, you know, stop tou-touching me. Like, stop grabbing me.

According to the transcript of the Buda PD interview, Officer Black also told Detective Fleming that on September 12 he had interrupted a telephone conversation Leah was having with a friend in which she was talking about being with another man and that:

((Leah) and I had –had an argument then, um, and that night, again, she – she, like, came at me and I – I just grabbed her and stopped her. **And I – I remember pushin' her up against the wall** (emphasis added).

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that the manner in which this case unfolded and the inaccurate information provided by Leah's friends and sister as well as the Buda PD transcript may have contributed to IA's unfavorable perception of Officer Black from the outset and influenced their assessment of the information gathered during the investigation and described in the Summary. Nevertheless, the undersigned rejects the Union's argument that the IA Investigators predetermined Officer Black's guilt and reported their findings in a manner intended to ensure he would be indefinitely suspended.

(See BPD Detective Fleming Interview at pages 10-11). However, the audio recording of the interview demonstrates that Officer Black had said he did **not** remember pushing Leah against the wall. IA had this faulty transcript prior to Officer Black's first compelled statement on December 18 and IA went into that interview erroneously believing that Officer Black had admitted pushing his wife into a wall on September 12. Although IA later learned of the transcription error, its reliance on this faulty information appears to have tainted its perception of Officer Black's honesty from the outset. IA's assumption that Officer Black was lying about "pushing" his wife is suggested by the repeated questioning contained in lines 2200 through 2540 of his first IA interview, during which that specific line of the Buda PD is identified repeatedly. Both IA Investigators expressed "confusion" about why Officer Black told Detective Fleming he remembered pushing Leah against the wall on September 12 if he was telling them he did not do that. Officer Black was not able to explain the mistake, as he was not aware of the error at that time. He testified he was confused and did not remember telling Detective Fleming any "pushing against the wall" had occurred on September 12. However, Officer Black also stated that since that is what appeared in the transcript, maybe he had said it. Regardless, his confused and inarticulate attempts to explain the discrepancy indicated to IA that he was outright lying and omitting/concealing information and this "admission" to Detective Fleming resulted in the second NOA being issued on January 9, 2020 which, rather than clarifying the situation, created additional discrepancies as Officer Black attempted to reconcile what had occurred with what he was unsuccessfully trying to explain. However, but for the mistaken transcript, it is unlikely that the second IA interview even would have been conducted. Although the Department acknowledges the transcript error, it does not appear to believe it is significant and Chief Manley testified he was aware of it. However, most of the witnesses disagree -- including IA Investigator Sgt. Torres who called it a "big deal" -- as does the undersigned, who concludes that the error in the Buda PD transcript gave IA an unfavorable impression of Officer Black's credibility from the outset. Officer Black's inability to immediately and definitively explain the Buda PD transcript error likely further contributed to a negative perception of his responses and demeanor from the very beginning.

In certain instances IA's Summary seems to omit information that, if considered in context, might have impacted Chief Manley's ultimate determination. For example, he was questioned about destroying his wife's cell phone which, IA believed, related to the "cycle of abuse." The question IA posed to Officer Black was whether he had destroyed any of her personal items or effects "out of frustration." He responded he did not recall doing so out of frustration but stated he had "broken things in the house" when he was angry. IA then asked if he had "broken anything

that has been given to her by you.” As Officer Black repeats that question<sup>19</sup>, Lt. Davis adds, “like a cell phone, have you ever smashed ...”. Before he even finishes that question Officer Black says yes, he had broken Leah’s cell phone and he describes what occurred at least a year earlier. See December 18 Interview, lines 492-543. While the undersigned assumes – and hopes -- that most people would recall destroying their spouse’s cell phone out of anger, someone involved in an on-going stormy<sup>20</sup> marital relationship such as the Blacks described might not have immediately remembered this particular incident. Officer Black had not been advised in the first NOA that he was being investigated about anything other than the events of “on or about September 30, 2019, (when) it was alleged you were involved in an act of family violence against your spouse, Leah Black.” IA also noted that Officer Black referred to the September 12 interaction as a “conversation” which, it believed, was intended to conceal/omit information from the Buda PD and IA. Officer Black explained that he referred to it as a “conversation” because it was not “a screamin’ and yellin’ match” but a “passionate” and serious talk during which he and his wife were “trying to convince the other to see our point of view.” See December 18 Interview, lines 1081-1098. While “conversation” was a poor choice of words to describe what was happening, the undersigned concludes that Officer Black was not trying to omit or conceal the nature of the couple’s interaction because the Buda PD report noted there had been an argument and that Leah had been crying. Moreover, during his interview with BPD Detective Fleming on October 8, Officer Black stated he and his wife had been arguing and gave details of both the September 12 and October 1 incidents. The undersigned finds it significant that Detective Fleming’s report reflects he had not detected any signs of deception and that Officer Black appeared to be telling the truth. Moreover, Officer Black knew, prior to his first IA interview, that IA had a copy of the Buda PD interview so he obviously knew any attempt to conceal that information or “omission” of details he already had given to Buda PD would be unsuccessful. He should have restated to IA everything he told the Buda PD, but his failure to do so could not have been intended to mislead IA.

For all of these reasons, the undersigned is unable to conclude that the truth of the Family Violence has been proven. The evidence indicates that the Honesty charges primarily are based

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<sup>19</sup> The undersigned does not know if Officer Black gave his wife the cell phone but his repetition of the question indicates he was thinking about what he had given her over the years and if he had broken those item(s) as he had admitted breaking items around the house.

<sup>20</sup> The Blacks’ testimony indicated their marriage had been “rocky” for about a year prior to the October 1 incident, by which time it had become “toxic.” However, the Blacks have since sought counseling and participate in other activities designed to improve their relationship. Moreover, Leah testified she has stopped abusing alcohol and has disassociated herself from at least one of her friends who, she felt, had encouraged and contributed to the strife in the Blacks’ marriage. They seem committed to healing and making their marriage work.

on Officer Black's responses when being interviewed about the allegations underlying the Family Violence charge. Indeed, the Suspension Letter specifies that "every reference to 'dishonesty' and 'untruthful' refers to Officer Black's attempt to conceal, divert and/or mitigate his true culpability, including intentionally so by omitting pertinent and material [information] from/with the BPD officers that responded on September 12, 2019, to Sgt. Driscoll<sup>21</sup>, to BPD Detective Fleming on October 8, 2019, and to Internal Affairs (IA) during his two (2) interviews (the first interview occurred on December 18, 2019, and the second interview occurred on January 16, 2020)." Although it also notes that this is not an exhaustive list of every act/statement by Officer Black that was considered an attempt to conceal, divert or mitigate his true culpability, it is clear that the Honesty charges are closely interwoven with and primarily dependent on a finding of Family Violence. While Officer Black may have seemed to be attempting to conceal, divert or mitigate his "true culpability" the offense on which this finding was based was not proven to have occurred. That is not to say that no misconduct occurred, however. But had Chief Manley been made aware of certain additional information, as discussed herein, he may have agreed with Officer Black's chain of command who did not believe Officer Black had engaged in Family Violence<sup>22</sup> or been intentionally dishonest, and who advocated for a finding of Neglect of Duty rather than Honesty.

#### Possibility of Lesser Discipline/Neglect of Duty

As Chief Manley testified, there is a single disciplinary outcome if he sustains someone for Honesty, and that is indefinite suspension:

So our discipline matrix has one outcome for honesty, and that is an indefinite suspension. So the real question is, is it honesty or is it the neglect of duty, and I, along with many members of the chain of command, felt like there was so many issues here that honesty was the appropriate, beginning on the, you know, the September 12th incident when the Buda police officer asked if there was anything physical, and then that led to in the Internal Affairs investigation when they asked Bryan if he was honest with the Buda police officer, and he said he was. Well, again, if I don't believe that that's an accurate account, then that's not honest. There were so many acts of mitigation throughout this, not admitting to so many portions of what happened that -- I'm sure that this got established on the record over the past two days, you don't want me to go through all of that, but all the efforts that Lieutenant Davis and, and Sergeant (Torres) had to, had to go to get the information from Bryan that he just didn't willingly provide. And we -- in the discipline hearing itself I felt like Officer Black, like Bryan was still mitigating. We, we had a lengthy conversation about whether, whether he pushed Leah or not,

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<sup>21</sup> The undersigned notes that Sgt. Driscoll testified he did not tell IA, and does not believe, that Officer Black was "dishonest" or "untruthful" in any of their communications, and further stated that none of his interactions with Officer Black concerning any facts involved herein constituted official discussions.

<sup>22</sup> Chief Gay, however, who has extensive experience in that area, was described by several witnesses as being particularly "vocal" in advocating for a Family Violence finding.

and I was left with him saying that, ultimately that he did and he didn't. And we found ourselves saying, Well, both can't be true.

Tr., page 895, lines 13 – page 896, line 18.

However, Chief Manley has the discretion to impose lesser discipline when Honesty violations are at issue per APD Policy 900.4.3 (i) which states:

Employees are expected to be truthful at all times in the performance of their duties. However, there may be instances where, initially, the employee has not been truthful; but, before the investigation is complete, the employee provides an accurate and detailed accounting of their true culpability in a situation, and accepts full responsibility for their actions. In those cases, the Chief may consider each case on a fact-specific basis.

There are sufficient facts present in the evidence that, had Chief Manley been aware, may have led him to sustain Officer Black for Neglect of Duty rather than Honesty. These include, but not limited to, the negative impact of the error in the Buda PD transcript; incomplete information about what Leah actually stated immediately after the October 1 incident as well as her demeanor and appearance the following day; IA's reliance on information provided by her friends and sister, none of whom "knew" anything other than what Leah had told them and what they discussed among themselves; Leah's excessive consumption of alcohol; and Officer Black's recognized communication deficiencies. The evidence demonstrated that Chief Manley paid careful attention to the information that had been furnished to him and gave this matter significant thought before reaching a decision. However, he recognized that if he had been provided incomplete or inaccurate information, his disciplinary decision could have been affected. The undersigned concludes that Chief Manley did not have the benefit of considering certain information, as discussed herein, and that this prevented him from fully considering whether lesser discipline was appropriate under the specific, proven facts of this matter. Had Chief Manley been advised of the missing information, he may have determined that Officer Black be sustained on Neglect of Duty which would not have mandated his Indefinite Suspension, particularly since Officer Black's chain of command, although agreeing that he had mitigated by not being forthright with IA, did not believe he was doing so intentionally.

#### Failure to Cooperate

Officer Black was charged, and sustained on, Failure to Cooperate due to his perceived omissions and concealment of information. This suggested his conduct was dishonest and an attempt to mitigate his culpability in the incidents by leaving out pertinent and material information,

giving evasive answers to IA's questions, and failing to be "forthcoming." The general perception of Officer Black's responses was that he forced IA investigators to "repeatedly drag information out of him." The undersigned agrees that his responses to questions posed by IA often were not definite or clear. His Austin Police Association (APA) Representative, Detective Ray, expressed concern about how Officer Black handled himself in the IA interviews and testified that when the Buda PD transcript<sup>23</sup> was brought up, even he suspected Officer Black might be dishonest. However, Detective Ray testified that in preparing Officer Black he advised him never to lie to IA and to use fewer words than he might because "rambling" comes across as dishonesty, to answer questions as they are asked, and to take responsibility for his conduct. The evidence showed that Officer Black generally uses few words anyway and his narrow focus on and attempt to answer the exact questions asked by IA seem to have contributed to the impression that he was not being forthcoming or accepting responsibility for his actions. While Detective Ray recognized that "anything is fair game" for IA, he felt he could have better prepared Officer Black to discuss the September 12 incident had the first NOA identified that as an area to be addressed. Detective Ray agreed that Officer Black "did very poorly" in the IA interviews and testified that he can see how his responses could lead to frustration and give the impression that Officer Black was withholding information. However, he attributed Officer Black's alleged omissions/concealment as failure to remember details, difficulty in discussing embarrassing information about a bad marriage, the high pressure setting of an IA interview and the "bad advice"<sup>24</sup> he had given to Officer Black to focus on the question asked and be "concise." The evidence demonstrated that, even though Officer Black's communication deficiencies were at the core of the Failure to Cooperate charge, he made IA's job much more difficult than it needed to be. As discussed above, his "admission" of giving "vastly different" accounts to IA (which is cited in the Suspension Letter in support of this charge), does not demonstrate deceit or intentional omission and, as to the cited example of him not giving information unless confronted by IA, the information sought had been given to the Buda PD officers or Detective Fleming and Officer Black knew IA had copies of the Buda PD documentation and had reviewed it in advance of the interviews. Regardless, the evidence demonstrated that Officer Black should have been more forthcoming with IA and, therefore, the truth of this charge was proven

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<sup>23</sup> Detective Ray stated that IA's emphasis of the Buda PD transcript gave him an uneasy feeling because it did not "jive" with what he remembered. He described the transcript error as "a pretty major discrepancy" regarding Officer Black's alleged admission of "pushing" but felt relief when he brought this "monumental flaw" to IA's attention.

<sup>24</sup> The undersigned does not believe Officer Black was given bad advice. Yet it is understandable how someone who generally is not talkative and having to discuss his private life – especially as embarrassing as remaining in a "toxic" marriage -- could misconstrue what he had been told.

although his failure to cooperate with IA was not due to dishonesty and he did not give a False Official Statement.

#### Failure to Report

It is undisputed that Officer Black failed to report the September 12 incident. The evidence showed that Sgt. Driscoll learned of it about a week later from another SWAT Officer and sought guidance from Commander Mason, who told him to talk to the Buda PD to determine if any policy violation(s) occurred. Sgt. Driscoll spoke with Detective Fleming, who sent him screenshots of the responding officers' report. Sgt. Driscoll relayed this information to Commander Mason and he directed Sgt. Driscoll to talk to Officer Black, to see if he was "okay" and whether he needed anything from the squad. Sgt. Driscoll, who testified he was not aware of any specific details of Officer Black's marital difficulties at that time, met with Officer Black at a coffee shop on September 19. Sgt. Driscoll asked Officer Black if everything in his marriage was okay because there had been some "chatter" among the other officers that there might be problems. According to Sgt. Driscoll, Officer Black was "very open" and told him his wife's issues with alcohol had led to a contentious relationship and that he was considering separation if the situation did not improve. Sgt. Driscoll advised Officer Black to protect himself and his job but they did not discuss the Buda PD visit to the Black home. Sgt. Driscoll reported to Commander Mason that Officer Black had a plan and that he had given Officer Black advice. Sgt. Driscoll had no other involvement but testified if he had felt there was more to the September 12 incident he would have reported it to his chain of command. Sgt. Driscoll learned of the October 1 incident when he was told to call Officer Black to the SWAT office because IA was going to interview him. He did not ask questions, but Officer Black gave a few details about what Sgt. Driscoll referred to as a "confrontation with his wife." The Union argues that Officer Black did not violate the policy because, although the situation involved a response from a law enforcement agency to an off-duty incident, "minor calls for service where the employee is not considered a suspect" are excepted. The provision identifies traffic violations and minor collisions as examples of "minor calls for service." Officer Black considered it a minor service call at the time of the incident and Commander Mason apparently concluded<sup>25</sup>, based on what Sgt. Driscoll had learned, that the Buda PD visit constituted a "minor call for service." However, Chief Manley testified that, while there was not enough information to determine whether Officer Black restrained Leah on September 12 in a defensive or assaultive manner, there was physical contact during a heated argument that should have been reported to

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<sup>25</sup> Chief Manley was not aware, until the Hearing, that Sgt. Driscoll had reported the September 12 incident to Commander Mason. This is another piece of information that, had it been known, might have had a bearing on his ultimate disciplinary decision.

the Department, per policy. Moreover, Officer Black stated he would have liked to have this information if he had been the responding officer and, during the DRH, conceded that he “should’ve at least given (his supervisor) a heads up that – that – that the (Buda) PD did show up to my house.” The Hearing Examiner concludes that the City has proven the truth of the Failure to Report charge.

However, the Union argues that, since the Indefinite Suspension Order did not issue until March 24, 2020 the challenged disciplinary decision was not implemented within 180 days from the date of this alleged misconduct. The Department contends that this situation falls within an exception to the general 180 day rule because the underlying incident involved criminal conduct and because a supervisor at the rank of Assistant Chief or above did not discover the alleged misconduct until sometime after the Department was notified of the October 1 incident. The undersigned is not convinced that the September 12 incident “involved” criminal conduct simply because the Buda PD investigated it<sup>26</sup> after initially referring to it as a verbal disturbance or because the Department believed Family Violence had occurred. However, the evidence reflects that the Department later “discovery” of the incident brings it within the exception. Thus, the Union’s 180 day argument must be rejected.

#### Appropriate Remedy

The evidence leads this Hearing Examiner to conclude that, although the Grievant engaged in some of the charged misconduct, the assessed penalty of indefinite suspension is excessive and unreasonable under the circumstances established by the credible evidence. When Chief Manley made the decision to impose an indefinite suspension, he was not aware of all pertinent information, including that related to the most egregious charges of Family Violence and Honesty. However, the circumstances present in this case persuade the undersigned that Officer Black did engage in some of the charged misconduct for which lesser discipline in the form of a forty-five (45) day suspension – which had been proposed and considered during the DRH deliberations -- is appropriate and which will serve a corrective purpose.

#### Other Arguments

The Union raised several other arguments but they need not be addressed as they would not change the outcome of this case.

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<sup>26</sup> As the Suspension Letter recites, on October 18, 2019, the Hays County Criminal District Attorney declined to prosecute Officer Black due to a lack of evidence.

For the reasons hereinabove set forth:

**AWARD**

The appeal is sustained in part. The City of Austin Police Department did not prove all of the charged misconduct by a preponderance of the evidence and there was not just cause to indefinitely suspend Officer Black. The discipline will be converted to a forty-five (45) day suspension. Officer Black is to be reinstated with the Department and made whole as to pay and benefits he would have received had he not been terminated. The Suspension Letter and related documents shall be removed from Officer Black's personnel and other City/APD records and the City shall notify TCOLE that the Indefinite Suspension has been removed and Officer Black has had no break in service.

Signed this 30th day  
of March, 2021

  
Lynne M. Gomez