

AMERICAN ARBITRATION ASSOCIATION

IN THE MATTER OF THE ARBITRATION	)	BEFORE ARBITRATOR:
	)	JAMES E. RIMMEL
between	)	
	)	AAA: #01-17-0003-7910
CLEVELAND POLICE PATROLMEN'S	)	
ASSOCIATION	)	HEARD: 10, 11 January and
	)	16, 17 July 2018, Cleveland, Ohio
and	)	
	)	POST HEARING BRIEFS REC'D:
CITY OF CLEVELAND	)	12 NOVEMBER 2018
	)	
	)	Issued: 1 DECEMBER 2018
	)	
	)	

APPEARANCES

FOR CPPA:

Henry J. Hilow  
Marisa Serrat  
McGinty Hilow and Sellacy Co. LPA

FOR THE CITY:

George S. Crisci  
Zashin and Rich

BACKGROUND

This grievance comes from a police officer who, at filing, was working out of the Financial Crimes' Unit<sup>1</sup> of the City of Cleveland, Ohio, Department of Public Safety, Division of Police, who contends his discharge effective 30 May 2017 was for other than just cause. A violation is alleged of Article IV of the Collective Bargaining Agreement (CBA or Agreement) between the City of Cleveland (City) and Cleveland Police Patrolmen's Association (CPPA). As filed on 30 May 2018, the grievance reads as follows:

On or about May 30, 2007 the Grievant [was] discharged without just cause in violation of Article IV of the collective bargaining [agreement] between the City and the CPPA.

Reinstate the Grievant, pay him full back pay and benefits, remove all reference to this discipline from his record, and otherwise make him whole for all losses he has

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<sup>1</sup> Grievant had been assigned to the Financial Crimes Unit during the pendency of external and internal investigations of the shooting death of a twelve (12) year old male in a Cleveland area park on 22 November 2014.

suffered.

Now, the genesis of this grievance dates to July of 2012 when grievant received a probationary appointment as a police officer with the City of Independence, Ohio. During his initial month at Independence, grievant started his certification training at the Cleveland Heights Police Academy, reportedly receiving his OPOTA Certification on 4 December 2012. The next day,<sup>2</sup> and while still in his probationary period, grievant tendered a Letter of Resignation to Independence Deputy Chief James Polak (Polak). Grievant's Letter of Resignation reads as follows:

Please accept this letter as my official resignation as a patrolman for the City of Independence. I am resigning my commission for personal reasons at this time. Thank you for the opportunity and training I have received.

At the bottom of this letter, the words "I accept. Polak" appear on the document of record. Grievant was employed by the City of Independence for a little less than five (5) months before he is claimed to have resigned during which there was no noted discipline on his personnel record.

It was in mid-April 2013 that grievant completed a "Personal History Statement" (PHS) with the City of Cleveland, Ohio whereon, among other things, he recorded he had worked for the City of Independence, Ohio, as a patrolman from 07/10/2012 to 12/05/2012 and had resigned for "personal reasons." He also listed a total of four (4) police agencies for whom he had taken civil service entrance examinations between August 2009 and February 2013. In any event, with receipt of grievant's PHS, various officers from Cleveland's Police Personnel Unit were charged with investigating his background, including his claimed work history. It was nearly seven (7) months after grievant had completed the City's PHS that Lt. Gail Bindel (Bindel) wrote the following communique' to her commanding officer, JoEllen O'Neill (O'Neill), concerning her recommendation on grievant's application for employment:

I have reviewed the investigative file & summary of applicant #241 Timothy Loehmann. The applicant was the subject of a complete investigation given all police applicants of the Division of Police. This formal summarizes findings of note.

SPECIAL ITEMS OF NOTE: Applicant reports that he is not delinquent financially. Employment reviews: his current employer is good view, but he has

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<sup>2</sup> Grievant tendered his letter of resignation on 3 December 2012 with Deputy Chief Polak entering the date of 5 December 2012 as the effective date.

only been employed there since September 2013. Applicant was employed as a police officer in Independence but resigned prior to end of probationary period. Record check: no violations, 1 accident 2006.

RECOMMENDATION: Continue to process.<sup>3</sup>

Appended to the Summation Report concerning grievant was a "Leads" Report concerning his employment at Independence reading, in part, as follows:

Mr. Lubin states the applicant was employed by their department as a Patrol Officer. He states the applicant made it to almost the end of his probationary period and they decided to have a 'mutual parting of the ways.' Lubin believes the applicant was a 'good kid' but may have been experiencing some personal problems during this time of his employment that may have prevented him from reaching his full potential. He states the applicant just didn't seem to have his head in the game and often talked about working for a larger department.

It was on 4 December 2013 that a six (6) person screening committee recommended grievant be moved forward in the employment process with a 6-0 vote. Grievant was deemed eligible for appointment with the City that same day, being scheduled to attend training at the City of Cleveland's Police Academy. No notable event is of record concerning grievant's Academy and field officer training that followed.<sup>4</sup>

Now, on 22 November 2014, patrol officers Loehmann (grievant) and Frank Garmback (Garmback) reportedly responded to Cleveland's Cudell Park area where they came upon an individual standing near a gazebo. As to what occurred after the officers arrived, there is considerable debate. However, there is no dispute that shots were fired by grievant resulting in the death of a 12-year-old male. This shooting reportedly sparked community outrage, national media attention, visits to the City of Cleveland by the U.S. Attorney General and a criminal investigation by the Cuyahoga County Sheriff's Office, the Cuyahoga County Prosecutor's Office and the Ohio Bureau of Criminal Identification and Investigation. As part of the latter, the prosecutor presented evidence of possible wrongdoing by the officers to a Grand Jury where the afore-referenced officers testified. The Grand Jury issued a no bill in the matters involving the officers that were before it.

Now, it was 14 February 2016, after the Grand Jury had issued a no bill on the officers'

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<sup>3</sup> While this recommendation to O'Neill did not mean grievant was to be hired, it was an important step in the Department's consideration of his application for employment as a Police Officer.

<sup>4</sup> The parties dispute grievant's level of performance in the City's field training program during his initial months with the Department.

conduct, that County Prosecutor Timothy McGinty (McGinty) announced that he was not going forward with any criminal charges against grievant and Officer Garmback. At that point, City Police Chief Calvin Williams (Williams) established a Critical Incident Review Committee (CIRC) to investigate the entire matter from an administrative standpoint. CIRC's investigation was quite extensive involving many different agencies, including a prior investigation initiated by the Department's Internal Affairs Unit. It apparently took CIRC roughly eleven (11) months before it concluded its work and prepared a written report for the Chief. In addition, while Williams reportedly sought certain changes to the draft, an effort reportedly strongly resisted, the changes requested by Williams concerned only officer Garmback.<sup>5</sup> In any event, certain excerpts from the CIRC Report appear relevant here.

First, the following statement concerning "Responsibilities" of the CIRC reads as follows:

CIRC was charged with conducting the administrative review and reviewing the actions of all members involved in the incident for compliance to rules & regulations, General Police Orders, rules of the Civil Service Commission, training, tactics and standards of the Division of Police. Moreover, CIRC was also charged with providing recommendations to the Chief of Police relative to training, potential rule and or policy violations, equipment needs and an overall assessment of the incident.

Additionally, on page 2, the CIRC Report continued:

In the interim, it was determined by the Cleveland Division of Police chain of command, to suspend any administrative action based on the report submitted by the IAU; until the criminal portion of the investigation was completed by the Cuyahoga County Sheriff's, and subsequently reviewed by the Cuyahoga County Prosecutor. On December 28, 2015, a Cuyahoga County Grand Jury, after reviewing the substantive facts associated with the death of Tamir Rice, issued a no bill as it relates to any criminal indictment of the individuals actions involved in the use of deadly force. Then the Cuyahoga County Prosecutor released its findings.

Based on this revelation, and to provide due diligence of this critically important administrative investigation, in February 2016, Calvin Williams, Chief of the Cleveland Division of Police suspends indefinitely the report issued by the IAU, which heretofore was advised an incomplete investigatory file. Instead, he transferred responsibility from the administrative review of the member's action of the Division of Police on November 22, 2014, to any had-hoc 'CIRC' investigatory body, led by Deputy Chief Doormat Drummond. Any prior administrative

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<sup>5</sup> Since Williams request of CIRC to revise the final report only concerned Garmback, I need not decide the approbation of such in this case.



investigation therefore yields authority to the findings of the 'CIRC.'<sup>6</sup>

The reality here is that no action, or lack thereof, by grievant on 22 November 2014 relative to the deadly force incident served as a basis for the termination issue presently before me. This incident, however, served as a basis for various agencies to look more closely into his background.

During these inquiries, some question was raised concerning why he had resigned from his police officer position with the City of Independence. It was suggested, primarily by media sources, that grievant had resigned after being told he would be terminated for various unacceptable incidents while serving at Independence. It was these disclosures which caused City Officials to look again at the various documents grievant had filled out when applying for a police officer position with Cleveland.

This examination led City Officials to conclude that grievant had misled/been other than forthcoming in completing the PHS. The City contends that had it been made fully aware of grievant's prior conduct and employment history at Independence, etc., he would never have been hired. As such, following contractually prescribed due process requirements, grievant was issued the aggrieved-of termination under letter date 30 May 2017, said letter reading:

This letter is to advise you of the result of the administrative pre-disciplinary hearing that you attended on March 2, 2017, in the office of the Chief of Police. The hearing was held to address the results of an internal investigation wherein you were alleged to have engaged in improper procedures. You were charged with a series of rule violations which follow:

#### **STATEMENT OF POLICY**

In part:

The Manual of Rules and Regulations sets forth the conduct and behavior to be followed by officers and employees. Any violation of these rules and regulations shall be a basis for disciplinary action. Disciplinary action includes, but is not limited to, verbal and written reprimands and the preferring of divisional charges which can result in suspension, loss of pay, demotion or termination. The rules, regulations, and standards contained in this manual shall apply whether the officer or employee is on or off duty. Where a conflict exists between a Rule and Regulation and a General Police Order, the Rule or Regulation provision shall be adhered to.

**General Police Order 1.1.01: City of Cleveland Mission Statement and Ethics**

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<sup>6</sup> At hearing, Williams testified that he had never approved this second paragraph excerpt. See Tr. at 606-607.

## **Policy**

### **General Police Order 1.1.02: Values Mission Statement**

### **Cleveland Division of Police Personal History Statement**

### **Manual of Rules for the Conduct and Discipline of Employees of the Cleveland Division of Police: Oath of Office, Law Enforcement Code of Ethics, Rules 1.07, 201, 2.02, 2.03, 2.04, 2.10, 2.14 (a)(b)(e) and (f) 3.12, 4.03, 4.12 and 5.01**

### **Civil Service Commission Rule 9.10(1)(3)(4)(5)(7)(10) and (18).**

**Specification #1:** In the November 18, 2016, Investigative Report, the Division learned that on May 13, 2013 you (Patrol Officer Timothy Loehmann #1231) verified under oath and provided false information on the Division of Police Personal History Statement (PHS) of your application for employment. Specifically, Section 10, # 12, Did you intentionally omit any facts that you feel might disqualify you for the position of Patrol Officer with the City of Cleveland? You omitted the fact that you would have been terminated by the Independence Police Department, but they allowed you to resign instead. Among other things, while working for the Independence Police Department, you failed to secure your firearm, were insubordinate and untruthful to a superior officer. In addition, the Independence Police Department concluded that you were 'emotional [sic] immature' and possessed an 'inability to emotionally function.' Also, during a state qualification course, you could not follow simple directions and had an emotional breakdown. Subsequently, you were sent home for the day.

**Specification #2:** In the November 18, 2016, Investigative Report, the Division learned that on May 13, 2013 you (Patrol Officer Timothy Loehmann #1231) verified under oath and provided false information on the Division of Police Personal History Statement (JPHS), specifically Section 5, entitled 'Employment History.' When asked about your employment with the Independence Police Department, you indicated without qualification or clarification that your reason for leaving was that you 'resigned for personal reasons' and when asked if you received any disciplinary actions, you answered 'No,' without mentioning that you faced discharge proceedings when your employment ended and that the resignation was permitted to avoid discharge.

**Specification #3:** In the November 18, 2016, Investigative Report, the Division learned that on May 13, 2013 you (Patrol Officer Timothy Loehmann #1231) verified under oath and provided false information on the Division of Police Personal History Statement (PHS), of your application for employment, specifically, Section 11, entitled 'Explanations and Clarifications,' when you were provided with the opportunity to include any additional explanatory information, you never mentioned the circumstances surrounding your resignation from Independence Police Department, you responded 'DNA.'



**Specification #4:** In the November 18, 2016, Investigative Report, the Division learned that on May 13, 2013 you (Patrol Officer Timothy Loehmann #1231) verified under oath and provided false information on the Division of Police Personal History Statement (PHS), of your application for employment. Specifically, Section 10, # 9, To your knowledge, has any other department agency or private company disqualified you for employment? You failed a written exam in the fall of 2009 for Maple Heights Police Department, according to your Personal History Questionnaire for Independence. The Independence Police Department also disqualified you when they declined to rehire you because you were allowed to resign to avoid a discharge.

**Specification #5:** In November 18, 2016, Investigative Report, the Division learned that on May 13, 2013, you (Patrol Officer Timothy Loehmann #1231) verified under oath and provided false information on the Division of Police Personal History Statement (PHS), of your application for employment. Specifically, Section 5, #3, Within the past seven (7) years, have you taken a Civil Service Examination for the position of Patrol Officer with any law enforcement or other governmental agency (including the Cleveland Police Department)? You listed four (4) police departments (Cleveland, New York City, Akron and Independence). You listed eight agencies on your Personal History Questionnaire for Independence (New York, Cleveland, Mentor, Euclid, Berea, Maple Heights, Rocky River, US Marshal's Service). You failed to correct your false statements when provided with the opportunity to do so in a follow-up interview.

**Specification #6:** In the November 18, 2016, Investigative Report, the Division learned that on May 13, 2013 you (Patrol Officer Timothy Loehmann #1231) violated the instructions contained on page one (1) of the Division of Police Personal History Statement (PHS), and of your application for employment, for answering questions, specifically: (a) failure to provide complete and truthful information will result in rejection for appointment pursuant to the City of Cleveland Civil Service Rules, and/or discharge after appointment; (b) applicants are cautioned to answer every question truthfully and without evasion; (c) the Ohio Revised Code provides penalties for making a false statement of a material fact, or perpetrating any fraud or deception in obtaining, or attempting to obtain municipal employment; and (d) penalties include rejection for appointment, discharge after appointment, and/or prosecution under Ohio Revised Code Section 2921.13,

All the specifications are in violation of the rules, regulations and procedures of the Division of Police, Department of Public Safety.

In attendance at the pre-disciplinary conference, that I presided over, were you, President Stephen Loomis, Second Vice President Thomas Lascko, Attorney Henry

Hilow and Attorney Brian Moriarty of the Cleveland Police Patrolmen's Association, George Crisci of the Law Firm Zashin & Rich CO., L.P.A, Jim Votypka of Quality Control, Consent Decree Coordinator Greg White, Shawn Mallamad and Janeane Cappara of the Law Department, Michael Evanovic of the U.S. Attorney's Office, Nicole Porter of the Department of Justice and Lieutenant Brian Carrey of the Case Preparation Office.

During the administrative hearing you acknowledged receipt of the charging letter; you and your representatives waived the reading of your charge letter and were then afforded the opportunity to be heard. You entered a plea of '**Not Guilty**' to the charges set forth in the charging letter,

Upon carefully reviewing the evidence presented by the Division, the memorialized record as well as the arguments of you and your representatives, I find there is just cause to impose discipline. As such, I find you '**Guilty**' of the charges.

**Therefore, you are hereby terminated from employment with the City of Cleveland, Department of Public Safety, Division of Police effective May 30, 2017.**

The subject grievance ensued and is properly before me for adjudication.

#### POST HEARING BRIEFS

Both parties have submitted thorough and quite extensive Post Hearing Briefs articulating their respective positions. The City submitted a one-hundred and two (102) page brief while the CPPA submitted a sixty-nine (69) page brief. Both briefs were well written, articulate, and set forth, in detail, the respective parties' positions. Due to the length and broad breadth of the briefs submitted, however, I will not endeavor to recite herein all the arguments made by each party, but rather, seek only to set forth the parties' salient positions in a concise manner. That said, I would emphasize that all proffered arguments were considered by me in depth in arriving at the decision herein.

#### CITY POSITION

Simply, the City argues that just cause existed for the meted-out termination because grievant lied on his sworn PHS. Specifically, the City alleges that grievant's responses on his PHS were untruthful and incomplete: he stated he "resigned for personal reasons" from the Independence Police Department but neither qualified nor clarified the circumstances surrounding



his departure from Independence.

The City initially argues that the administrative disciplinary charges against grievant were filed timely under the CBA's Bill of Rights. The City stresses that the express language of the CBA indicates that any administrative investigations are contemplated to occur after the completion of any criminal proceedings. The City believes that the criminal investigation conducted by the Cuyahoga County Sheriff's Office might have addressed grievant's alleged false statement under oath in his employment application because the Sheriff's Office had subpoenaed the City's personnel records regarding grievant's application, training and employment. The full scope of the County's investigation was not known, however, until 28 December 2015, when the grand jury returned a "no bill" and the Sheriff's investigative records became publicly available. At that point, the City learned that the Sheriff's Office had subpoenaed similar personnel records from other jurisdictions.

The City argues that it was certainly within the County Prosecutor's discretion to pursue criminal charges against grievant for falsifying his PHS under oath, a violation of Ohio law. The City surmises that it was reasonable for it to hold in abeyance its investigations regarding grievant's use of force and his truthfulness in answering his PHS until after the County had concluded its criminal investigation. It was well within the County's authority to levy criminal charges against grievant for perjury if elected to do so.

In the alternative, assuming Article VIII, Section 1 applies, the City claims it then had one (1) year after the release of the County's investigative file, or until 28 December 2016, in which to initiate disciplinary charges against grievant. The City further argues that due to the complex nature of some situations, the CBA's Bill of Rights contains a self-effectuating ninety (90) day extension period for the filing of disciplinary charges. According to the City, Union consent is not required, and the extension operates as an automatically-available extension as long as the City articulates good cause for the extension. In support of this argument, the City references Arbitrator Zeiser's findings in the grievance of Officer Garmback. Succinctly, Arbitrator Zeiser, in examining the same contractual language and timeliness argument, found that the CBA provides the City with an additional ninety (90) day extension, upon a showing of good cause, absent CPPA agreement or permission.

To establish good cause, the City argues that the CIRC needed additional time to discharge its duty due to the scope, complexity, and breadth of materials considered in conducting the

investigation. Discipline from the CIRC investigation remained a possibility until its review was complete and an addendum to the report issued in January 2017. The City again refers me to Arbitrator Zeiser's opinion that the City has established good cause under the circumstances present.

The City further contends that its' decision to delay charges against grievant until after the conclusion of the CIRC's review was based on the CPPA's historical objection to the "stacking" of charges. In fact, the City claims that it has been by mutual agreement of the parties to avoid "stacking" charges by holding all disciplinary charges, so they can be brought at the same time. Overall, the City argues it has shown good cause, thus invoking the self-effectuating ninety (90) day extension. Factoring in the extension, grievant was provided notice of discipline within ninety (90) days of completion of the CIRC's investigation.

The City next argues that it had just cause to discipline grievant for each of the six (6) enumerated offenses. I will not restate, *verbatim*, the accusations set forth, but suffice it to say, all stem from grievant's alleged failure to provide truthful and complete information when completing his PHS. In summary form, the City highlights the following:

- In response to charging Specifications Nos. 1 and 2, grievant was silent on his PHS about the circumstances surrounding his departure from the City of Independence in that he failed to disclose that his resignation was in lieu of disciplinary discharge;
- As to Specification No. 3, grievant failed to provide any qualification or clarification regarding his departure from Independence despite given space and direction to elaborate on any prior information warranting further detail;
- Regarding Specification No. 4, grievant failed to disclose that both the Maple Heights and Independence police departments had "disqualified" him from employment;
- As to Specification No. 5, grievant failed to fully disclose / update his PHS to include all jurisdictions to which he had applied to for employment;
- As to Specification No. 6, grievant admitted that he read and understood the instructions on the PHS, and yet, made material misrepresentations and omissions throughout.

Plainly, the City argues that grievant omitted material, disqualifying information from his

PHS which, had same been disclosed, would have precluded him from gaining employment with the City. In other words, the City surmises that grievant obtained employment with the City through means of evasion and dishonesty.

The City further argues that termination is a just penalty consistent with comparable cases and proportional to the gravity of the offense. Initially, discharge is appropriate under the City's disciplinary matrix. Under the matrix, "Reports False" and "Statements False" are Level Three offenses subject to discipline up to and including discharge. Dishonesty, according to the City, is a serious infraction warranting discharge on the first instance. Dishonesty calls into question the future credibility of a witness in future legal proceedings; in the context of a law enforcement officer, the *Giglio* decision requires prosecutors to disclose to the defense any evidence of an officer's untruthfulness during his employment. The City alleges that the dishonesty exhibited by grievant is the very type of untrustworthiness which is required to be disclosed under *Giglio*, thus calling into question grievant's ability to effectively testify and prosecute future criminal proceedings. Moreover, grievant's dishonesty occurred in the context of a sworn statement under oath.

While I will not go into extensive detail herein regarding the case of Brandon Smith, I have read in detail the City's argument and understand the City's position that the case is directly on point factually and strongly suggests that discharge is the appropriate remedy here. I further acknowledge the City's argument that the case is the leading case in the Division of Police following the implementation of the disciplinary matrix in which an officer has been charged with making dishonest statements on a PHS.

The City further preemptively argues against the CPPA that: (1) grievant's outright denial at his pre-disciplinary proceeding lacks credibility; (2) the internal documents from Independence relied upon by the CPPA to establish that grievant resigned his position do not, in fact, support such an argument; (3) the conduct of Independence post-dating grievant's resignation letter and permitting him to receive his OPOTA certification is not an indication that Independence was not going to discharge grievant; (4) grievant read, reviewed and understood all of the instructions on the PHS form, therefore putting the onus on him to provide all relevant information surrounding his departure from Independence; and (5) that any shortcomings and/or failures of the Personnel Unit do not excuse grievant's dishonesty.

The City additionally argues that the CPPA has failed to set forth any cases establishing

disparate treatment. The City posits that the examples proffered by the CPPA are significantly dissimilar because it is inequitable to compare police officers, who are held to a higher standard of duty, to other City employees. Further, other employees not under the appointing authority of Public Safety Director Michael McGrath (McGrath) are improper comparators. Likewise, police officers disciplined before McGrath became Safety Director are not similarly situated since McGrath has established his own standards of conduct and/or such cases occurred before the disciplinary matrix was established. The City specifically distinguishes several cases proffered by the CPPA. This arbitrator has reviewed the facts, circumstances and discipline imposed in detail for each of the referenced cases.

The City argues that grievant's termination was not the result of public or political pressure. The City stresses this is a case about grievant's dishonesty, and not his lawful use of deadly force. In further support of its position, the City highlights various arbitrations where it was held that political pressure, while conceivably present, was not enough to find impropriety in the decision-making process about the officer's discipline. Lastly, the City argues that grievant's performance in the Financial Crimes Unit and the various letters of commendation do not ameliorate his past conduct

In the end, the City requests that I deny the grievance in its entirety.

#### CPPA POSITON

The CPPA argues the City exercised its authority in violation of the just cause provision of the CBA. Initially, the CPPA contends that the discipline meted-out to grievant was untimely under the parameters of the CBA's Bill of Rights, which sets forth at Paragraph 12(l), "Bargaining Unit Members shall be entitled to the following rights: In such cases where the administrative investigation is initiated without a citizens' complaint, and the investigation could not lead to criminal charges, the City shall not bring administrative charges later than one year after the date within which the Chief had knowledge of the alleged violation." The CPPA argues that because the scope of the Cuyahoga County Sheriff's Office was limited to the 22 November 2014 use of force incident, there was no criminal investigation into the administrative disciplinary charges that resulted in grievant's termination. Moreover, the CIRC's investigation was not broad enough to include investigating grievant's responses on his PHS. Williams testified that he was aware of the allegations regarding grievant's employment application as early as 3 December 2014. At the



least, Williams was aware when Commander Daniel Fay (Fay) issued his report into the conduct of the Personnel Unit on 11 February 2015. The City did not order an investigation into the hiring process of grievant until 25 October 2016, over 692 days (1 year, 10 months, 22 days) after Williams had knowledge of the alleged administrative violations.

The CPPA highlights that the first disciplinary letter setting forth the administrative charges was issued on 13 January 2017, over 772 days (2 years, 1 month, 10 days) from the date Williams had knowledge of the alleged administrative violation. The CPPA characterizes the City's failure to timely bring administrative charges against grievant within the one (1) year time limit imposed by the CBA's Bill of Rights as a due process violation. According to the CPA, the City was required to initiate administrative proceedings against grievant by 4 December 2015, or within one (1) year after Williams first learned of the alleged administrative violation. Further, the CPPA did not waive the time limitation or agree to any extension. The CPPA interprets the Bill of Rights, as well as past practice, as requiring both parties to agree to any extension in writing. That was not done in this case. Consequently, the CPPA argues that grievant's due process rights were violated, and that the relief stated in the Bill of Rights must be enforced, namely, that the "accused member may be ordered to respond to the complaint and the investigation but shall not be subject to disciplinary action." Plainly, the City was required to bring any administrative charges against grievant by 4 December 2015 or request an extension of time to do so. Having failed to timely bring administrative charges against grievant, the CPPA argues that the City unequivocally violated the parties' CBA.

Regarding charging Specifications Nos. 1 and 2, the CPPA vociferously argues that grievant did not provide any false information on his PHS, but rather, properly disclosed that he resigned from the Independence Police Department for "personal reasons." The CPPA further alleges that grievant was not subject to any disciplinary proceedings while at Independence and was not subject to discharge.

When completing the PHS, grievant indicated that the reason he left the Independence Police Department was that he "resigned for personal reasons." The CPPA argues that this statement is entirely true. There is no evidence that grievant was subject to discharge and the CPPA cites arbitral law holding that when an employee has shown clear evidence of an intent to resign and sever the employment relationship, arbitrators have refused to view the matter as a discharge. In support of this position, the CPPA relies upon several internal documents from the City of

Independence that characterize grievant's departure as a voluntary resignation. When viewing the totality of the circumstances, the CPPA contends that it is clear grievant resigned his position with the City of Independence for personal reasons and departed on good terms.

If the City of Independence thought grievant was somehow "unfit" to be a police officer, the CPPA argues Independence would have simply fired him, which would necessarily have prevented him from obtaining his OPOTA certificate. Instead, Independence permitted grievant to receive his OPOTA certification, be sworn in as an Independence Police Officer, resign, and continue to pay him until his resignation came into effect. The CPPA stresses that grievant was never subject to any formal disciplinary action from the City of Independence, and City of Independence Human Relations Director Joe Lubin (Lubin) confirmed this fact when he advised Cleveland Personnel Unit Detective David Hamilton (Hamilton) that grievant was never subject to discipline during his tenure at Independence. Accordingly, when grievant answered "no" on the PHS in response to whether he had any prior disciplinary action, he was being truthful. In addition, grievant signed a release with the City of Cleveland permitting the City to obtain all his prior employment records. The CPPA argues that grievant had nothing to hide and was completely forthcoming in all his responses on the PHS. He did not intentionally omit or falsify his previous employment information on his application with the City of Cleveland.

The CPPA further argues that McGrath violated the parties' CBA when he spoke to Polak from Independence after the close of the pre-disciplinary hearing and before McGrath rendered his decision. Accordingly, the CPPA alleges that McGrath relied, at least in part, on his own independent investigation without affording the CPPA the opportunity to confront and/or cross examine Polak. In essence, the CPPA posits that McGrath violated the CBA when he conducted his own independent investigation and did not permit the CPPA to be a party to his investigation and interview or permit the CPPA to cross examine a crucial witness prior to making a disciplinary determination. Overall, regarding charging Specifications Nos. 1 and 2, the CPPA concludes that grievant was truthful and hid nothing from the City regarding his experience in Independence because he had nothing to hide from the City.

As to Specification No. 3, the CPPA argues that the PHS did not clearly direct grievant to use Section 11 to further explain the reasons for his departure from the City of Independence. Nowhere does Section 5 – Employment History, instruct an applicant to use Section 11 to further explain any prior employment responses. The CPPA contends that the City's deficiencies in the

application itself should not be used to discipline grievant. Grievant never intentionally lied or concealed his prior employment history and aptly put the City on notice of his prior employment with the City of Independence and the reason for his separation therefrom.

Regarding Specification No. 4, the CPPA argues that grievant has never been disqualified for employment as a Cleveland Police Officer. Simply, the CPPA argues that neither the City's past nor current PHS put applicants on notice that failing a prior civil service examination with another agency or resigning from a prior employer is a disqualifying event precluding employment with the City. When responding to the question of whether he had ever been disqualified from employment by any other agency, etc., grievant answered "no" under penalty of perjury. In other words, the CPPA surmises that this question is one of opinion, to which grievant truthfully and honestly responded. The same is true regarding the inquiry of whether the applicant intentionally omitted any facts that might disqualify the candidate for the position. According to the CPPA, grievant answered honestly and truthfully. As such, grievant is still qualified to be a police officer in the State of Ohio and for the City.

As to charging specification No. 5, the CPPA contends that grievant followed the instructions provided and used the space available to disclose prior civil service examinations he had taken. In his PHS, grievant identified four (4) prior civil service examinations he had taken with other agencies. His application for employment for the City of Independence identified eight (8) prior exams. Regardless, the CPPA argues that grievant did, in fact, take the civil service examinations for all four (4) of the agencies identified and therefore his response was factually true. Moreover, he used the space that was given to him. The question did not provide instruction to use additional space if needed, nor did it instruct the applicant to list every agency that he or she has taken a civil service entrance examination. Therefore, the CPPA argues that grievant did not violate Specification No. 5 by failing to identify all agencies with whom he took entrance examinations.

Relative to Specification No. 6, the CPPA alleges that grievant followed the instructions given to him in May of 2013 and completed his PHS truthfully according to those directions. Since 2013, the PHS has been significantly altered to address many of the perceived deficiencies in the prior application. The CPPA believes the City is now attempting to terminate grievant for questions that were never asked of him on the former employment application and for not following instructions that were never given to him in 2013. The CPPA concludes that grievant filled out

his employment application truthfully and did not intentionally omit any facts or answers that were asked of him.

The CPPA next argues the discipline imposed was excessive because the City treated grievant more severely than similarly situated City employees. The CPPA posits that several comparators received lesser degrees of discipline for similar, or even more egregious, conduct. I will not endeavor to recite the specific facts surrounding each matter delineated by the CPPA, but this arbitrator thoroughly examined and analyzed each instance under the just cause analysis.<sup>7</sup>

The CPPA believes that grievant's termination was a politically expedient solution to the public outcry and intense political pressure the City received after the fatal shooting on 22 November 2014. Even though grievant was legally and administratively cleared of any wrongdoing relative to the 22 November 2014 use of force incident, the CPPA argues that the City manufactured the charging specifications to appease public demands for grievant's dismissal. Consequently, the City did not have just cause to terminate grievant.

*Brady* and *Giglio* require the Cuyahoga County Prosecutor's Office to disclose any past events of untruthfulness by an officer to the defense in a criminal proceeding. Citing Arbitrator Zeiser, the CPPA contends that possible *Giglio* impairment should not affect an arbitrator's decision. The CPPA additionally alleges that there will be no *Brady* or *Giglio* impact on grievant because he was truthful on his PHS and during the hiring process with the City.

The CPPA additionally argues that the disciplinary matrix is not incorporated into the parties' CBA and was independently created by the City. The matrix has only been upheld as a guideline and the just cause provision of the CBA to impose discipline must still be followed. The CPPA argues that Group III offenses are the most severe infractions under the matrix, and include egregious behavior such as criminal acts, having sex while on duty, drug related offenses, gross immorality, etc.; it is clear that grievant's conduct does not fall into this category. Grievant did not make a false statement to the City. Compared to others who made intentionally false statements, but received no discipline or minor suspensions from duty, it is apparent that grievant's termination was disparate.

Regarding the level of proof required, the CPPA argues that, under such circumstances, the

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<sup>7</sup> The CPPA detailed past instances of discipline involving Kevin Jones, Aaron Reese, Lynda Kimble, Omayre Feliciano, Nicole Carlton, Shani Hannah, Daniel Flannery, Officer Luccarelli. In his Opinion dealing with a grievance submitted by Officer Hannah, Arbitrator Gerhart reviewed criminal conduct of other Cleveland Police Officers. A detailed chart is set forth on 53-55 of the CPPA's Post Hearing Brief.



City must satisfy the just cause standard by clear and convincing evidence. Stressing that discharge is the ultimate punishment amounting to "economic capital punishment," the CPPA contends that it is the City's burden to prove, by clear and convincing evidence, that grievant knowingly engaged in the alleged misconduct and that his discharge was justified under the circumstances. The CPPA argues that the City has failed to meet this burden.

Overall, the CPPA requests that I sustain the grievance, reinstate grievant, order full back pay, restitution of all lost benefits and rights, and award any further relief deemed appropriate in this case.

#### RELEVANT CONTRACTUAL PROVISIONS

##### ARTICLE IV MANAGEMENT RIGHTS

(4) Except as expressly limited by the terms of this Contract, any and all rights concerned with the management of the Division of Police are the exclusive and sole responsibility of the employer. It is further recognized that the City has the right to:

\* \* \*

(c) Maintain and improve the efficiency and effectiveness of governmental operations;

(d) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;

(e) Suspend, discipline, demote or discharge for just cause, layoff, transfer, assign, schedule, promote, or retain employees;

\* \* \*

(j) Effectively and efficiently manage the work force; and,

(k) Take actions to carry out and implement the mission of the City as a unit of government. The City reserves the right to implement new or revised existing policies which do not conflict with the express terms of this Contract.

(5) Notwithstanding §4117.08 of the Ohio Revised Code, the Employer is not required to bargain on any subjects - including, but not limited to, those enumerated above.

##### ARTICLE VIII, SECTION (L) BILL OF RIGHTS

(l) In such cases where the administrative investigation is initiated without a citizens' complaint, and the investigation could not lead to criminal charges, the City shall not bring administrative charges later than one (1) year after the date within which the Chief had knowledge of the alleged violation. If the administrative charges are not brought within one (1) year, the accused member may be ordered to respond to the complaint and to the investigation but shall not be subject to disciplinary action. The City may be granted an additional 90 days for good cause shown.

#### ARTICLE V EMPLOYEE RIGHTS AND REGULATIONS

(6)(a) The City recognizes the right of patrol officers to be free to join the CPPA, to file grievances, to give testimony in grievance proceedings, and to hold office in the organization. Therefore, the City agrees that there shall be no discrimination, interference, restraints, coercion, or reprisal by the City, or any agent thereof, against any patrol officer because of CPPA membership or because of any lawful activity in an official activity in an official capacity on behalf of CPPA.

(b) The City and the CPPA hereby reaffirm their commitments, legal and moral, not to discriminate in any manner relating to employment on the basis of race, color, creed, national origin, age, sex, or disability

(c) The City recognizes the right of the CPPA to select local officers and alternates to represent the employees on grievances arising under the Contract. A local officer or alternate, shall be permitted to investigate and process a grievance within his own location as provided in the Grievance Procedure during his working hours without loss of regular (straight time) pay, such activity taking into consideration and with proper regard for the departments operational needs and requirements. Within the time limits set forth in the Grievance Procedure, meetings shall be scheduled at times mutually convenient and acceptable to the City and the CPPA.

## RELEVANT POLICE DEPARTMENT RULES & REGULATIONS

### Police General Order No. 1.1.01 – City of Cleveland Mission Statement and Ethics Policy:

**Purpose:** To establish a Mission Statement that provides vision, purpose and direction for the Division of Police and to establish an ethics policy to guide the actions of all its members.

**Policy:** Members of the Division of Police shall carry out their mission in accordance with the strictest ethical guidelines. Division members shall conduct themselves in a manner that fosters public confidence in the integrity of Cleveland's government, its processes, and its accomplishments. Members of the Division of Police shall be guided by the values expressed in the City of Cleveland mission Statement, the City of Cleveland Ethics Policy, and the Division of Police Manual of Rules and Regulations.

#### **City of Cleveland Mission Statement**

We are committed to improving the quality of life in the City of Cleveland by strengthening our neighborhoods, delivering superior services, embracing the diversity of our citizens and making Cleveland a desirable, safe city in which to live, work, raise a family, shop, study, play and grow old.

### Police General Order No. 1.1.02 – Values Mission Statement:

**Purpose:** To establish a Values Mission Statement for the Division of Police that provides vision, purpose, and direction for members of the Division.

**Policy:** Members of the Division of Police shall not only be guided by the City Mission Statement, but by the values that the members of the Division shall live by.

#### **Values Mission Statement of the Cleveland Division of Police**

The Mission of the members of the Cleveland Division of Police is to enhance the quality of life, strengthen our neighborhoods and deliver superior services with professionalism, respect, integrity, dedication and excellence by working in partnership with our neighborhoods and community.

**Professionalism** We take pride in ourselves, our profession, and our community. We will be role models for our community by enthusiastically excelling in quality performance.

**Respect** We will treat all people with dignity, compassion, courtesy

and without prejudice. We will protect the constitutional and civil rights of everyone through impartial enforcement of the law.

**Integrity** We hold ourselves accountable to the highest standards of moral and ethical conduct, we maintain public trust by being honest, competent and consistent with our values and actions.

**Dedication** We dedicate ourselves to improving the quality of life by developing a partnership with the community and being committed to protecting life and property, thus reducing fear which leads to a safer community for all.

**Excellence** We hold ourselves to the highest standards of law enforcement. We will continuously improve the quality of service to the community through education, training and development.

**We the members of the Cleveland Division of Police take P.R.I.D.E. in the community that we serve.**

## MANUAL OF RULES FOR THE CONDUCT AND DISCIPLINE OF EMPLOYEES

### Statement of Policy:

. . .

The Manual of Rules and Regulations sets forth the conduct and behavior to be followed by officers and employees. Any violation of these rules and regulations shall be a basis for disciplinary action. Disciplinary action includes, but is not limited to, verbal and written reprimands and the preferring of divisional charges which can result in suspension, loss of pay, demotion or termination. The rules, regulations, and standards contained in this manual shall apply whether the officer of employee is on or off duty. Where a conflict exists between a Rule and Regulation and General Police Order, the Rule or Regulation provision shall be adhered to. . .

### Rule 1.07 Patrol Officer

Patrol Officers shall be held responsible for the good order of their assignment and shall be prepared at all times to inform their superior officer of the conditions of



their post, beat, or zone.

They shall be under the immediate supervision of the head of the administrative unit to which assigned. They shall perform such duties and work such hours as designated by their superior officer. They shall cooperate with all other personnel in the performance of police duties.

They shall acquire a thorough knowledge of the criminal laws and the rules of evidence so that they may carry out their duties in an efficient manner.

**Rule 2.01**

Personnel shall not violate any law of the United States, the State of Ohio, Charter provision or ordinance of the City of Cleveland, or neglect to perform any duty required by law, nor shall they engage in any conduct that would constitute a crime under the laws of the United States, the State of Ohio, or the Charter provisions or ordinances of the City of Cleveland.

**Rule 2.02**

Personnel shall not willfully disobey any rules, General Police Orders or directives of the Division of Police, or any lawful orders, written or oral, issued to them by a superior officer of the Division of Police.

**Rule 2.03**

Personnel shall perform all duties required by rules, regulations, general police orders, directives, or orders of the Division of Police

**Rule 2.04**

Personnel shall study all rules, regulations, general police orders and directives pertaining to their duties, and shall be held accountable for any action contrary to these instructions.

**Rule 2.10**

Personnel shall familiarize themselves with all directives issued by the Chief of Police. Personnel absent from duty for any reason shall familiarize themselves with all orders and notices issued during their absence.

**Rule 2.14**

The following are additional grounds for disciplining personnel, including removal, in addition to the grounds stated in Civil Service Commission rule 9.10:

- a. Incompetence
- b. Gross neglect of duty
- ...
- e. Failure to obey orders given by proper authority
- f. Any other reasonable and just cause

### **Rule 3.12**

Personnel shall be truthful and unbiased in all written reports, verbal reports, court testimony and conversations affecting the Division of Police, its officers and employees or persons under its jurisdiction.

### **Rule 4.03**

Personnel shall give full attention to the performance of their duties.

### **Rule 4.12**

Personnel shall be considered to be on duty at all times for purposes of discipline.

### **Rule 5.01**

Personnel shall not engage in any conduct, speech, or acts while on duty, or off duty, which would reasonably tend to diminish the esteem of the Division of Police or its personnel in the eyes of the public.

## **CIVIL SERVICE COMMISSION RULES**

### **Civil Service Commission Rule 9.10 Tenure**

Tenure of every officer or employee in the classified service shall be during good behavior and efficient service. No such officer or employee shall be discharged, suspended or demoted for political, racial or religious reasons, or for refusing to contribute to any political fund, or refusal to render political service.

But any officer or employee in the classified service may be discharged, suspended or reduced in rank for any one or more of the following causes:

1. Neglect of Duty.
- ...
3. Incompetence or inefficient performance of duties.
4. Fraudulent conduct or false statements in any application or examination for a position in the Civil Service of the City.
5. Conduct unbecoming an employee in the public service.

...

7. Disorderly, immoral, or unethical conduct while on duty.

...

10. Willful violation of any of the provisions of law governing the Civil Service of the City or of the rules or regulations of the Commission.

...

18. For other failure of good behavior which is detrimental to the service, or for any other act of misfeasance, malfeasance or nonfeasance in office.

### PERSONAL HISTORY STATEMENT (PHS) INSTRUCTIONS

#### **CLEVELAND DIVISION OF POLICE, PERSONAL HISTORY STATEMENT**

... Failure to provide complete and truthful information will result in rejection for appointment pursuant to City of Cleveland Civil Service Commission rules, and/or discharge after appointment.

... Additional space for explanation or clarification regarding your responses can be found in Section 11, page 14.

Applicants are cautioned to answer every question truthfully and without evasion. The Ohio Revised Code provides penalties for making a false statement of material fact, or perpetrating a fraud or deception in obtaining, or attempting to obtain municipal employment. Penalties include rejection for appointment, discharge after appointment, and/or prosecution under Ohio Revised Code Section 2921.13.

...

Failure to fully complete the Personal History Statement or to submit the required documents will delay the investigation of your suitability for employment and may jeopardize your appointment to the Cleveland Police Department.

#### **Statement of Hiring Standards**

... The Cleveland Division of Police is committed to hiring a diverse workforce, specifically targeting ethical, honest, and moral employees who will treat all citizens with respect, dignity and understanding. The occupation of Police Officer carries with it an expectation of a "higher standard" when viewed by the public in general. Specifically, the public expects its Police Officers to obey the laws they enforce; they expect officers to serve as role models in their moral character and social behavior; they expect officers to refrain from acts such as abusive use of alcohol and drugs. In short, the public expect its law enforcement officers to stand

behind their oath of office and execute their duties in a truthful and conscientious manner.

Although these standards are as thorough as possible, other facts may be discovered about an applicant through the background investigation which are not contained in any of the described categories. These facts may make the applicant an unsuitable choice for employment with the Cleveland Division of Police. . . .

#### STANDARDS FOR DISQUALIFICATION/NON-FAVORABLE CONSIDERATION

. . .

##### (C) JOB HISTORY

A poor employment history will result in disqualification of the applicant for the position of Police Officer. This includes a record of insubordination, absenteeism or tardiness, dishonesty, incompetence, or consumption of alcohol in violation of company policy while employed. As a general rule, any conduct on the job which would result in discipline if the applicant were a member of the Cleveland Division of Police shall be grounds for disqualification.

. . .

##### (F) FALSIFICATION/FAILURE TO COOPERATE WITH APPLICATION PROCESS

Any applicant who fails to cooperate with the Cleveland Division of Police and the City of Cleveland in the processing of his/her application for the position of Police Officer shall be eliminated from consideration. This includes failure to provide necessary information, making untrue or misleading statements in connection with the personal history statement or any part of the processing procedure, or the failure to include any information or documents requested by the City or the Division of Police. . .

#### CONCLUSION

Failure by the applicant to enumerate or disclose any offense or information does not exclude such offense or information for being the basis of disqualification. Any . . . material discovered through the background investigation, under the proper circumstances, can result in disqualification from employment as a Cleveland Police Officer if it is demonstrated that the acts or omissions of the applicant were such as to make it inappropriate for him/her to serve as a Police Officer.

The Cleveland Division of Police, through careful and thorough applicant processing procedures, can insure that the highest quality candidates are employment and retained. When used properly, these standards for hiring will ensure only those applicants meeting and exceeding the "higher standard"



expectations of the public are met. The citizens of Cleveland deserve nothing less

### ISSUE

Was the aggrieved-of termination meted-out to grievant on 30 May 2017 for just cause? If not, what shall be the remedy?

### OPINION

Despite the national (international) attention the deadly force incident of 22 November 2014 has garnered over time, this arbitrator would like to be very clear that this opinion and award is neither influenced by nor impacted by public opinion, perceived “political correctness” from either side of the spectrum, the media’s interpretation of past events, or the opinions, thoughts, or beliefs of any individual, their representatives, or any other third party. It is undisputed that the Cuyahoga County Sheriff’s Office, the Cuyahoga County Prosecutor’s Office, the Ohio Bureau of Criminal Identification and Investigation, an empaneled Grand Jury, the Cleveland Division of Police Internal Affairs Unit, and the ad-hoc Critical Incident Review Committee all concluded that grievant did not act criminally or violate any Division administrative rule or regulation on 22 November 2014. Hence, this case is not about the legal or administrative conclusions surrounding the events of 22 November 2014. While this incident precipitated the investigation that led to the meted-out discipline, in my current role, I am tasked solely to adjudicate whether the City had just cause to terminate grievant for his alleged omission and/or failure to provide full and complete information on his PHS when applying for employment with the City. That is my focus here!

As a threshold matter, the CPPA argues that the City is time-barred from bringing administrative discipline under Article VIII, Section I, of the parties Agreement. Entitled the “Bill of Rights,” the provision reads:

(I) In such cases where the administrative investigation is initiated without a citizens’ complaint, and the investigation could not lead to criminal charges, the City shall not bring administrative charges later than one (1) year after the date within which the Chief had knowledge of the alleged violation. If the administrative charges are not brought within one (1) year, the accused member may be ordered to respond to the complaint and to the investigation but shall not be subject to disciplinary action. The City may be granted an additional 90 days for good cause shown.

The CPPA argues that the City is time-barred under the clear language of the CBA and

should have initiated disciplinary charges against grievant by no later than 4 December 2015, or one (1) year after Williams first learned of the potential issues with grievant's PHS. Having failed to request an extension of time, the CPPA contends the City should be restricted to the remedy set forth in the contract, namely, that the "accused member may be ordered to respond to the complaint and the investigation but shall not be subject to disciplinary action."

The salient language at issue limits the one (1) year time limitation to cases where "the investigation could not lead to criminal charges..." From grievant's initial interactions with the City, he was put on notice that any false or omitted facts that may affect his employment were subject to criminal charges, i.e., perjury. In fact, the PHS explicitly states:

Applicants are cautioned to answer every question truthfully and without evasion. The Ohio Revised Code provides penalties for making a false statement of material fact, or perpetrating a fraud or deception in obtaining, or attempting to obtain municipal employment. Penalties include rejection for appointment, discharge after appointment, and/or prosecution under Ohio Revised Code Section 2921.13.

Grievant was placed on notice that any false or evasive answers could subject him to discipline and/or criminal prosecution, even after appointment as a Patrol Officer. Given the complexity, breadth, and detailed scope of the investigations of the Cuyahoga County Sheriff's Office and the County Prosecutor, it was reasonable for the City to hold in abeyance any internal administrative review during the pendency of those investigations. It was not until the conclusion of those investigations, on or about 28 December 2016, that the City learned that Prosecutor McGinty would not be pursuing criminal charges against grievant for alleged perjury or otherwise. From that point, pursuant to the CBA, the City had one (1) year, or until 28 December 2017, in which to initiate disciplinary charges against grievant. However, the contract provides the City with a ninety (90) day extension for good cause shown. While the CPPA argues that the extension can only be effectuated upon consent of both parties in writing, the contract contains no such limiting language. Nowhere in the Bill of Rights did the parties articulate any consent requirement. Thus, the ninety (90) day extension of time is self-effectuating upon a showing of good cause. Here, the City argues that the CIRC investigation was complex, detailed and voluminous in that the information the committee reviewed filled a 66-gigabyte hard-drive. It cannot be disputed that the deadly force incident at issue was unique and contained multiple moving parts. There is no evidence that the CIRC was dilatory or did not pursue its task with diligence and expediency. Under these circumstances, the City has shown good cause for the ninety (90) day extension. There

is no question that the charging letter of 13 January 2017 was issued within that period. Plainly, the meted-out discipline cannot rightly be rescinded under the one (1) year time limit set forth in Article VIII, Section I, of the parties' CBA.

The CCPA argues that the City is required, by clear and convincing evidence, to establish just cause. While various arbitrators view just cause differently, the majority have held that the employer need only prove, by a greater weight of the evidence, that alleged infractions occurred. A preponderance of the evidence standard, and not the heightened burden of clear and convincing evidence, is appropriate here. Thus, I will determine whether the City has established, by the greater weight of the evidence, that the aggrieved-of discharge was pursuant to just cause.

Sgt. Greg Tinnirello (Tinnirello) and Deputy Chief Polak of the Independence Police Department both testified that grievant experienced a series of incidents during his initial field training that led his supervisors to conclude that grievant lacked the maturity and emotional stability to be a police officer.<sup>8</sup> The individual incidents need not be specified herein, as they are well documented in the record. Suffice it to say, however, the incidents led management within the City of Independence to conclude that grievant was not suitable for employment as a police officer and provided grievant the opportunity to resign in lieu of formal discharge. These claims are largely undisputed. Grievant elected the former and authored a resignation letter dated 5 December 2012 stating that he was resigning for "personal reasons."

The CPPA argued that grievant was not subject to discipline while at Independence as reflected in certain internal administrative e-mails and other correspondence/memoranda. The internal communications indicate a degree of discretion on the part of Independence. From the evidence provided, it appears that grievant left the City of Independence under good terms, and there would have been no reason for the City leadership to provide detailed information regarding grievant's departure to those not needing to know such information.

Grievant applied for police officer positions with various other agencies, including the City. In his employment applications, grievant consistently listed "personal reasons" as the basis for his departure from Independence. The crux of the present issue is whether grievant's representation that he resigned from the Independence Police Department for "personal reasons" comports with the instructions and directions of the City's PHS, or whether grievant was obligated

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<sup>8</sup> Since grievant opted not testify at hearing the testimonies of Tinnirello and Polak considering grievant's work history at Independence are unrebutted.

to provide further clarification or explanation as to the underlying incidents leading to his departure from Independence.

The analysis of whether grievant made untrue statements or failed to provide clarifying information on his PHS requires a poignant examination of the PHS utilized by the City in 2013. Immediately following the cover page, the PHS sets forth the directions and instructions to be used by the applicant in completing the PHS. Pertinent to the current issue, the PHS explains, in part:

. . . Failure to provide complete and truthful information will result in rejection for appointment pursuant to City of Cleveland Civil Service Commission rules, and/or discharge after appointment.

. . . Additional space for explanation or clarification regarding your responses can be found in Section 11, page 14.

Applicants are cautioned to answer every question truthfully and without evasion. The Ohio Revised Code provides penalties for making a false statement of material fact, or perpetrating a fraud or deception in obtaining, or attempting to obtain municipal employment. Penalties include rejection for appointment, discharge after appointment, and/or prosecution under Ohio Revised Code Section 2921.13.

\*\*\*\*\*

Failure to fully complete the Personal History Statement or to submit the required documents will delay the investigation of your suitability for employment and may jeopardize your appointment to the Cleveland Police Department

The document must be notarized with the attestation clause providing "I further understand that the answers contained herein are complete and correct in every respect." The clause reiterates the consequences of providing misleading information and states that "I also understand that any material misrepresentation of fact may be cause for rejection before appointment or disqualification and prosecution after appointment."

With this background in mind, we now turn to the individual charging specifications resulting in the aggrieved of discipline. Specification Nos. 1 through 3 read as follows:

**Specification #1:** In the November 18, 2016, Investigative Report, the Division learned that on May 13, 2013 you (Patrol Officer Timothy Loehmann #1231) verified under oath and provided false information on the Division of Police Personal History Statement (PHS) of your application for employment. Specifically, Section 10, # 12, Did you intentionally omit any facts that you feel might disqualify you for the position of Patrol Officer with the City of Cleveland? You omitted the fact that you would have been terminated by the Independence Police Department,



but they allowed you to resign instead. Among other things, while working for the Independence Police Department, you failed to secure your firearm, were insubordinate and untruthful to a superior officer. In addition, the Independence Police Department concluded that you were 'emotional [sic] immature' and possessed an 'inability to emotionally function.' Also, during a state qualification course, you could not follow simple directions and had an emotional breakdown. Subsequently, you were sent home for the day.

**Specification #2:** In the November 18, 2016, Investigative Report, the Division learned that on May 13, 2013 you (Patrol Officer Timothy Loehmann #1231) verified under oath and provided false information on the Division of Police Personal History Statement (PHS), specifically Section 5, entitled 'Employment History.' When asked about your employment with the Independence Police Department, you indicated without qualification or clarification that your reason for leaving was that you 'resigned for personal reasons' and when asked if you received any disciplinary actions, you answered 'No,' without mentioning that you faced discharge proceedings when your employment ended and that the resignation was permitted to avoid discharge.

**Specification #3:** In the November 18, 2016, Investigative Report, the Division learned that on May 13, 2013 you (Patrol Officer Timothy Loehmann #1231) verified under oath and provided false information on the Division of Police Personal History Statement (PHS), of your application for employment, specifically, Section 11, entitled 'Explanations and Clarifications,' when you were provided with the opportunity to include any additional explanatory information, you never mentioned the circumstances surrounding your resignation from Independence Police Department, you responded 'DNA.'

All three Specifications center around the information grievant provided regarding his departure from the Independence Police Department. In Section 5 – Employment History, responding as to why he left his prior employment, grievant wrote "Personal re," crossed out same, and continued "Resigned for personal reasons." Further, Section 10, Question 12 asked: "Did you intentionally omit any facts that you feel might disqualify you for the position of Patrol Officer with the City of Cleveland?" Grievant responded "no." In response to Section 11, entitled 'Explanations and Clarifications,' grievant did not provide any explanatory information or clarify the reasons for his departure from Independence, but instead, responded "DNA." In any event, when grievant, under oath, signed off on his PHS on 13 May 2013, he affirmed that "the answers contained herein are complete and correct in every respect." He also acknowledged he understood "that any material misrepresentation of fact may be cause for...disqualification and prosecution

after appointment.”

Given these application affirmations by grievant, it is appropriate to consider the insertion of the terms “personal reasons” on his PSH when addressing the question why he had resigned his position at Independence. Put simply, was his use of the terms personal reasons “complete and correct.” I think not, for those terms in no way provided any insight as to what the circumstances/objectives were surrounding his resignation. He could have easily done so under Section 11 of this PHS.<sup>9</sup> These terms were clearly ambiguous at best and far from “complete.”

Viewing all the evidence, while grievant’s responses were technically correct in that he did not overtly lie or provide false information, it is apparent that grievant omitted certain facts that he knew, or least suspected, would jeopardize his future employment as a police officer. Salient to this determination was the conflicting nature of grievant’s testimony relative to his “personal reasons” for leaving the Independence Police Department.

When applying for a position with the Euclid Police Department, grievant told Sgt. Barron “I just knew I wasn’t going to be happy there.” Pressed further, he indicated he wanted to work in a larger department. Sgt. Barron testified that he was convinced that grievant was not being forthright with him. Similarly, while proceeding through the hiring process with the Greater Cleveland Regional Transit Authority (GCRTA), grievant told Detective Joseph Kemmett that “he was looking for more action.” Lastly, during his pre-disciplinary hearing, grievant offered yet a third explanation and testified that his resignation was unconditional. More troubling, after further inquiry, he then backtracked and testified that he could not recall the substance of the conversation between himself and his superiors at Independence. A questionable lapse of memory.

It is evident that grievant was confronted with a moral dilemma: provide detailed information explaining the reasons for his departure from the Independence Police Department and jeopardize future employment opportunities, or provide as little information as possible regarding the reason for his departure with the hope that it would go unnoticed or he would at least get his “foot in the door” and be afforded the opportunity to provide further information. Grievant chose the latter. What strikes me as disconcerting is that even when afforded the opportunity to explain the reasons for his departure, he remained evasive and not forthcoming. Sgt. Barron and

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<sup>9</sup> At 1 of grievant’s PSH the following is stated “Additional space for explanation or clarification regarding your responses can be found in Section 11, page 14.” This was clear notice to grievant that his responses to specific questions were not to be limited to the space provided in/following a question.

Detective Kemmett were impartial witnesses and both believed grievant was not being truthful during his interviews. Grievant elected not to testify at the arbitration, so there is no evidence contradicting or mitigating either Sgt. Barron or Detective Kemmett's testimony. Again, as impartial witnesses with no perceived advantage to testify one way or the other, their testimony deserves considerable deference. Further, grievant's testimony during his pre-disciplinary hearing did not help his cause. Outright denial of proven facts, or in the alternative, resorting to lack of memory, does not provide color or explanation as to grievant's side of the story. Considering all the evidence, I am persuaded that the City has proven, by a greater weight of the evidence, that it had just cause to discipline grievant under Specifications Nos. 1 through 3 of the charging letter.

Specification No. 4 read as follows:

**Specification #4:** In the November 18, 2016, Investigative Report, the Division learned that on May 13, 2013 you (Patrol Officer Timothy Loehmann #1231) verified under oath and provided false information on the Division of Police Personal History Statement (PHS), of your application for employment. Specifically, Section 10, # 9, To your knowledge, has any other department agency or private company disqualified you for employment? You failed a written exam in the fall of 2009 for Maple Heights Police Department, according to your Personal History Questionnaire for Independence. The Independence Police Department also disqualified you when they declined to rehire you because you were allowed to resign to avoid a discharge.

Here, the City requires too much of grievant. The term "disqualified" is ambiguous, unclear and subject to multiple interpretations. For example, the mere fact that grievant failed the civil service examination for the Maple Heights Police Department does not mean he was forever "disqualified" from becoming a Maple Heights Police Officer. It simply meant that grievant was not eligible to be placed on the then current civil service list. Most jurisdictions give civil service examinations every two (2) years, and grievant was fully entitled to retake the examination for inclusion on a subsequent hiring list. Similarly, it is not entirely clear that grievant was "disqualified" from ever returning to the Independence Police Department. Sgt. Tinnirello and Deputy Chief Polak attributed grievant's deficiencies primarily to a lack of maturity. Given more time, experience and personal growth, it is unknown whether the Independence Police Department would have entertained the idea of employing him at some future point in time. Accordingly, the City has not established just cause for the issuance of Specification No. 4.

Charging Specification No. 5 alleges that grievant did not identify all the agencies he had

applied to in response to Section 5, #3. That section asks: “Within the past seven (7) years, have you taken a Civil Service Examination for the position of Patrol Officer with any law enforcement or other governmental agency (including the Cleveland Police Department)?” Grievant listed four (4) police departments (Cleveland, New York City, Akron and Independence), in contrast to the eight (8) agencies he identified on his Personal History Questionnaire for Independence (New York, Cleveland, Mentor, Euclid, Berea, Maple Heights, Rocky River, US Marshal’s Service). While grievant’s failure to identify all applicable agencies may have been a violation of the instructions provided, no evidence has been presented that would leave me to believe the omission was intentional or with any nefarious intent. As such, the City has not established just cause relative to Specification No. 5.<sup>10</sup>

The CPPA argues there are multiple parties at fault and grievant should not be held accountable for the failures of others. It is most certainly true that, in this instance, blame can be distributed among others. The City of Independence was not entirely forthcoming with information when contacted by the City’s Personnel Unit regarding grievant’s employment. It can further be argued that the Personnel Unit missed obvious “red flags” and did not investigate grievant’s background with requisite diligence or degree of thoroughness. Regardless, I must agree with the City that the shortcomings of others cannot be used to exonerate or alleviate grievant’s misconduct. As I have indicated in another setting, police officers are held to a higher standard of duty than the general public. With their position comes an enhanced expectation of truthfulness and honesty. Ultimately, the onus was on grievant to be completely truthful and provide complete and accurate information on his PHS. The conduct of others does not relieve grievant of this obligation.

The CPPA further argues that grievant’s discipline was the result of political pressure and was nothing more than a politically expedient solution to public discontent. It is undisputed that several third parties, including Tamir Rice’s mother, her attorney(s), various activist organizations, all sought to interject themselves into the investigations regarding grievant and Officer Garmback. The CPPA highlights the continued pressure Ms. Rice and/or her attorneys placed on the City’s administration calling for the termination of both grievant and Officer Garmback. While such pressure was certainly present, I find no evidence that it improperly

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<sup>10</sup> The City acknowledged that Specification No. 6 does not constitute a separate act of misconduct, but rather, reflects non-compliance with the PHS instructions which were, in part, not followed by grievant.



influenced the investigation into grievant's PHS. In fact, had the City succumbed to political pressure, then an immediate response would have been more likely. It took over two (2) years for the Cuyahoga County Sheriff's Office and the CIRC to complete their respective investigations. The investigation regarding grievant's responses on his PHS did not occur until both afore-referenced investigations were concluded.

Having found just cause for the issuance of Specifications Nos. 1 through 3, it is paramount that the discipline imposed be commensurate with the infraction. It is well settled that discipline cannot be administered in a capricious or arbitrary manner and must be commensurate with the seriousness of the alleged misconduct. Generally, arbitrators are reluctant to disturb Management's chosen level of discipline when just cause is established by the Employer; thus, the burden is upon the Union to prove the affirmative defense that the level of discipline was, in fact, excessive, discriminatory, arbitrary and/or capricious.<sup>11</sup> In determining whether the meted-out discipline was excessive, discriminatory, arbitrary and/or capricious, due consideration must be given to the seriousness of the alleged misconduct; the employee's past record; past practice of the Employer in similarly situated situations; and whether the misconduct at issue was of such a nature to preclude the Employer's ability to function effectively.

Here, both parties have highlighted prior instances of discipline involving other City employees and other Division of Police members, constituting a myriad of offenses over a span of time. As mentioned above, I will not restate the facts of each incident, though I have thoroughly examined and studied same and given much thought as to the effect, if any, that each incident may have on the current dispute. Such an analysis cannot be rightly limited to the level of discipline issued for a specific offense but must include the factual circumstances each action. More on this point below.

Turning to the disciplinary matrix, the CPPA observes that it was installed unilaterally by the City and not the product of negotiations. It, however, has cited no contractual provision requiring the City to negotiate employee conduct rules with the CPPA. The reality here is that under the provisions of Article IV of the CBA the City may establish reasonable employee rules of conduct if they do not contravene the parties' CBA. In other words, Arbitrators typically agree that an employer has the right to establish and enforce work rules so long as such are reasonable

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<sup>11</sup> See *Rural Metro Ambulance Co.*, 123 LA 604 (Sergeant, 2007).

and serve a legitimate business reason.<sup>12</sup>

While the Matrix is of little import in determining the initial issue under a just cause analysis, i.e., was there reasonable basis to issue discipline, it does provide a basis/guideline to measure employer consistency in the meting out of discipline (penalties) for similar offenses. In other words, the matrix provides a reasonable basis for determining if a selected penalty is consistent with other penalties imposed by the Police Department for similar offenses, under similar circumstances. The City's use of its disciplinary matrix does not conflict with the CBA's just cause provision. It is not to be viewed as supplanting the contractual just cause requirement but simply as a tool to assess consistency in the meting out of discipline. This does not require that all discipline for a specific offense must be the same, especially where materially different circumstances are present. Rote consistency in the meting out of discipline clearly would be the crutch of a small-minded person and contrary to the discretion provided for under the matrix.

Viewing the disciplinary matrix, it is evident that providing false statements or reports is a Level III violation, for which it prescribes discipline up to and including discharge. When examining the fairness and equal imposition of discipline, it is incumbent to compare "apples to apples" and not "apples to oranges." In other words, proper comparators must be those receiving discipline from the same appointing authority and under the same disciplinary framework. Here, it is only proper to examine prior instances of misconduct arising from other police officers, disciplined by the same appointing authority, and utilizing the same disciplinary framework. In this regard, the City highlights the case of Brandon Smith. The City characterizes this as the leading case in the Division of Police following the implementation of the disciplinary matrix and under the tenure of Public Safety Director McGrath in which an officer had been charged with dishonesty on his PHS. The CPPA distinguishes this case because Mr. Smith was a cadet in the police academy and not a sworn officer. Further, the CPPA argues that it produced compelling mitigating factors regarding grievant's employment evaluations, testimony of other officers, and letters of commendation from outside sources. All these data have been reviewed and considered by me.

As for the CPPA's claim of disparate treatment by the City in terminating grievant for not providing more detail to in his completion of his PHS, such is without merit. Disparate treatment

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<sup>12</sup> See *Nuplex Resigns, LLC*, 133 LA 996 (Wilson, 2014).

is generally defined as treating an individual employee less favorably than his peers in the meting out of a disciplinary penalty. In other words, the grievant claims s/he has been disadvantaged because other employees in the past were treated in a more favorable manner. CPPA attempts to prove disparate treatment in this case citing 23 prior disciplines ranging from two to 120-day suspensions for alleged acts of dishonesty/falsification. Three (3) interrelated circumstances undermine this CPPA argument.

First, most of the cited disciplines predate the Police Department's promulgation of its disciplinary matrix, a fact acknowledged by CPPA President Follmer at hearing.<sup>13</sup> In any event, the matrix was intended, in part, to address alleged inconsistency within the Police Division in the meting out of disciplinary penalties for similar offenses. Second, it is McGarth, as the deciding authority, whose actions under the matrix that must be considered and not his predecessors or other City officials. This record shows no inconsistency in his back in cases involving charges of falsification of records by an applicant/employee who was under oath at the time. Third, there has been no compelling showing that cited disciplinary actions involved similar offenses under similar circumstances. That proffered by the CPPA simply fails to establish disparate treatment of grievant in the meting out of the aggrieved-of discipline.

After reviewing both sides, the similarities between the Brandon Smith case and grievant's current situation outweigh any distinguishing factors. The simple fact remains that had grievant been forthright on his PHS and provided clarification relative to his departure, he, most likely, would not have been hired as a Cleveland Police Officer. It was reasonable, under the circumstances, that Public Safety Director McGrath made the decision that grievant could no longer function as a competent member of the police force after having determined that he lacked trustworthiness and honesty, two (2) core characteristics of a professional police officer. In the end, I find that the CPPA has failed to provide evidence that grievant was treated differently or disparately from any other similarly situated comparator.

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<sup>13</sup> At Tr. 901-902" the following exchange appears "Q: If I recall correctly, every one of those cases that you mentioned were all cases that were decided –the discipline was assessed, and the case was decided before the police Division established its disciplinary matrix, is that correct? A: Correct." Several of the cited prior disciplines/incidents of alleged falsification involved individually working in other City Departments not in the Police Division chain of command and are thus irrelevant.

**AWARD**

The grievance is denied, the City having demonstrated just cause in its meting-out the aggrieved-of discharge related to Specifications Nos. 1 through 3 in the charging letter dated 13 January 2017. Specifications Nos. 4 through 6 are dismissed for the reasons set forth above under the Opinion herein.

  
JAMES E. RIMMEL  
ARBITRATOR

12/1/18