BEFORE AN ARBITRATOR APPOINTED THROUGH THE FEDERAL MEDIATION AND CONCILIATION SERVICE

In the matter of:

INTERNATIONAL UNION OF POLICE ASSOCIATIONS (IUPA) (on behalf of Grievant Ofc. Johan "Joey" Mulero),

Union,

and **FMCS Case # 190926-11289**

CITY OF DELAND,

Employer.

_____/

ARBITRATOR'S AWARD

Appearances:

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PROCEDURAL HISTORY

This matter was submitted under the grievance arbitration provisions of the relevant collective bargaining agreement between the Parties. CX-1, Article 12; CX-2, Article 12[1] Two days of arbitration hearings were held: the first occurred on July 30, 2020, which was held in person at the City Commission Chambers in DeLand; the second was held by ZOOM on November 19, 2020. Both proceedings were open to the public. The Parties also stipulated that Court Reporters, who were present for the hearings, would transcribe the proceedings, and that said transcript would serve as the official minutes and record of the hearings.

The Parties stipulated at the arbitration hearing that the matter of the discharge of Grievant, Johan "Joey" Mulero, was properly before the arbitrator, although the Parties disagreed as to how that discharge should be properly framed as an issue to be decided.

The arbitrator accepted into evidence several Exhibits, CX-1 through CX-52-6 (except CX-41 and CX-43, both of which the arbitrator excluded), UX-1 through UX-31, and AX-1. The City presented the testimony of DeLand Police Chief Umberger, DeLand City Manager Michael Pleus; and the Grievant. The Union presented the testimony of DeLand Police Sergeant Joshua Santos; DeLand Police Lieutenant Juan Millan;[2] Union Business Agent Gregory Cook; and the Grievant. The City did not present a case in rebuttal.

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[1] Throughout, references to City Exhibits are denoted as "CX-[n]", Union Exhibits are denoted as "UX-[n]", and the single Arbitrator's Exhibit is denoted as "AX-[n]",where "[n]" corresponds to the number of the exhibit. Thus, CX-1, refers to City Exhibit 1, the Collective Bargaining Agreement between the Parties for FY 2017 – 2018. The Parties disagree as to whether CX-1 or CX-2 applies to this proceeding. That argument is addressed below.

[2] This witness was a Sergeant at the time of the Internal Affairs investigation that led to discipline here but held the rank of Lieutenant at the time of the arbitration hearings in this matter. He is otherwise referred to herein by the rank he held at the time of the investigation: "Sgt. Millan."

The Parties stipulated to the submission of posthearing briefs due on or before January 22, 2021; this deadline was extended twice, such that briefs were due not later than February 12, 2021, The arbitrator received the second of the Parties' post-hearing briefs electronically on February 12, 2021, and the arbitrator emailed both briefs to both Parties at that time, closing the record.

After considering the testimony and argument presented at hearing, reviewing the eighty-seven Exhibits, and thereafter reviewing the arguments in the Parties' posthearing briefs, the arbitrator has deliberated and hereby issues the following award.

ISSUE PRESENTED

The Parties disagreed, both at hearing and in their posthearing briefs, as to the specific issue submitted to me for decision.

The City points to the arbitration provisions of both CBAs, which limit my inquiry to the issues as framed in the Step 1 grievance, CX-1, Art. 12, § 12.6: ". . . Under no circumstances shall the issues to be arbitrated be expanded from the issues set forth in the original grievance filed at Step 1 of the grievance procedure." Thus, the City frames the issue as:

> WHETHER THE CITY VIOLATED SECTIONS 8.1 AND/OR 8.7 OF THE RELEVANT COLLECTIVE BARGAINING AGREEMENT, WHEN IT TERMINATED GRIEVANT'S EMPLOYMENT? IF SO, WHAT SHALL BE THE REMEDY?

The Union points out that Section 8.7 (of either CBA) provides that probationary employees are subject to dismissal for any reason and that the City did not need just cause for their termination. However, the Union asserts the only proper interpretation of Section 8.7's

language is that the City had to have just cause to discharge nonprobationary employees, like Grievant. Thus, the Union urges me to frame the issue as:

> WHETHER THE CITY HAD JUST CAUSE TO DISCHARGE THE GRIEVANT AND, IF NOT, WHAT SHALL THE REMEDY BE?

In determining the issue submitted for decision, I necessarily must address two threshold questions: which collective bargaining agreement applies; and what did the Parties mean in §§ 8.1 and 8.7?

In determining which CBA applies, I note that, by its terms, CX-1 (the FY 2017-2018 CBA) applied from the date of its ratification, February 19, 2018, through the date of its expiration, September 30, 2018. (CX-1, pp. 35 – 36) By its terms, CX-2 (the FY 2018 – 2019 CBA) applied from the date of its ratification, January 7, 2019, through the date of its expiration, September 30, 2019. (CX-2, pp. 36 – 37) During the period after lapse of CX-1 until the effective date of CX-2, the City was obligated to maintain the status quo, i.e., to abide by the terms of the then-expired CX-1. *See, e.g.*, *Utility Workers Union of America v. City of Lakeland*, 8 So. 3d 436, 437–38 (Fla. 2d DCA 2009) ("Generally, the "status quo period" refers to the gap between collective bargaining agreements, when one agreement has expired and another has not yet been executed. During this time, the terms of the first agreement govern the labor/management relationship. The employer cannot unilaterally alter material terms in the expired contract pending negotiation of a new contract.")

While the conduct at issue occurred prior to CX-1, the ultimate termination decision was taken on December 3, 2018. (CX-23) The present grievance was filed on December 4, 2018, asserting violations of CX-1. At that time, CX-1 was in its post-expiration status quo period, and is, therefore, the applicable collective bargaining agreement; CX-2 is of no

relevance here. *See also,* Fla. Stat. § 447.309: ". . . . Any agreement signed by the chief executive officer and the bargaining agent shall not be binding on the public employer until such agreement has been ratified by the public employer and by public employees who are members of the bargaining unit. . . ." Answering this initial question does not, in and of itself, fully resolve the question of the proper scope of the issue before me.

While the Parties agree that Sections 8.1 and 8.7 of the CBA (CX-1) are what the Union's grievance asserted were violated, the Parties differ on whether "just cause" applies to the current termination. The City says it does not, because § 8.1 does not limit management's right to discipline solely to situations where it had just cause, and § 8.7 does not apply because Grievant was nonprobationary. The Union, for its part, asserts that § 8.7's reference to the City's ability to discharge probationary employees without just cause to do so necessarily implies that just cause is required for the City's discharge of nonprobationary employees.

Accordingly, to determine the issue presented here, I must interpret the CBA to determine whether the just cause standard is applicable to Grievant's discharge. As noted by the Supreme Court,

> [w]hen an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem.... Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). Thus, we must turn first to the contract language at issue. The relevant CBA provides the following regarding discipline of bargaining unit employees like Grievant:

ARTICLE 8
EMPLOYEE DISCIPLINARY PROCEDURES

> **8.1** The City may, as provided for in other Articles of this Agreement and City, Departmental and Divisional policy, discipline employees as required. The Grievance and Arbitration Procedure hereunder shall be the exclusive procedure to contest disciplinary actions. The City's grievance procedure shall not apply (or be available) to bargaining unit employees hereunder.
>
> . . . .
>
> **8.7** Bargaining unit employees serve at the will and pleasure of the City during their new-hire probationary period. As such, new-hire probationary employees may be disciplined or discharged with or without cause, and with or without notice. Further, new-hire probationary employees shall not be subject to the Law Enforcement Bill of Rights.

Elsewhere, in Article 10, the City has retained the management right to "[f]ire, demote, suspend or otherwise discipline employees in accordance with this Agreement. . . ." (CX-1, Art. 10, § 10.2.Q)

I believe two important contract interpretation tools provide us with apt guidance here: (1) *espressio unius est exclusio alterius* and (2) contract interpretations that tend to nullify or render meaningless any contract term are to be avoided. These principles are both discussed in ELKOURI AND ELKOURI, HOW ARBITRATION WORKS, 8th Ed. May (2016), pp. 9-36 and 9-40, and the cases cited therein; they are also familiar features of black letter contract law. The first tool tells us that parties' inclusion of certain specific terms in a contract necessarily implies the parties' intent to exclude those related items not mentioned. The second leads us to disregard contract interpretations that would lead to any part of the contract being seen as having no meaning.

Applying these maxims to § 8.7, I believe the Parties' reference to the inapplicability of "just cause" to probationary employees necessarily implies they meant to apply the just

cause doctrine to nonprobationary employees. The language of § 8.7 would make no sense if the "just cause" standard did not already apply to other, nonprobationary bargaining unit members; put another way, if "just cause" did not apply to the entire bargaining unit, including both probationary and nonprobationary employees, there would be no need to mention its inapplicability as to probationary employees.

Thus, I determine the two aspects of the issue submitted by the Parties are really one in the same: whether the City violated §§ 8.1 and/or 8.7 necessarily means whether the City had just cause for the nonprobationary Grievant's termination. Accordingly, the issue submitted here is:

> *Whether the City violated sections 8.1 and/or 8.7 of the collective bargaining agreement by terminating Grievant's employment without just cause? If so, what shall the remedy be?*

As this is a discipline case, the City has the burden of proof.

RELEVANT CONTRACT PROVISIONS

[Articles 8 and 12, cited above]

RELEVANT CITY RULES AND REGULATIONS

City of DeLand Rules and Regulations:

ARTICLE XXII - DISCIPLINARY ACTIONS

Section 1. Purpose
It is the intent of the City that effective supervision and employee relations will avoid most matters which necessitate action. To this end, the City encourages to the fullest that employee behavior is positive and supportive of the goals of management. The purpose of the rules and the disciplinary actions for violations of those rules is to ensure the rights of all employees and to secure cooperation and orderliness.

. . . .

Section 3. Procedure

A. The following procedure is intended to assist supervisors and Department Heads in determining a proper course of action when discipline is needed. An employee who violates any of the established personnel policies, administrative directives or operational, safety or departmental rules is disciplined on the basis of the severity and/or frequency of the violation. Severity is interpreted as follows:

- Minor Not a threat to the safety or well-being of persons, property or the organization.
- Major Intentional need for performance or behavior correction to include greater disciplinary action items. This includes steps to discipline to possibly include suspension.
- Serious Intentional or repeated violation of the City's Rules and Procedures or violations of local, state or federal law. A threat to the safety or well-being of persons, property or the organization. Or such an egregious violation of the City rules and procedures or violation of local, state or federal law that poses such a threat to the safety or well-being of person, property or the organization that employment of the individual committing the violation cannot be continued.

B. Progressive Disciplinary Action

Disciplinary action may be taken for any just cause. . . .

C. Disciplinary Actions:

. . . .

6. Dismissal

A dismissal is initiated when all previous disciplinary actions have failed to bring a satisfactory change in conduct or when lesser action is deemed insufficient for the offense. All dismissals must be approved by the City Manager.

. . . .

(AX-1)

DeLand Police Department Rules and Regulations:

1.2.1 Members and employees shall not engage in any conduct which constitutes neglect of duty, conduct unbecoming of a member or employee, or any act which is likely to adversely affect the discipline, good order, or reputation of the Department.

1.8.2 A person shall not be arrested or detained except as provided by law.

> 1.8.3 Officers shall not use any more force than is necessary to effect an arrest or take a person into police custody, i.e., Baker Act, missing person, etc.
>
> 1.8.15 No member or employee shall knowingly falsify any official report or enter or cause to be entered any inaccurate, false, or improper information on any document, used and/or maintained by this department.
>
> 5.7.2 Incident Reports — Conduct thorough investigations.
>
> 5.7.3 Incident Reports — Obtain sworn written witness and victim statements, whenever possible....

(CX-12; CX-21)

FACTS AND ARGUMENT OF THE PARTIES

The facts in this case are largely undisputed. The Grievant had been a Police Officer with the DeLand Police Department (DPD) since February 2013. During that time, he received generally positive performance evaluations, had received only one formal instance of discipline (for an at-fault car accident) and a few counseling letters (not considered formal discipline), and had served as a K-9 Officer and a Field Training Officer (FTO).

On the evening of September 14, 2017, Grievant interacted with two civilians, one of whom – Allan Kidd – the Grievant detained and arrested during the incident. At hearing and in their briefs, both the City and the Union described the events of September 14, 2017, however, I was also provided Grievant's body-worn camera (BWC) footage from the incident (CX-7), which allowed me to see and hear for myself what occurred. Based thereon, I quote the relevant parts of the City's brief, omitting argumentative descriptors of the conduct and events, as the description of the facts of this case:

> On September 14, 2017, at approximately 7:34 pm, [Grievant] and (former officer) Paul Turner responded to a dispatch report of a person allegedly "yelling at passerby's [sic]" at the intersection of N. Orange Avenue and W. New York Avenue in DeLand. [Grievant] arrived on scene, activated his Body Worn Camera ("BWC") and interacted with two individuals — one later identified as Allan Kidd, and a second unidentified male.

[Grievant]'s BWC footage from this encounter . . . is approximately six (6) minutes and fifty-eight (58) seconds long.

. . . . When [Grievant] first encounters Mr. Kidd, [Grievant] appropriately directs Kidd and the second individual to move away from downed power lines. . . . Kidd mentions to [Grievant] that he did not look up and notice the power lines, to which [Grievant] responds "okay, well maybe you should pay attention." [Grievant]'s condescending tone is immediately apparent in this comment.

. . . [A] few seconds after this demeaning comment, [Grievant] pushes Kidd and tells him "get away from me." . . . [Grievant] did not warn Kidd before initiating physical contact or request that he take a step back. Kidd questions [Grievant] by asking[, "Y]ou're pushing me away from you?" [Grievant] then further escalates the situation by stating[,] "I don't need you stepping up to me like that, sit down." Kidd merely responds in a questioning tone, "[S]tepping up to you?" at which point [Grievant] yells at Kidd and exclaims, "[S]it down or I'm going to sit you down." Kidd attempts, in a respectful tone, to tell [Grievant] "I wasn't stepping up to you, sir." However, [Grievant] ignores Kidd, grabs him and forcibly shoves him into a seated position on the ledge behind him. . . .

. . . . Further, [Grievant] neglected to ask any pertinent questions of the second individual, who was a potential witness. Indeed, [Grievant] never asked the individual if he saw Kidd yelling at passersby, nor did he get the individual's identification and/or contact information for follow-up purposes. In fact, the only person [Grievant] asked about the reason for being dispatched (yelling at passersby) was Kidd himself, who unequivocally and emphatically denied the allegation.

. . . . Over the next few minutes, [Grievant] (1) screamed at Kidd multiple times, (2) pointed his finger in Kidd's face on multiple occasions, (3) threatened to take Kidd to jail seven separate times — despite Kidd denying the allegation of yelling at passersby and despite [Grievant] having no information that a crime occurred — (4) told Kidd to "[S]hut up," (5) told Kidd he [wa]s going to "lay [him] out" and (6) ultimately tackled Kidd to the ground and arrested him for calling [Grievant] a "Nazi." Officially, [Grievant] arrested Kidd for the alleged crime of resisting an officer without violence.

[Grievant] then prepared his charging affidavit, detailing the arrest of Kidd. In his charging affidavit, [Grievant] alleges that, after he asked Kidd to step away from the powerlines, "Kidd began to get verbally aggressive and belligerent towards me. Kidd began to yell, asking why I was harassing him." . . . . [Grievant] further stated in his charging affidavit that he asked Kidd to sit down on multiple occasions and Kidd refused. . . . [Grievant] also stated that once he sat Kidd down, Kidd "began to yell profanities and began to call me a Nazi." . . . . In fact, [Grievant] continued to hold onto Kidd after forcibly sitting him down, yelled at Kidd, said "[W]hen I tell you to do something, you do it," and then pointed his finger in Kidd's face. Finally, [Grievant] omitted [from the charging affidavit] much of the remaining interaction with Kidd, [including, for example, that] Kidd denied that he ever yelled at passersby and [that Grievant] threatened to take Kidd to jail seven times.

> Ultimately, the State's Attorney's Office dismissed the charges against Kidd for lack of legal basis/probable cause after reviewing [Grievant]'s BWC footage of this incident.

(City Brief, at pp. 6 – 8, citations omitted)

No action was taken against Grievant at the time because the matter was not brought to the City's attention until May 2018, when the City received a demand letter from an attorney representing Mr. Kidd. (CX-10) The letter included a short version of the events and only the last 20 seconds or so of Grievant's BWC footage. Review thereof by the Chief and others led to no disciplinary or other investigation at the time and the City's outside counsel opined the arrest looked legal. Later, however, Mr. Kidd's counsel submitted the entirety of Grievant's BWC footage – which had apparently been deleted (or became otherwise unrecoverable) from DPD servers, so the only extant copies were those at the State Attorney's Office and, consequently, Mr. Kidd's counsel's office – which did lead the City to take action.

The matter was referred for Internal Affairs (IA) investigation, which was delayed somewhat due to the City's preference to resolve Mr. Kidd's civil claim before interviewing him for the IA investigation; Grievant was interviewed before Mr. Kidd's interview was completed but after the trainee officer was interviewed. (CX-12; CX-13; CX-14; CX-15; CX-16; CX-17) Ultimately, IA concluded the investigation and issued its report – although the IA investigator, Sgt. Millan, who was new to IA, failed to include a verified statement, required by Fla. Stat. § 112.533(1)(a)1, that "the contents of the report [we]re true and accurate based upon the person's personal knowledge, information, and belief." (CX-17) In the report, Sgt. Millan indicated the investigation led him to conclude Grievant did not have probable cause to detain or to arrest Mr. Kidd, used excessive force with Mr. Kidd, and failed to conduct a thorough investigation by,

among other things, not asking Mr. Kidd appropriate questions and by failing to get any identifying information from the other civilian present:

> As [Grievant] was talking to Kidd while Kidd was sitting on the concrete wall, the camera footage does show Kidd scooting forward and closer to [Grievant]. Kidd told [Grievant] he was just trying to get more comfortable, however, [Grievant] perceived it as a possible threat. When Kidd stood up to retrieve his ID, he was again questioning [Grievant]'s actions. When [Grievant] told Kidd that he did not like people trying him Kidd replied that he did not like fucking Nazis either. At that time Kidd pointed his finger in [Grievant]'s face. [Grievant] then uses a takedown to place Kidd on the ground and places him in handcuffs.
>
> Again in reviewing the video there was concern as to whether or not this was reasonable. It did not appear that Kidd was an immediate threat or was resisting [Grievant]'s efforts. [Grievant] stated that Kidd's finger was in very close proximity to his face and the camera angel did not show the fact that Kidd had a clinched fist and took a step towards [Grievant]. Once again, the same factors as mentioned above have to be considered. First, there are the officer/subject factors, Mr. Kidd is much older than [Grievant] and is not large in stature. Second, there were two officers present. Third, [Grievant] did nothing to try to take a step back from Kidd to create distance that would have made Kidd's intentions more apparent.
>
> Although Kidd was argumentative, he was attempting to produce his identification as requested by [Grievant]. The camera footage does not support [Grievant]'s statements that Kidd appeared to be an immediate threat which would justify grabbing Kidd and taking him to the ground. Just prior to this occurring [Grievant] used no verbal commands asking Kidd to take a step back, to again sit back down or telling him that he was under arrest and to place his hands behind his back. Based on the evidence and the facts as they are known, [Grievant]'s actions were [u]nnecessary and unreasonable.

(CX-17, p. 14)

Thereafter, the matter was referred to Chief Umberger who, after review with his command staff, decided to recommend Grievant's discharge, issuing Grievant a Notice of Proposed Discharge on October 25, 2018. (CX-18) Grievant elected the offered show-cause hearing before the Chief; the hearing occurred on December 5, 2018. At the show-cause hearing, Grievant (who attended personally and with two Union representatives), acknowledged he "could have done things different. I could have talked to this guy more and figured out how to deescalate the

situation. I had a bad day; a really bad day and I wish I could go back. I just don't want this to define me as the wrong officer." (CX-19, p. 1) The Chief asked Grievant why he acted as he did in front of a trainee.[3] Grievant stated:

> It is hard to tell you at this point exactly what was going through my head and what made me make the decisions that I made. I went off of some of the things I reacted based on the way he was being and I felt like I was making the decisions that I needed to make at the time. After reviewing and reviewing and all of this could do this in our careers, go back and wish and pray that we could do something different. But I couldn't really explain to you one hundred percent exactly what was going through my head. It's been so long ago, but I just, I don't know Chief it is hard to explain. I felt like I was just reacting to the way I did based on his actions and me having a bad day and me having all the things going on at that time and still going through and it's just, it Is hard to explain. But I've learned a lot in the past year, not just on this but with everything in my life and I'm heading in a different path and I'm praying to God that this isn't the last of me to where 1've completely lost everything. I've been able to work on the things my personal stuff and I've gotten some of the stuff handled, but I always felt that what was keeping me going was the hope and the idea that eventually coming back here where I know that I am happy. Where I know I have everybody that has my back and have the support that I have always had. That's what's kept me going this far. So losing this, I have nothing else. I really don't.

(CX-19, pp. 2 – 3)

Following the show-cause hearing, the Chief decided to sustain the recommendation of discharge and forwarded that recommendation to City Manager Pleus, who had the final decision. Mr. Pleus reviewed the investigative report and Grievant's BWC footage, which he later testified "deeply disturbed" and "deeply bothered" him (Tx. 175/2 – 14) and terminated Grievant's employment effective December 3, 2018. (CX-23) This grievance followed.

The City's Position.

The City stands behind the IA investigation, the BWC, the balance of the record, and its witness testimony to assert Grievant's discharge was proper. The City notes Grievant does not

[3] This apparently referred to Grievant telling the trainee officer, who was riding along with Grievant as his FTO, to "Watch and Learn," as they got out of the patrol car and Grievant confronted Mr. Kidd.

dispute the fact of discipline but, rather, asserts discharge was too harsh. However, the City states Grievant's "bad day" defense simply is insufficient in light of the fact that he abused his police authority, had no probable cause to detain, much less to arrest, was physically abusive to Mr. Kidd, and then, in essence, falsified the criminal arrest affidavit, by slanting his reporting of the events in a light that did not reflect the entirety of the circumstances. Not only was Mr. Kidd not prosecuted based on Grievant's BWC footage, the City asserts, but also the City had to pay out a settlement to Mr. Kidd; moreover the incident was the subject of negative publicity for the City. (CX-26; CX-27; CX-28) Accordingly, discharge was the appropriate discipline to impose here, due to the severity of the misconduct and the lack of mitigating circumstances.

In this regard, the City notes that neither Chief Umberger nor City Manager Pleus was persuaded by Grievant's "bad day" defense. Indeed, Mr. Pleus, acting as the Step 3 Grievance Officer, had IA pull other BWC videos of Grievant's interactions with the public, to see if, in fact, September 14, 2017 was just a bad day or was indicative of how Grievant interacted with the public. Mr. Pleus testified that the several videos, which were played at hearing (CX-52-1 to CX-52-6), led him to conclude that this was just how Grievant interacted with the public at the slightest lack of immediate cooperation. When Grievant asserted he had been trained that way but offered no specifics, Mr. Pleus found that unpersuasive. Accordingly, Mr. Pleus upheld the discharge and the City urges me to do so as well. (Tx. 177 – 178)

The Union's Position.

The Union argues the City did not have just cause for Grievant's termination.

First, the Union states that the proper burden of proof here should be clear and convincing evidence, that is, that the City must show it had just cause – all seven factors thereof – by clear

and convincing evidence, due to the seriousness of the conduct of which Grievant was accused and the severity of the discipline imposed – discharge.

Second, the Union argues that the City violated the Law Enforcement Officer's Bill of Rights, by failing to include the Fla. Stat. § 112.533(1)(a)1 verification of truthfulness language in the report.

Third, the Union states the City failed to conduct a fair investigation because Sgt. Millan interviewed Mr. Kidd on September 27, 2018, after Grievant was interviewed. Moreover, while Mr. Kidd's interview was recorded on audio and on an accompanying officer's BWC, the recordings thereof were deleted on or before February 1, 2019, because Sgt. Millan did not take steps to have them preserved – despite the fact that, as of that time, the present grievance was already pending. Thus, the only evidence of Mr. Kidd's interview that was available to Grievant or anyone else was the "unverified" purported transcript prepared from the now-destroyed audiotape.

The Union also points out that, in his IA report, Sgt. Millan referred to a 20-second video of the September 14, 2017, incident that was viewed in May 2018 (when Mr. Kidd's attorney first made a civil claim on Mr. Kidd's behalf), yet that video was not preserved either. Indeed, the Union states that, in his report, Sgt. Millan's reference to this video made it seem as if he had either viewed it himself or that he was simply relying on the word of Chief Umberger or other command staff – yet these latter individuals who may have viewed the short video were not interviewed about it during the investigation.

Fourth, the Union points out that the City violated due process, fundamental fairness, and the Law Enforcement Officer's Bill of Rights by failing to place Grievant on Notice that he was

being investigated for (and ultimately fired for) violations of DPD Rules and Procedures 5.7.2 and 5.7.3. The Union notes that the initial charging document (i.e., the notice of IA investigation, CX-12), references investigation into alleged violations of

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> 1.8.2 A person shall not be arrested or detained except as provided by law.
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> 1.8.3 Officers shall not use any more force than is necessary to effect an arrest or take a person into police custody, i.e., Baker Act, missing person, etc.
>
> 1.8.15 No member or employee shall knowingly falsify any official report or enter or cause to be entered any inaccurate, false, or improper information on any document, used and/or maintained by this department.

but the final IA report (CX-17) and the Notice of Proposed Discipline (CX-18) made reference to violations of

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>
> 5.7.2 Incident Reports — Conduct thorough investigations.
>
> 5.7.3 Incident Reports — Obtain sworn written witness and victim statements, whenever possible....

In this regard, the Union notes that Sgt. Millan admitted on the stand that Grievant was not placed on notice of investigation into potential violations of DPD Rules 5.7.2 or 5.7.3 until his receipt of the final IA report. (Tx. 524/9 – 525/23)

Fifth, the Union asserts there was a prejudgment against Grievant, and, as evidence thereof, notes that there are at least three versions of CX-17, which Sgt. Millan prepared variously between October 16, 2018, and October 25, 2018, after receiving input from his supervisor, Deputy Chief Batten. The Union notes that Sgt. Millan at first suggested Deputy Chief Batten simply reviewed and made grammatical changes, but the Union pointed out that one such change – the excessive force charge (DPD Rule 1.8.3) being changed from "Not Sustained" to "Sustained," especially with the subsequent omission of Sgt. Millan's statement that the BWC camera angle did not provide a complete visual record of some the conduct in which Grievant stated Mr. Kidd engaged, and thus prevented Sgt. Millan from sustaining that charge – was hardly simply "grammatical." In this regard, the Union also states that the report omitted references to statements Grievant made about his state of mind at the time of the incident, which was problematic, since determining whether an officer employed excessive force (i.e., force in excess of what the Fourth Amendment to the United States Constitution allows) requires examination of whether the force was "objectively reasonable," which should include consideration of what the officer was feeling at the time.[4]

In conclusion, the Union argues that the City has failed to prove the third, fourth, fifth, and seventh elements of the just cause standard articulated by Arbitrator Daugherty. The Union states that the incident was nothing more than a mistake by Grievant, which should be remedied by some discipline and/or retraining. In this regard, the Union notes that Grievant stated he had been trained to act in an aggressive manner during such interactions and that retraining should serve to address

[4] The Union also takes issue with Sgt. Millan's "random" identification of BWC videos for Mr. Pleus to watch of the Grievant's interactions with the public at the Step 3 Grievance stage. The Union asserts these were actually so-called "cherry-picked" (my term, not the Union's).

the concern. In any event, the Unions states discharge was too severe a penalty to impose here and urges me to sustain the sustain the grievance and reinstate the Grievant "with all back pay, benefits and seniority as if there had been no break in service, less any discipline deemed appropriate short of termination."

DISCUSSION

Arbitrators have held that there is a variety of factors in determining whether an employer has met its burden of proving just cause. One arbitrator has posed seven questions, each of which must be answered in the affirmative in order to find that an employer had just cause for termination:

1. The employee was forewarned.
2. The employer's position with respect to employee's conduct was reasonable.
3. The employer investigated before discharge.
4. The investigation was fair.
5. Substantial evidence supports the charge against the employee.
6. There was no discrimination.
7. The degree of discipline was reasonably related to the nature of the offense and the employee's past record.

Atlantic Richfield Co., 70 Lab. Arb. (BNA) 707, 715-16 (1978) (Fox, Arb.). A "No" answer to any one or more of the questions normally signifies that just cause did not exist. *See also Grief Bros. Cooperage Corp.*, 42 Lab. Arb. (BNA) 555, 557-59 (1964) (Daugherty, Arb.), quoted in Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 Duke L.J. 594, 599-601 n.30 (1985). In effect, the just cause criteria

seek to prevent employers from disciplining employees who have not been forewarned as to proscribed conduct. The rule is also designed to ensure that an employee's "punishment" fits the "crime." *Lockheed Aircraft Corp.*, 28 Lab. Arb. (BNA) 829, 831 (1956) (Hepburn, Arb.) ("Just cause requires that employees be informed of a rule, infraction of which may result in suspension or discharge, unless conduct is so clearly wrong a specific reference is not necessary."); *Shenango, Inc.*, 67 Lab. Arb. (BNA) 869, 870-71 (1986) (Cahn, Arb.); *Safeway Stores, Inc.*, 81 Lab. Arb. (BNA) 772, 773-74 (1983) (Yaney, Arb.). In the matter at issue here, we will address each of these seven factors.

In this case, the record shows no significant dispute as to elements 1, 2, 3, 5, and 6. While the Union argues that elements 3 and 5 are contested, I do not find same on the record. As to element 3, the City clearly conducted an investigation of the issue to determine whether Grievant violated DPD policies. (CX-12; CX-17) As to element 5, Grievant's own BWC footage and his subsequent testimony constitute clear and convincing evidence[5] that Grievant engaged in the conduct of which the City accused him. There are questions as to elements 4 and 7, which should be addressed here.

As to element 4, whether the investigation was fair, I am troubled by the violations of the Law Enforcement Officers' Bill of Rights committed by Sgt. Millan here: the failure to preserve the video and audio tapes of Mr. Kidd's interview (so they were available for comparison to the typewritten statement in the record); the failure to add the veracity language

[5] This is the appropriate standard of proof here: *see, e.g., In re City of Hollywood and AFSCME Local 2432*, 122 Lab. Arb. (BNA) 335 (Kravit, Arb. 2006) ("Virtually all arbitrators agree that proof merely by a preponderance of evidence is not sufficient where an employee has been charged with a crime or discharged for violence, theft, gross insubordination, unlawful discrimination or other reasons that reflect upon his honesty, character or desirability of employment.").

at the end of the report, as required by Fla. Stat. § 112.533(1)(a)1;[6] the failure to notify Grievant of the addition of new DPD Policy violations being investigated; and the failure to hold off on Grievant's interview until after Mr. Kidd's interview. Those failures are neither trivial nor insignificant and, whether they are best ascribed to a lack of training or simple error, they have an impact here.[7] More concerning here, though, is the apparent substantive involvement of Deputy Chief Batten in the analysis and conclusions Sgt. Millan made in his report. Changing the conclusion as to the 1.8.3 charge (excessive force) from "not sustained" to "sustained" and deleting the explanatory clause Sgt. Millan had given for his earlier "not sustained" outcome, is no mere grammatical or writing style correction; it is a substantive increase in the ultimate findings and may, frankly, have been the tipping point that led to discharge as the discipline imposed.

This same concern affects my analysis as to element 7, whether the discipline imposed was, ultimately, "just," taking into account all aggravating and mitigating factors, including, e.g., the severity of the proven misconduct and the Grievant's work record (both good and bad).

Here, the approximately six minutes of BWC footage of Grievant's encounter with Mr. Kidd on September 14, 2017, showed an officer who, almost from the start, reacted poorly and failed to use any de-escalation techniques with a possibly intoxicated member of the

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[6] The Union argues that this failure led to the IA process never actually having been completed – which could, ostensibly, mean the investigation was still open now, 2½ years later – and it would therefore be a violation of the Law Enforcement Officers' Bill of Rights to discipline Grievant before his investigation had been completed. This argument has some merit but has no ultimate impact on my decision here.

[7] The City correctly notes that the Law Enforcement Officers' Bill of Rights does not absolutely require other witnesses be interviewed first, but there were no exigent circumstances cited by Sgt. Millan or anyone with the City for this deviation from the expected norm.

public. His several years of experience and his FTO status meant that Grievant not only should have known better how to handle the situation, but also that he actually did. In fact, his statement to his ride-along trainee officer, that the trainee should "Watch and Learn," suggested Grievant intended to be aggressive with Mr. Kidd before he even encountered Mr. Kidd; he was going to show the trainee how to control the scene, something Grievant testified was what he understood he was to help the trainee with. Watching the video, I do not believe Grievant ever had probable cause or other legal ground to detain, much less to arrest, Mr. Kidd – a conclusion apparently reached by the State Attorney's Office, who declined to prosecute Mr. Kidd for resisting arrest without violence. (CX-9)

Grievant acted improperly and in violation of DPD policies 1.2.1, 1.8.2, and 1.8.3. As there was no conclusion sustaining the 1.8.15 charge and as there was no timely notice to Grievant of the addition of the 5.7.2 and 5.7.3 charges, I find the City has not proven Grievant was properly disciplined as to those latter charges. I do find that discharge would, ordinarily, be the appropriate level of discipline for an officer acting in such a willfully aggressive way toward a member of the public without proper cause; Grievant's work record is essentially irrelevant here, since this conduct would, on a first instance, merit discharge. I do not accept Grievant's "bad day" excuse; as shown by the other videos of his interactions with members of the public, Grievant has tended to react aggressively whenever a member of the public is anything but immediately compliant and fawningly polite.[8]

[8] I am unpersuaded by the Union's argument that Sgt. Millan in essence cherry-picked videos showing Grievant engaging in this conduct, rather than truly random videos to show Mr. Pleus. The fact remains that Grievant has been caught on tape at least six times engaging in similarly aggressive conduct, which belies his claim that he never acts in this fashion.

However, I am dismayed by the DPD IA's failure to comply with the Law Enforcement Officers' Bill of Rights. Sgt. Millan may have been brand new and untrained in IA procedures, but the City was required to make sure the investigation was conducted properly – but did not. I recognize that Florida Statutes provide a remedy for breach of the City's obligations, Fla. Stat. § 112.534, but that statutory remedy only obtains during the pendency of the investigation and affords no substantive rights of action or of reinstatement. *Migliore v. City of Lauderhill*, 415 So.2d 62, 65 (Fla. 4th DCA 1982), *quoted in Bermingham v. City of Clermont, Fla.*, slip. op., Case No. 5:12-CV-37-OC-37PRL, 2013 WL 3974654, at *6 (M.D. Fla. July 31, 2013). Nonetheless, I am constrained by the just cause analysis to take these violations into account in determining whether a fair investigation was conducted and whether, to use an analogy, the "punishment fit the crime."

Accordingly, I conclude that the City did have just cause to discipline Grievant but not to discharge him and, thus, violated Art 8, §§ 8.1 and 8.7 of the relevant CBA. Having said that, Grievant engaged in extremely serious misconduct and should receive similarly serious discipline, substantial additional training, a last chance, and removal from Field Training Officer status.

AWARD

For all these reasons,[9] the Grievance is SUSTAINED IN PART, and the City is hereby ordered to reinstate Grievant, with the following provisos:

[9] This award is based on the arbitrator's review of the entire record and of the Parties' post-hearing briefs. It also represents the arbitrator's best understanding and interpretation of the just cause doctrine, whose application is implied by § 8.7 of the Parties' collective bargaining agreement. Any arguments not specifically addressed herein are deemed unpersuasive and are rejected. Any evidence not specifically mentioned was considered but did not, in the arbitrator's view, merit express discussion.

1. Upon reinstatement, Grievant shall be reinstated retroactive to December 3, 2018, however, Grievant is denied back pay through the date of this Award but shall accrue pay from this date forward until reinstated to active police duty by the City; the intervening time (from discharge through the date of this award) shall be characterized as leave without pay (or such any other non-pay status) so as to avoid Grievant having a break in service for seniority and similar pay and benefit purposes.
2. Upon reinstatement, Grievant shall not retain his Field Training Officer status and may only receive such status at a later date if and when the City is satisfied that he has – at that time – demonstrated suitability therefor.
3. Grievant is hereby notified that this reinstatement is in the nature of a "last chance," such that, should Grievant again be accused of violating DPD Police Rules And Regulations 1.2.1, 1.8.2, or 1.8.3 (or their successor regulations), any resulting discipline shall be at the level of dismissal, regardless of any other mitigating factors, and future arbitrators reviewing such discipline should simply determine whether (a) the City conducted a fair investigation and (b) there is substantial evidence to prove that Grievant engaged in the conduct of which he was accused at that time.
4. Grievant shall also submit to all appropriate training the City may require regarding the conduct proscribed in DPD Police Rules 1.2.1, 1.8.2, or 1.8.3.

Respectfully submitted today, March 12, 2021, at Tampa, in Hillsborough County, Florida.

Christopher M. Shulman
Arbitrator