

IN THE MATTER
OF
ARBITRATION
BETWEEN
THE CITY OF CLEVELAND, OHIO
AND
CLEVELAND POLICE PATROLMEN'S ASSOCIATION

Grievances: Discharge; Police Officer William Forrest
Dates of Hearing: February 27, 2008.
Case No: 53 390 00309 07
Date of Award: July 30, 2008

Finding: The Grievance is denied.

Union Representative:

Patrick D'Angelo
2000 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

William T. Doyle
1370 Ontario Street, #2000
Cleveland, Ohio 44113

City Representative:

Stewart Hastings
Ami J. Patel
City of Cleveland Law Department
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114

OPINION AND AWARD

Michael Paolucci
Arbitrator

Administration

By Agreement between the Parties as confirmed in a letter dated February 28, 2008, from Linda Johnson, the Case Manager with the Michigan Regional Office of the American Arbitration Association, the undersigned was informed of his designation to serve as arbitrator in an arbitration procedure between the Parties, and as a replacement for a previously assigned arbitrator. On February 27, 2008, a hearing went forward in which the Parties presented testimony and documentary evidence in support of positions taken. The record was closed upon the submission of post-hearing briefs from both Parties, and the matter is now ready for final resolution.

In addition, much of the record for this grievance was referenced in a separate Grievance with Police Officer Pete Turner. To prevent duplication of evidence the Parties agreed to re-use some the evidence in that case for this one. Other than this reference, the two (2) Grievances will be treated separately, and separate awards and decisions will be issued hereunder.

Grievance and Question to be Resolved

The following grievance (Joint Exhibit – 2) was filed on April 20, 2007, and is the pertinent subject matter of this dispute.

* * *

STEP 1

Statement of Grievance (Giving time, dates, who, when, where, what, and why):

On Tuesday April 17th 2007 P.O. William Forrest #1162 was notified via a letter from Safety Director Martin L. Flask dated Monday April 16th 2007, that his employment with the City of Cleveland was terminated. This notice followed a disciplinary hearing that was held in the Safety Directors Office on Tuesday April 3rd 2007.

The Union contends that the Cities decision to terminate P.O. Forrest is a violation of the Collective Bargaining Agreement between the City and the Cleveland Police Patrolmen's Association and the past practice between the

parties. The punishment imposed was arbitrary, excessive, discriminatory and unreasonable. The punishment imposed was also disparate and inconsistent with past disciplines imposed. The decision to terminate is a violation of the just cause standard and a violation of Articles IV, V & XXIX as well as the Witnesseth Clause and Articles, I, II, III, VIII, XV, XXV, and XXVI of the extant labor agreement and State and Federal laws.

Pursuant to Article XXII of the extant labor agreement we would file this grievance at step 3A as it involves the payment of wages.

* * *

The questions to be resolved are whether the City had just cause, and thereby whether it violated the Agreement when it discharged the Grievant, Officer William Forrest; and if so, what should the remedy be?

Cited Portions of the Agreement

The following portions of the Parties' Collective Bargaining Agreement (Joint Exhibit - 1), hereinafter "Agreement", were cited:

* * *

PURPOSE

This Contract sets forth the basic terms of agreement between the City of Cleveland, hereinafter referred to as the "City," and the Cleveland Police Patrolmen's Association, hereinafter referred to as "CPPA," regarding employment of employees in the CPPA bargaining unit for the purpose of assuring that the operation and services of the City of Cleveland will be conducted efficiently and effectively.

WITNESSETH

The parties acknowledge that during the negotiations and/or interest arbitration which resulted in this Contract each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law or regulation from the area of collective bargaining and that the understanding and agreements arrived at by the parties after the exercise of those rights and opportunities are set forth in this Contract. Therefore, the parties voluntarily waive the right to demand new proposals on any subject or matter, not included herein, during the term of this Contract, even though such subject matter

may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Contract. If an agreement is reached between the CPPA and the City, any such supplemental agreement shall be in writing and subject to the prior approval of the Executive Board of the CPPA and the City or their respective designated representatives.

ARTICLE I RECOGNITION

(1) City of Cleveland hereby recognizes that the Cleveland Police Patrolmen's Association is the sole and exclusive bargaining agent for all persons employed in the rank of Patrol Officer and/or apprentices by the City of Cleveland, Division of Police, Department of Public Safety, for the purpose of bargaining with respect to wages, hours of work, and other conditions of employment. The City shall not negotiate with any other employee organization concerning bargaining rights for the classifications of Patrol Officer and/or apprentices. (City will recognize a separate exclusive unit of Radio Dispatchers).

* * *

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:

(a) Determine matters of inherent managerial policy which include, but are not limited to, areas of discretion or policy such as the functions and programs of the City, standards of services, its overall budget, utilization of technology, and organizational structure;

(b) Direct, supervise, evaluate or hire employees and to determine when and under what circumstance a vacancy exists;

(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;

(f) Determine the adequacy of the work force;

(g) Determine the overall mission of the City as a unit of government;

(h) Require employees to use or refrain from using specified uniforms or other tools of duty;

(i) Privatize or subcontract services consistent with the attached settlement agreement;

(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 – reserved to and retained by the City under this Article. Therefore, the CPPA agrees that, during the life of this Agreement, the City shall have no obligation to bargain collectively with respect to the exercise of any rights reserved to and retained by it pursuant to either Section 4117.08(c) of the Revised Code or pursuant to this Article of this Agreement.

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, interferences, 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

department's 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.

(d) Members of the CPPA Bargaining Committee, not to exceed five (5) in number, shall be granted time away from duty without loss of straight-time pay or benefits, for the purpose of negotiating an agreement with the City, or any supplements thereto, in accordance with past practice.

(e) The CPPA shall provide the City an updated list of its officers and Bargaining Committee members.

* * *

ARTICLE XXII

GRIEVANCE PROCEDURE

(49) It is mutually agreed that the prompt presentation and settling of grievances is to the benefit of both the City of Cleveland and the members of the bargaining unit. Discipline shall fall under the grievance procedure and shall be based upon internal investigation within the Department of Public Safety.

(50) The term "grievance" shall mean any dispute arising out of or connected with the subject matter of this Contract or the interpretation, application or enforcement of any of its terms.

Step 1. A grievance must be reduced to writing within seven (7) calendar days after the event or knowledge of the event giving rise to said grievance. A member having a grievance shall, accompanied by a representative of the Union, present the grievance to the Commanding Officer of the Administrative Unit. The grievance shall be signed by both the grievant and a Union representative, and shall set forth in detail the appropriate facts and requested remedy and relief. A copy of all grievances and answers are to be filed with the Chief of Police and the Union. A member shall be entitled to have a meeting on the grievance within seven (7) calendar days of the time the written grievance is submitted to the Commanding Officer of the Administrative Unit, if the member requests a meeting. If the member does not request a meeting, the grievance shall be answered in writing within seven (7) calendar days. If the member requests a meeting, the Union President or a designee may be present with the member at the meeting. The Chief of Police will designate an appropriate representative at the meeting, and will give the grievant a written answer to the grievance within seven (7) calendar days after the meeting.

Step 2. If the grievance is not satisfactorily settled at Step 1, said grievance may, within seven (7) calendar days after receipt of the Step 1 answer, be appealed to the Chief of Police. The Police Chief and/or the designated representative of the Department shall meet with the President or Vice

President(s) of the Union within seven (7) calendar days of receipt of written appeal and shall render an answer in writing within seven (7) calendar days.

Step 3. If the grievance is not satisfactorily settled at Step 2 the Union may, within seven (7) calendar days after receipt of the Step 2 answer, appeal in writing to the Safety Director. The Director or his designee, which may include representatives of the Department of Personnel, shall meet with the Union President, or designee, within twenty (20) calendar days after the grievance is submitted to the Director. The Safety Director, or designee, shall provide the Union with an appropriate written answer within twenty (20) calendar days and will institute any other appropriate procedures or hearings as required by the City Charter and applicable law.

Step 3-A. If the grievance is not satisfactorily settled in Step 3, and it concerns a matter of Contract interpretation, then the Union may, within seven (7) calendar days after the Step 3 answer, refer said grievance to the Labor Relations Manager for review. A written answer to the grievance shall be given to the Union President, personally or by mail, within twenty (20) calendar days after the grievance is submitted to the Labor Relations Manager or his designee.

All grievances involving the payment of wages may be filed at Step 3-A.

Step 4. If any grievance is not satisfactorily settled by the Safety Director or pursuant to Step 3-A, the Union, and only the Union, may submit the matter to arbitration within thirty (30) calendar days after the receipt of the answer. The Union shall notify the American Arbitration Association and the City at the same time of its intent to appeal the grievance. The arbitrators shall be chosen in accordance with the rules of the American Arbitration Association. The fees and expenses of the arbitrator shall be borne equally by the City and the Union. Further, the aggrieved member, his representative-time pay for time of the job while attending an arbitration proceeding.

In the event a grievance goes to arbitration, the arbitrator shall have jurisdiction only over disputes arising out of grievances as to the interpretation and/or application and/or compliance with the provisions of this Contract, including all disciplinary actions and in reaching his decision, the arbitrator shall have no authority (1) to add or subtract from or modify in any way any of the provisions of this Contract; (2) to pass upon issues governed by law, (3) to make an award in conflict with law. The arbitrator shall issue a decision within thirty (30) calendar days after submission of the case to him.

The Grievance Procedure set forth in this Contract shall be the exclusive method of reviewing and settling disputes between the City and the Union and/or between the City and a member (or members), and all decisions of arbitrators shall be final, conclusive, and binding on the City, the Union, and the members. A grievance may be withdrawn by the Union at any time and the withdrawal of such grievance shall not be prejudicial to the filing of future grievances, even if on the same subject matter.

A policy grievance which affects a substantial number of employees may initially be presented by the Union at Step 2 of the Grievance Procedure.

The time limits set forth in the Grievance Procedure shall, unless extended by mutual written agreement of the City and the Union, be binding, and any grievances not timely presented, or timely processed thereafter, shall not be considered a grievance under this Contract and shall not be arbitrable. Any grievance not timely processed by the City at any of the preceding steps may be placed by the Union in the next step.

Calendar days as provided within the Grievance Procedure shall not include Saturdays, Sundays or Holidays.

* * *

ARTICLE XXIX

SUSPENSIONS FROM DUTY

(70) The Chief of Police may suspend an officer for ten (10) days or less for disciplinary reasons. If the Chief recommends a greater penalty, then the Director of Public Safety will hear the disciplinary charge filed against the officer and render judgment on such charge and set the disciplinary penalty, if any. The Director of Public Safety is responsible for more severe disciplinary penalties and he shall hear such matters as soon as practicable following their filing. All decisions of the Director of Public Safety shall be subject to the Grievance Procedure beginning at Step 3-A.

In addition to the Chief, a Deputy Chief can conduct a predisciplinary hearing and make recommendations to the Chief regarding discipline up to and including a ten (10) day suspension.

(71) In the event that administrative charges are brought against an officer by the Chief of Police and such charges arise out of the same facts and circumstances which are also the subject of a criminal indictment or criminal complaint pending against the officer, then the following procedures shall apply:

(a) If the criminal indictment or criminal complaint alleges a violation of a misdemeanor offense, then the officer can be reassigned pending resolution of the criminal charges.

(b) If the criminal indictment or criminal complaint alleges a violation of a felony offense then the officer shall be relieved of duty without pay and the administrative hearing continued pending resolution of the criminal charges. The officer shall continued to participate in any health care benefits offered by the City, and may draw upon his accumulated compensatory time during the period of continuance. As soon as practicable following resolution of the criminal charges, the administrative hearing shall be reconvened and the administrative charges disposed of in accordance with the judgment of the

Director of Public Safety. If the Director of Public Safety does not sustain the administrative charges, then the officer shall be returned to duty and made whole.

(72) Nothing in this article shall be construed as precluding the preference and hearing of administrative charges alleging violation of the Civil Services rules or the manual of rules and regulations of the Division of Police, even though such administrative charges may arise out of the same facts and circumstances which are the subject of a criminal proceeding. No arbitrator or other party shall substitute his judgment for the judgment of the Chief of Police or the Director of Public Safety in applying the provisions of this article.

(73) In the event that administrative charges are filed against an officer by the Chief of Police and such charges do not give rise to a criminal indictment, then the charges shall be disposed of by the Director of Public Safety within ninety (90) days of their filing, unless extended by mutual agreement; otherwise the charges shall be automatically dismissed.

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The following portions of the City's Manual of Rules and Regulations (City Exhibit - 2), hereinafter "Rules", were cited:

* * *

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 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.

* * *

II. ADMINISTRATIVE COMPLIANCE

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.

* * *

- 2.13 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
- c. Gross immorality
- d. Habitual drunkenness
- e. Failure to obey orders given by proper authority
- f. Any other reasonable and just cause

* * *

IV. DUTY

- 4.01 Officers shall protect life and property, prevent crimes, detect, arrest and prosecute offenders, preserve the public peace and enforce laws and ordinances within the scope of their job classifications and in accordance to law.

* * *

V. BEHAVIOR

* * *

- 5.10 Personnel shall not be a witness for the defense in any criminal prosecution in which the Division of Police is involved except on subpoena lawfully issued, and only upon notifying the Chief's office.
- 5.11 Personnel shall not use epithets, terms or words that tend to denigrate any person(s) due to their race, color, creed, or sexual orientation except as is necessary when quoting in police records or testimony.

* * *

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The following "General Police Orders", hereinafter "GPO"(City Exhibit - 3), were cited by the City in its action against the Grievant.

* * *

GPO 1.1.02

* * *

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.

* * *

GPO 1.1.03

* * *

POLICY: Division members shall be resourceful and polite when dealing with the general public. This includes but is not limited to personal, physical and telephone contact.

PROCEDURES: Division of Police personnel shall:

- I. Not engage in any conduct, speech or acts while on 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 (Rule 5.01).
- II. Not engage publicly in any disparaging conversation detrimental to the Division of Police or its personnel, or representing policy as other than as stated in the rules, general police orders, divisional notices and memorandums (Rule 5.02).

- III. Conduct themselves in such a manner as to command the respect of the public (Rule 5.08).
- IV. Be courteous and respectful in their speech, conduct and contact with others (Rule 5.09).

* * *

GPO 1.1.23

POLICY: An incident that may involve the Division in controversy or cause unfavorable publicity shall be immediately reported to the office of the Chief of Police.

PROCEDURES:

- I. Members shall immediately complete a Form -1, if they learn of an incident that may cause controversy or unfavorable publicity for the Division of Police. The member shall forward the Form-1 through their chain of command to the Chief's Office.
- II. During the hours the Chief's Office is open, the incident shall be reported to the Chief's Office.
- III. If the Chief's Office is closed, the incident shall be reported to the Public Information Officer.

* * *
* * *

Factual Background

The Employer is the City of Cleveland; and the Union represents the police officers in the City. The City employs approximately 8,800, with over 1,200 being patrol officers. The Grievant, prior to his discharge, worked for the City since February 1, 1993, or approximately 13 years. The Grievant had no prior discipline. Although the Union represents the Grievant, a motion was made by the Union to allow the Grievant to also be represented by his own counsel. The City objected, and the motion was overruled. The hearing was held with the Grievant's counsel conducting the case as it pertained to the facts, and the Union's counsel conducting the case as it pertained to just cause issues.

The center of the dispute involves actions of the Grievant while off-duty in a bar. The Grievant spent much of the evening at the bar and was drunk by the time of the incident. The record indicates that he had been drinking through the night and estimates were that he had had between 12 and 15 beers. The incident occurred at the "Castlebar" where many fellow police officers spend their off-hours. Although the record does not show that the Grievant was alone while drinking, the person who accompanied him that is relevant to the case is Police Officer Pete Turner. Turner had been at the Castlebar earlier, with his wife, to inform friends, including the Grievant, that his wife was pregnant. Turner left the Castlebar earlier in the evening and then returned later – sometime after 11:00 p.m. There he met up with the Grievant again. Both officers are white males and their race is a large part of the case.

At some point, indications are that it was around 12:30 p.m., a white female, Jamie Cruxton, and her boyfriend, Aric Jackson, a black man, came into the bar together with Cruxton's cousin, Amy Collins, a white female who was visiting from Canada. Because none of the three (3) testified at the hearing, their version of events was taken from sworn testimony that

was provided in the criminal trials of the Grievant and Turner; and from statements given to police immediately after the incident that followed them entering the bar.

Although many facts are in dispute, the center of the controversy was proven and was sufficient to glean the essence of what occurred. After the three (3) entered the bar, they went to a back area to play a bowling game. The Grievant points out that in one of the statements Cruyton fails to mention this fact, and he claims that such impugns her credibility. After playing the bowling game, the three went to the bar and ordered drinks and sat at the opposite end of the bar from where the Grievant and Turner were sitting. At some point soon after getting their seats and ordering drinks, the two women, Cruyton and Collins, got up to use the restroom. At that point the Grievant and Turner got up from where they were sitting; went to the end of the bar where Jackson was sitting; and sat on either side of Jackson in seats that had just been left by the two (2) women.

As a factual matter, Turner denied in prior sworn testimony that he was with Forrest at this point, and claims that he just enters the bar and happens to sit next to Jackson. Turner claimed that Forrest's sitting on the other side of Jackson was coincidence and that he did not meet up with Forrest. Although he admits to having spoken briefly to Forrest that evening, he claims that his choice of seat was done independent of Forrest; and he claims that he sat and watched baseball that was on television. This is counter to all of the other witnesses, and is not supported by any other evidence. Since neither Forrest nor Turner testified as part of this process, their version of events is not known except through Turner's testimony in the Municipal Court portion.

While sitting on either side of Jackson, Jackson testified that the Grievant and Turner began using some slight but obvious actions meant to instigate or intimidate him. The facts are

in serious dispute. However, the record shows that at the very least the Grievant and Turner engaged in conduct that created tension between them and Jackson. The activity included talking "around" Jackson as if he were not sitting between them; placing their faces close to Jackson; and singing loudly. The testimony points to Forrest as the main offender, but does not single him out. The City cited two (2) separate statements of Jackson that it claimed tended to prove that he was being pressured. Those statements read as follows:

August 6, 2005 statement. "The one on my left (Forrest) stared me down for a long period of time,...I ignored them as they spoke...I moved so that they would not have to interact with them...I could hear the male (Forrest) 'why do you?' Then I heard my girlfriend's rebuttal, it was something like why do you date black men. My girlfriend with her back turned to him, then told him you should turn around and mind your own business. I'm not talking to you I'm talking to my friend. At that point that male (Forrest) started pushing her physical[ly] out of her seat onto me. I then asked what are you doing. That's when the other guy (Turner) got up and stated "What are you going to do about it!" As I'm standing there they started closing in on me." (City Exhibit - 1; Tab -2, Jackson statement).

August 9, 2005 statement. "When they first sat next to me number 6 (Forrest) was on my left and number 1 (Turner) was on my right and they began ruff housing me. They began bumping me, carrying on a conversation over me with each other as if I wasn't there...The next contact took place when number 6 (Forrest) was elbowing my girlfriend in her back area. He went from elbowing my girlfriend in the back to grabbing her chair and dumping her out of it...I asked number 6 (Forrest) 'What are you doing twice'. Then number 1 (Turner) jumped up out of his seat and stated 'What the fuck are you going to do about ?' Then number 6 jumped up and they both walked towards me." (City Exhibit -1; Tab 2, 8/9/05 statement).

In addition, the City cited the statements of other witnesses. Melinda McKeown, who was working the bar that night, provided the following statement:

August 6, 2005 statement. "...Pete Turner and Billy Forrest got up. They walked to the end of the bar and sat on both sides of him (Jackson). They (Turner and Forrest) were making racial comments just trying to aggravate the black kid. They (Turner and Forrest) were saying things like buy all the niggers a beer and singing the Irish music...loudly in his ear. As if they were letting him know that it was their bar and he did not belong...Then Billy Forrest started nudging one of the girls' chair and asking her things like "What do you find so attractive in this

nigger.” Both Billy and Pete continued to aggravate the group...” (City Exhibit – 1; Tab 3, McKeown Statement).

Again, Turner denies that these are accurate; he claims that he was not part of any interaction with Jackson; but provides no evidence other than his prior testimony to contradict it.

The matter continually escalated from there. Cruyton and Collins returned from the bathroom and Cruyton stopped on the way back when she ran into an ex-boyfriend, also a black man. The Grievant and Turner both point to testimony of Cruyton’s where she leaves this information out – claiming that such proves her unreliability as a witness. In one statement made after the altercation that followed, Cruyton claimed that Jackson was the only black man in the bar. The Union points out that Cruyton had to know that this was false since she had spoken to her ex-boyfriend, and claims that she made the statement to exaggerate the facts. In addition, after the incident she gave a statement to police investigators claiming that she did not know anyone in the bar, even though she made another statement acknowledging that she ran into her ex-boyfriend and his buddy- both of whom she knew. The information was also used as evidence, from the Grievant’s perspective, as proof that there was no real racial component to the altercation because this person was not attacked by anyone at the bar.

When Cruyton and Collins returned to Jackson, they questioned why their drinks and change from paying for same had been moved. When the Grievant and Turner had sat down, Forrest moved the money to another area of the bar. Jackson testified that the money and the drinks made it obvious that the seats were taken, but he did not object because he did not want to cause trouble. He pulled his chair out for one of the woman, the Grievant moved down to another stool, and his stool was given to the other woman. The three then sat with Cruyton’s

back to the Grievant. The record is not clear on the order of what occurred next, but the evidence was certain that certain bad things started to happen in rapid succession.

At one point someone yelled out "buy every nigger in the bar a beer." McKeown, testified that she knew that Forrest made the statement several times, but she denied that Turner said anything. None of the defense witnesses admitted to having heard the statement in either criminal trial that followed. At some point, Turner bought Jackson a beer, and although unclear, it was possible that it was done in response to the statement having been said a couple of times. When Cruyton complained to Jackson about the treatment, he told her to not worry "they're just drunk" and "he [Turner] bought me a beer."

Another witness who provided a statement was Sean Kane, a bar back. He provided a statement that reads:

"when Pete and Billy went over and sat on both sides of the black guy (Jackson). About an hour past by and I could hear a little animosity and obscenities...Pete or Billy s[aid] something along the lines of 'buy every nigger in the bar a beer'...and that [their] intention were to harass him (Jackson) because from the moment that he (Jackson) walked in they looked over at him and started talking. They were drunk and acting like idiots and went over there." (City Exhibit - 1; Kane Statement).

Turner's brother, Hanz Turner, also a Cleveland Police Officer at the time, was at the bar. In his statement he confirmed that Turner was drunk; that Turner and the Grievant moved to the seats on either side of Jackson; and that he had to remove Turner from the bar after he was eventually knocked unconscious in his fight with Jackson (City Exhibit - 1; Tab 1, p. 15; Hanz Turner statement). Hanz Turner denied having heard the "nigger" comment, and denied witnessing any trouble between the officers and Jackson or his friends.

What occurred next escalated the matter to a physical confrontation. While Cruyton and Forrest sat back-to-back, Collins told Cruyton that she was receiving dirty looks from the guys

behind them. Soon thereafter the Grievant leaned over to Cruxton and asked if he could ask her a question. She replied yes, and the Grievant then said, in essence, "What do you see in niggers?" Cruxton responded with "you wouldn't understand, it's a big dick thing and you probably wouldn't know anything about it." And "you probably can't even get it up...so why don't you shut the fuck up and leave me alone."

The Grievant did not take this well and began saying to Turner, in a loud manner so that Cruxton and Collins could hear, that he hopes "the nigger lover feels uncomfortable" and he hopes Cruxton takes her "nigger out of here." Cruxton then said to Collins that the bar is ignorant and that they should leave. Cruxton testified that she was stunned and upset with the racist comments. Jackson's testimony is that he did not hear much of what was going on since he was watching the game. There is little indication that Turner is participating in any of this back-and-forth.

When Cruxton tells Collins and Jackson that she wants to leave, Jackson tells her he wants to finish his beer. Cruxton testified that the "racist" conversation continued; that the word "nigger" was used over and over; and that it was then that McKeown brought a note with a beer to hand to Jackson. The note read "I'm sorry for these two jerks if I thought I could do something I would, but I don't want to see a fight. Their [sic] police." (City Exhibit - 1; Tab 3, McKeown Statement). When McKeown attempted to pass the note to Jackson, Cruxton testified that she thought it was a phone number and out of jealousy she grabbed it and ripped it before Jackson could read it. Jackson testified that he saw the part of the note that said "I'm sorry.." and figured out what its gist was. He put the note in his pocket and continued to watch a game on television. Neither Cruxton nor Jackson were able to read the entire note at that time.

After that Cruyton tells Collins that she “hates hillbilly racists that like to ruin somebody’s good time” (City Exhibit – 7, tp 26). The Grievant then asks her “are you talking to me.” Cruyton responds “No, I believe I’m talking to my cousin and you need to mind your own business.” The Grievant responds “You are my business.” Cruyton replies “No. A dermatologist needs to be your business.” Forrest asks what that means, and Cruyton points to her face referencing Forrest’s bad facial skin condition and says something like “its all up in your grill.” At this point, the two are still back-to-back and the Grievant begins tilting Cruyton’s stool so that she starts falling out into Collins lap. Much of this version comes from the testimony of Cruyton, and the record shows that she is the only witness to testify who would have heard the entire exchange. Since Forrest did not testify in any tribunal, there is no evidence to counter this testimony.

As Cruyton is lifted or pushed out of her chair, Jackson catches her and yells, twice, “What are you doing?” It is then that it is claimed that Turner slams his hand on the bar and yells back “What the fuck are you going to do about it?” Turner claims that he does not yell this at Jackson, but instead is trying to get McKeown to intervene between the Grievant and Jackson. McKeown denies that this happened. When Turner gets up, he spins out of his chair and approaches Jackson.

The Grievant and Turner then are around Jackson and begin approaching him with the two women between Jackson and a wall. It is important to note that things are happening quickly at this point. As the Grievant and Turner get closer to Jackson, pushing begins. It is not clear who starts the pushing, but the testimony of Jackson is that he pushes them back to warn them off. Jackson testifies that at some point in the stand off Turner begins to get lower as if he is about to attack. Jackson then punches Turner, he claims 4-5 times, and he is knocked

unconscious. Turner denies this is accurate and claims that he was knocked out as soon as he turned around from yelling to McKeown. He testified that he was either punched with an ashtray, or he hit his head on the bar after being punched, and denies that it was more than one punch.

Regardless of the cause, Turner was quickly out of the fight and had to get staples in his head to heal the injury. Because he was unconscious, he had to be helped to the hospital by his brother. On the way to the Hospital, Turner demanded that he be taken home instead. The City claimed that the Grievant's action after the fight helped prove his guilt. It cites the fact that he failed to assist Turner after he was knocked unconscious, even though he was bleeding profusely; that he failed to identify himself as a police officer; that he did not report to the responding officers that he was a police officer; that he did not report the incident to his supervisors; that he did not file a police report; and with advice of counsel, he did not provide a statement to the Internal Affairs Unit or at his pre-disciplinary hearing.

After Turner was punched and knocked unconscious, Jackson was attacked by 2-3 of the people in the bar. He was able to fight them off until a second round of fighting began with the bar owner, Powers, getting involved. There was a great deal of confusion and contradictory evidence about what occurred at this point. Cruyton was on the phone with 911 during the altercation and had to call back once. Jackson testified that someone went to close the blinds and that such made him worry that he was about to be seriously harmed by everyone in the bar. The Union claims that this was an outrageous suggestion, and points out that Kane's statements include the fact that he had already pulled the shades closed as part of his late night routine before the bar closes. After the second altercation, Jackson and Cruyton attempt to leave, and both claim that Powers initially refuses to allow them to go.

There is little evidence that Forrest was part of the altercation, but no witness denied that Jackson was scuffling with more than one person during the altercation. In the scuffle, Jackson bit Power's finger. Once outside, the three met the police who arrived on the scene. In one of the statements Jackson claims that a police officer was already outside and was leaning against the car, implying that he knew something was going. However, the first police officer to arrive denies that he did anything except begin taking statements. In addition, Jackson claimed that he was refused medical attention, and the officer testified that Jackson himself refused treatment after it was offered.

During the altercation, Kane contacted 911 as did Cruxton – twice. Once the police arrived an investigation followed. Neither Jackson nor Cruxton received significant injury – Jackson had scuffed knuckles from when he was defending himself. Criminal charges were filed against both officers, and the matter was well reported in the local press. Following the incident both McKeown and Kane were fired by the bar owner, Powers. His testimony was that because McKeown did not take action and inform him of what was going on, and instead passed a note to Jackson, she failed in her responsibility. It was not clear what Kane might have done wrong. The City argued that the discharges were because he was mad about both employees helping the non-police customers rather than his regular customers, and friends, Turner and Forrest. Powers was laid off from his regular job once the incident became public. It was not clear what his current status is.

The City claimed that Forrest acted improperly by not responding to his fellow officer after being knocked unconscious. It cites the testimony of the Safety Director, Martin Flask, who testified that Forrest's reaction to Turner being knocked out, and "in a pool of blood" was not reasonable, and that it would be expected that some law enforcement action should have

occurred. It points out that he did not call for assistance; did not direct the bartender to call 911; and did not attempt to arrest Jackson. Forrest failed to notify the arriving officers that he was a police officer; and that he only identified himself after he was threatened with an arrest. It cites the testimony of Officers Hart and Collier, who responded to the disturbance, who stated that Forrest showed confusion; was intoxicated; asked officers if he was in trouble; and that he attempted to contact Turner to return to the scene. (City Exhibit -1, tab 1, p. 12-13; Tab 5).

Forrest was charged with a felony – an abduction charge in addition to three (3) misdemeanor charges of inciting to violence and two (2) counts of assault. In a bench trial the Court found him not guilty of all charges. In that court decision (City Exhibit – 7d) the judge recognizes that the “atmosphere in this bar of racial tension and outright racist comments that fueled the altercation, and fuels the controversy afterwards, and fuels everyone’s perception of what happened that evening, and it is reprehensible. It is despicable.” In addition Judge Corrigan stated that the Grievant “used racial slurs at the end of the bar, that he was drunk,” that the evidence was overwhelming; and what he did with Ms. Cruyton “was childish, wrong, ungentlemanly, racist and disgusting, really.” (t.p. 14). He also commented that the case was not over and that another forum with a lesser standard of proof may come up with a different result. (City Exhibit 7-D, t.p. 20).

At the time the two (2) officers were criminally charged, the Safety Director suspended them without pay pending resolution of the charges. The Union relied on the criminal court results and focused on the fact that neither officer was convicted of any criminal charges. It also points out that neither officer was ever charged with a racially motivated crime in connection with the incident. In addition to the criminal charges, both officers were brought before the Safety Director for a disciplinary hearing. After the initial trials, the pre-disciplinary hearings for

both were reconvened on April 3, 2007 (City Exhibit – 4; Turner and City Exhibit – 9; Forrest), and the discharge of both was imposed. The Union pointed out that no witnesses were called by the City at the Safety Director level. The Union presented past discipline for other bargaining unit members; the Sgt. Burner employment file; and a post-hearing brief that was used in the Kirby arbitration. The Safety Director terminated both officers, and the Union complained that he did so without reviewing any of the documentation that was submitted (Forest Trans. P. 48).

The Union's defense relied in part on the claim that the City's decision making was affected by political pressures. It cited the firing of Don Imus, a nationally syndicated radio talk show host, that occurred in April 2007. In that case the discharge of Don Imus was based on racially insensitive remarks he made on the air. The Union cited a newspaper article (Union Exhibit – 7) that described those events, and claimed that the political pressure the City felt included the public outcry that followed the Imus incident. The Grievant was discharged by the Mayor in a press conference. The termination letter to the Grievant followed the press conference, and the Union described them as pre-textual and it argued without contradiction that such had never been done before. By letter dated March 27, 2007 (City Exhibit – 9), the City notified the Grievant that his matter was being reconvened on April 3, 2007.

Following the hearing on April 3rd, the Grievant was notified by letter dated April 16, 2007 of the Public Safety Director, Martin Flask's, decision to discharge him. In addition to citing substantial authority (statutes, ordinances, Rules and Regulations, and Civil Service Rules), the Flask made the following analysis:

* * *

ANALYSIS

It is undisputed that a criminal and administrative investigation was conducted of an incident occurring at the Castlebar on Saturday, August 6, 2005. It is

undisputed that a Grand Jury indicted you for felony and misdemeanor violations of City and State Law (rule 2.01). It is also undisputed that you were acquitted of the offenses for which you were charged.

Although you were off-duty (Rule 4.12), you were in a bar where you were known as a Cleveland Police Officer. You moved to an area inside the bar in very close proximity to the African American patron. Although you did not know the Caucasian female patron, you became involved in an argument with her while she was seated near, and socializing with, the African American patron where your behavior was characterized by a Judge as being, "childish, wrong, ungentlemanly, racist, and disgusting." (See GPO 1.1.02; 1.1.03; MR 5.08, 5.09, CS 9.10(5)(9)(10)).

You continued to argue with the Caucasian female patron inside the Castlebar and took no action to prevent a breach of the peace (rule 2.13 (b)) rules 2.02, 2.03, 2.04, and 4.01 CS 9.10(18)). The Caucasian female patron who you had been arguing with went from being seated on a bar stool to the floor of the bar. The African American patron became involved in a physical altercation in which Patrol Officer Turner...was left unconscious and bleeding from the head. In your presence, while attempting to administer aid, Patrol Officer Turner's ...brother was threatened by the African American patron, yet you still failed to identify yourself as a police officer.

During the time that Patrol Officer Turner...was being assisted from the bar you did not contact police or identify yourself as a police officer to the African American patron nor did you identify yourself as a police officer to the responding officers. You did not identify yourself as a police officer until you were informed that you would be taken into physical custody.

Based upon the aforementioned information, coupled with the investigatory record, which was un-refuted during the Administrative Conference, I find that you violated the identified General Police Orders on "Values", "Conduct", and "Courtesy", as well as the administrative rules addressing administrative compliance, ethics, duty and behavior. In addition, I find that the weight of the evidentiary record establishes, by a preponderance of the evidence, that you engaged in conduct unbecoming a member of the Cleveland Division of Police.

It was disputed that you acted "in concert" with Patrol Officer Peter Turner... However, this fact became less disputed when I considered the memorialized note from the barmaid which identified "two jerks" who were also policemen. Although you did not acknowledge nor deny being referenced in the notes, I found it compelling that Patrol Officer Turner...stipulated to being one (1) of the two (2) "jerks" in his criminal trial. I found that fact interesting because Patrol Officer Turner...identified you as the only other police officer in the bar that evening.

In addition, it is also undisputed that the barmaid had nothing to gain and everything to lose in writing the note, and the barback attendant had nothing to gain in providing a statement to the Internal Affairs Unit. Both individuals could have left the scene or chose not to become involved in the investigation. Unfortunately, the end result is that neither individual is employed at the Castlebar and the barmaid no longer resides in Cleveland.

* * *

Following the filing of the Grievance the Parties entered into a Settlement Agreement which preserved the Grievant's ability to file for retirement effective April 28, 2007, while also enabling the Grievant's reinstatement if the Grievance is sustained.

At the hearing the Union submitted several prior cases (Union Exhibit - 8) that it claimed was proof that the Grievant was being singled out, and treated disparately. These include:

1. Officers Tankersley and Staimple. Both Officers were initially charged and pled guilty to misdemeanor crimes of assault in June 1997. The case had racial overtones. They were both off-duty at the time of the incident; and both were returned to work by an arbitrator. (Union Exhibit 4- Tab H).
2. Officer Pettry was determined to be guilty of assault in an off-duty incident in April 1998. Although discharged, she was returned to work by an arbitrator. (Union Exhibit 4- Tab I).
3. Officer Jones was found guilty of misdemeanor crimes committed on-duty, where he threatened a minor child on a school bus with his pocket knife. The incident occurred in March 1998, and the suspension imposed was reduced. (Union Exhibit 4- Tab J).
4. Captain Lynch was terminated after an acquittal on a rape charge. The discharge was based on serious administrative violations, but he was returned to work in July 1990. (Union Exhibit 4- Tab O).
5. Officer McMichael's suspension was reduced in length after criminal charges were dismissed, and after the remaining charges against him were only administrative rule violations. The reduction occurred in October 1993. (Union Exhibit 4- Tab P).
6. Officer Kirby was reinstated after a termination for use of excessive force. He was reinstated in December 2001. (Union Exhibit 4- Tab M).

7. Officers Bettis, Douglas and Rimmer were convicted of disorderly conduct and received either a ten (10) day suspension (Bettis and Douglas) or a five (5) day suspension.
8. Officers Barnes and Graziolli were found guilty for fighting with each other while off-duty at a bar, and both were given verbal warnings.
9. Officer Ruma did not report her arrest by a different agency and received a verbal warning.

This document also shows approximately 215 different disciplinary actions between September 2006 and November 2007; of these the count of the undersigned shows two (2) discharges and two (2) resignations. (It should be noted that the format makes the document difficult to read, and there may be some errors in this calculation).

The Union also cited three (3) instances of misconduct where the City did not discharge employees for conduct that it argued was more severe than that alleged against the Grievant here.

These include the cases of Officer Fischbach, Officer McMichael, and Sergeant Burner.

1. Officer Fischbach. Officer Fischbach was off-duty when he and two (2) co-workers, both patrol officers, went to the victim's place of employment – a local bar. At the time Fischbach was having an affair with the wife of the person who worked at the bar. At the bar a fight began between Fischbach and the employee of the bar, and the bar employee was injured. Fischbach was given a thirty (30) day suspension by the Safety Director.
2. Office McMichael. Officer McMichael was convicted of several misdemeanors while off-duty, and under the influence of alcohol, he threatened and assaulted his girlfriend. McMichael damaged his girlfriend's property and had deadly weapons available. He is also African-American.
3. Sergeant Burner. On February 12, 1996, Sgt. Burner was involved in an off-duty incident when he got into a heated argument with a husband and wife. During an alleged traffic violation, he got into an argument with the other driver, and the incident escalated until Burner pulled his issued sidearm and threatened the other car.

On February 19, 1999, Burner was disciplined for excessive force on a prisoner who received five (5) stitches as a result of the incident.

On February 12, 1996 Burner was on-duty and was called to a Greyhound bus station for a call about a juvenile who was acting unruly. When he arrived he discovered that the girl, an African-American, was a runaway. In attempting to handle the situation Burner entered the room where the juvenile was seated; he ordered everyone else out; he then called her a "nigger"; and struck the juvenile in the face. Burner was criminally charged, but the case was dismissed because of the unavailability of witnesses. He received a thirty (30) day suspension for his actions.

Contention of the Parties

City Contentions

The City argues that the timing of the discharge should not be affected because it was administered differently than was done for Officer Fischbach. Since the Grievant was given notice of the reconvened hearing; and since he was afforded an opportunity to be heard on the issue; then the due process requirement has been met. Since the Grievant refused to make a statement (albeit under advice of counsel) and since his counsel only offered argument and prior sworn testimony of other witnesses in the criminal phase; then it argues that insufficient reason was provided for overturning the discharge. It cites the Agreement for authority that the action it took in not reassigning the Grievant was discretionary. It counters the Union's argument regarding the need to reconvene only after the appeals are complete as being against the Agreement and the practical application of same.

The City also cites legal authority for the proposition that the Grievant's refusal to testify at the pre-disciplinary hearing was the same as not appearing; and for support of its claim that his choice of not testifying relieves the City of providing additional due process rights. It argues that the Fifth Amendment does not extend to non-criminal litigation and it cites authority opposed to such a broad interpretation. It asks that the undersigned make negative inferences of the Grievant's choice not to testify.

The City counters the Union's claim that Jackson engaged in an unprovoked attack on the Grievant by pointing out that the Grievant is the person charged with enforcing the laws of Ohio, which should include filing complaints and/or police reports when criminal behavior occurs. It argues that if the Union were correct on this point, then the Grievant would have been expected to file a complaint or take some action in that vein. Since he instead intentionally and suspiciously slinked away as if he had no involvement, then it argues such proves his guilt.

The City contends that the dismissal of the criminal charge against the Grievant did not make the facts unproven. It cites Judge Corrigan's statements as evidence that he expected that the Grievant would not survive a forum where the burden of proof was less. It cites the statements of the Judge, who recognized that the Grievant acted "despicably" and "disgusting." It contends that since an officer can commit a number of administrative rule infractions that would justify discharge, but would not rise to the level of a criminal offense, then the impact of the "not guilty" findings on this tribunal should be minimal. Since even the Judge recognized that the actions of the Grievant should not be tolerated by society, then it asks that it not be forced to tolerate the same actions as that society's employer. It maintains that the Grievant's administrative rule infractions were so severe that termination is warranted regardless of the status of the criminal charges. It contends that the discharge was fair, reasonable and appropriate to the purposes and specific circumstances.

The City rejects the notion that since it has not discharged an officer in twenty (20) years, then it may not terminate an officer for a misdemeanor violation. It maintains that the argument fails to consider the number of officers who have chosen to resign or quit rather than fight pending discipline. It contends that the Grievant, as a patrol officer, is granted more power than the average citizen -- including the power to seize property, search a private citizen, and use

force, sometimes deadly, against an individual. It asks that it not be forced to keep an employee who is incapable of carrying out these duties without bias.

The City argues that the Union President's testimony should be discounted because of his lack of experience in personnel issues. While it concedes his ability and expertise make him a credible witness, it contends that his inexperience in making disciplinary decisions weakened the value of his testimony. In contrast it cited the experience and abilities of the Safety Director who was able to review the complete files of both the Grievant and Turner; and who had a more extensive knowledge of the history than the Union President.

The City claims that the August 6th incident was much more than "just" a barfight as claimed by the Union. It contends that the Grievant and Turner consciously ignored their duty and for no apparent reason other than race, targeted an innocent private citizen; instigated a fight; and then attempted to ignore the consequences. It asserts that their off-duty conduct is sufficient reason to discharge, and it cites arbitral authority in support. It contends that there is no mitigating factor since the victims were strangers, and only race seemed to fuel the Grievant and Turner's actions. Since the Safety Director credibly testified that he doubted that he could "have faith in the ability of [either] to fairly enforce the laws of this community without bias, prejudice in a multi-racial, multi-cultural, diverse community", it argues that it proved its just cause burden.

The City argues that police officers have a higher standard of conduct in their workplace than a private citizen, and it cites case law in support. It argues that by instigating and engaging in an altercation with a stranger solely on the basis of his race or interracial relationship, neither the Grievant nor Turner acted in accord with their duty to act with a higher standard of conduct. It argues that the failure to act by stopping the altercation, or calling police, or removing

themselves all violated the standard that police must follow. It contends that both also attempted to scurry away once the misconduct they engaged in risked further trouble. It asserts that the City has a duty to apply the laws fairly and uniformly and it asks that it not be forced to retain an employee who takes action based on race. It argues that it would not have hired either the Grievant or Turner if these predilections were known, and it maintains that it should not have to keep them once they become known.

The City claims that the decision to discharge was not disproportionate to the misconduct, and it contends that the prior discipline imposed by the City in previous cases does not bind it, nor the arbitrator, to similar discipline. It addresses each cited prior instance as being distinguishable as follows:

1. Officer George Kirby. 2000 Arbitration decision. The City contends that the Kirby case is distinguishable because he entered a building with reports of someone with a gun; because the nature and extent of the physical assault that Kirby was charged with was not prolonged, repeated or calculated; and that his physical assault was not malicious. Moreover, since Kirby was responding to a call, it claims that it is different since he was not the aggressor, and since he was forced to enter an already tense situation. In contrast, it argues that this case involves contact with an innocent victim; involves problems of racial motivation; involves prolonged, repeated and calculated assaults, both verbal and physical; and involves an intent to aggravate, instigate and harass Jackson and his companions.

2. Officer Scott Marek. 1995 Arbitration decision. The City claims that Marek's case involved a one-time, back handed strike by the Officer against his girlfriend's son who was threatening her. Similar to Kirby, it argues that Marek's case is distinguishable. In addition, it points out that while Marek showed remorse, neither the Grievant nor Turner have.

3. Officer Michelle Pettry. April 6, 1998 Arbitration decision. The City claims that this case is distinguishable since Pettry was reacting to a school cafeteria worker not allowing her son to have breakfast, which in turn caused him to become unable to take medication; which resulted in potential harm coming to him. In addition, to the distinguishing characteristics of the other cited cases, the City also claimed that Pettry's immediately reporting the incident to her supervisors proved that she acted properly following the misconduct.

4. Officers Tankersely and Staimpel. February 5, 2001 Arbitration decision. The City claims that these incidents were distinguishable since the arbitrator in that case found that the complaining witnesses against the Officers were not credible, and that the officers were. Since the opposite is the case here, it argues that the case is not directly applicable.

5. Captain Lynch. July 6, 1990 Arbitration decision. The City distinguishes this case since there was evidence that the City Prosecutor pressured the Safety Director to discharge Captain Lynch because of a vendetta; and since Lynch, unlike the Grievant, was found not guilty by a jury.

6. Officer Noah Jones. March 16, 1998 Arbitration decision. The City distinguishes this case since Officer Jones was called to a difficult situation involving difficult children, and since Jones was only proven to have engaged in a verbal altercation with no allegations of physical contact being made.

7. Officer McMichael. The City claims that this case is not comparative since it involved claims of theft by working a job while on leave. Since this involves no claims of violence, the City argues it is not comparable.

8. Sergeant Burner. The City claims that this case is distinguishable since Burner was called to answer a call for an unruly teenager. While it agrees it was inappropriately handled, it claims that the fact that Burner was on-duty and answered a call mitigates his case where it does not have an impact on the Grievant and Turner. In addition, it rejects the twelve (12) year old case involving Burner drawing his weapon, it asserts that such was done within the City's policies on drawing a weapon.

9. Officer Fishbach. The City claims that this case is distinguishable since there was a familiarity between Fishbach; and since Fishbach was provoked; and since there was intimacy between Fishbach and the wife of the person who provoked Fishbach.

The City argues that none of the cited prior incidents are comparable or meet the test of being "equal circumstances" that would otherwise require consistent discipline. It asserts that none of the evidence from the Union paints a complete picture of the circumstances surrounding the incident, or all of the evidence that supported the discipline. It states that the comparison of the evidence as submitted is incomplete, and makes a full comparative analysis impossible.

For all these reasons, it asks that the Grievance be denied.

Union Contentions

The Union argues that the factual case was impacted because it involved a bar altercation, fueled by alcohol, and a media frenzy; and that all that could be proven were exaggerated and inaccurate claims of racial remarks. The Union relied on the comments of the trial judge in the Grievant's criminal case where he concluded that:

So I'm left with the credibility of the statements of Mr. Jackson and Ms. Cruxton with respect to what Mr. Forrest did. And Ms. Cruxton's testimony was—she was, no doubt, not telling the entire truth to the police, not telling the entire truth in this court.

And she was reluctant to admit some of the facts, whether she thought they were significant or not.

Most troubling, with respect to her description of this fight, was that she never saw any – any swinging, how Mr. Turner was injured, the assault on Mr. Turner. She didn't see that at all. It happened right in front of her. The Court can't understand how that's possible. It didn't seem right.

Mr. Jackson's testimony was very precise, almost too precise, and was inconsistent in many different ways, the time line, what he saw, what he perceived.

And, therefore, I find that it was just not credible beyond a reasonable doubt to find Mr. Forrest guilty of assault. So I'm finding him not guilty of assault with respect to Mr. Jackson and Ms. Cruxton. (t.p. 8-9).

The Union claims that the testimony could not prove that the Grievant did anything wrong. It argues that Kane's testimony did not involve claims that Forrest did anything aggressive. Kane's testimony was also that he closed the blinds at 2:00 a.m., and that at that time there was no problem. It contends that the testimony of both Jackson and Cruxton were that the blinds were drawn during and after the fight as if the customers were attempting to hide what was occurring in the bar from those on the outside. Since Kane testified that the fight lasted

from 1-3 minutes, and that he never saw Forrest engaged in the fight, then it argues that the Grievant was never proven to have engaged in fighting Jackson.

The Union also relies on other inconsistencies. It cites the testimony of McEown who claimed that Jackson and his friends sat at the bar during the entire night as contrasted with the testimony of Jackson and Cruyton who claimed that they were first bowling in the back of the bar. It cites the phrase that Jackson used in the Forrest trial of an "imperceptible touch" as having come from the Judge during the Turner trial. It contends that these prove that Jackson was lying, and it claims that the evidence is that he was the aggressor.

The Union contends that Jackson's testimony proved that he was the aggressor. It contends that his claim that the "whole bar" was fighting him; that he claimed he made a conscious decision "not to kill" Powers; that he decided to bite Powers finger because it was an annoyance; and that he admitted to having asked Turner's brother, Hanz, if he "wanted some." It claims that after the fight Jackson showed himself to be lying.

Contrary to Jackson's claims, the Union argues that the facts show that Jackson was not refused EMS transport – he refused it when it was offered; that no one yelled "arrest the nigger" as Jackson claimed, and that Officer Heishel, the first officer on the scene, denied anyone said that. It argues that the Court concluded that Jackson embellished and lied throughout his testimony; that he was proven to be the aggressor; and that his testimony is unworthy of belief.

Similarly, it argues that Cruyton was not believable. It points to her testimony as an admission that she lied to police about her former boyfriend, Wayne Thomas, being at the bar, and it rejects her excuse that she never thought it was going to go to Court. It contends that this was significant because she lied about another black man being in the bar and that person was not subject to racial epithets. It maintains that Cruyton escalated the incident and that her

inflammatory language provoked the altercation. Since she admitted to wanting to belittle and demean the Grievant, then it asks that her credibility be considered in determining the truth of her claims.

The Union argues that Cruyton's statements are a morass of contradictions. It contrasts her statement to the police after the incident on August 6 where she stated that she was not injured with her testimony where she claimed she was hit in the ribs. It cites her claim that she did not see Jackson hit Turner even though it occurred right in front of her – something that the Judge made note of in his decision. It argues that all of this proves that Cruyton is not reliable and was a contributor to the incident in the bar that evening.

The Union contends that the media frenzy that followed the charges were the motivating factor to the City overreacting. It contends that once the facts proved that Jackson and Cruyton had lied, embellished, were confrontational and aggressive on the evening in question, then the basis for the media's attention was misplaced. It contends that the Grievant's long service without discipline must be considered and asks that the Grievant be returned to work.

The Union contends that the uncontested facts prove that the Grievance should be sustained. It argues that the record shows that the following facts are undisputed:

- The Grievants have not been convicted of any criminal offenses;
- The Grievants have never been charged with a racially motivated crime;
- The material facts were in dispute at every level, and the City could not prove the disputed facts were as alleged at any point;
- The Safety Director did not, and could not, make credibility determinations from live witnesses;
- The Safety Director made his decision without reading or considering evidence submitted by the Union on the subject of discipline and termination;
- The comparative discipline shows that only minor discipline has been issued in the past for many acts of misconduct that were similar to those alleged against the Grievant and Officer Turner;

- The comparative discipline also shows that prior officers were convicted of assault and other offenses of violence, and only suspensions were imposed;
- The comparative discipline also shows that suspensions were imposed where no criminal prosecution occurred;
- The comparative discipline where officers on-duty, who engaged in verbal abuse of citizens, resulted in only suspensions.
- The Safety Director admitted that the use of a racial epithet, whether on- or off-duty is not *per se* a dischargeable offense.
- Both Grievants are senior officers; and
- Neither officer has a prior discipline against them.

The Union argues that the termination of the Grievant violates the just cause mandate of the Agreement. It asserts that any claims of the City that the decision of the Safety Director can not be modified by an arbitrator must be rejected since the just cause standard must be followed by the City. Since the Agreement gives the arbitrator jurisdiction over all grievances, and all disciplinary matters are subject to the grievance procedure, then it contends that the arbitrator *must* determine whether just cause was followed. It contends that if the just cause standard is not imposed by the arbitrator, then he would actually violate the Agreement by modifying the terms that require that that standard be followed.

The Union rejects the City's position regarding the provision that prohibits the undersigned from "substitut[ing]" his judgment for that of the Safety Director. It points out that that sentence is only applicable to suspensions, and it claims that it does not remove the arbitrator's jurisdiction or authority. It asks that the provision be read in conjunction with the remainder of the Agreement. It complains that if the City were to prevail on this issue, the Union would be prohibited from appealing any of the Safety Director's decisions regarding such discipline.

The Union cites arbitral authority in support of its positions. It cites substantial authority regarding the just cause standard, and claims that the City failed to sustain its burden in this case.

It contends that the discharge is unreasonable based on the facts and circumstances, and that it is disparate when considering other discipline administered for comparable cases. The Union also contends that the past practice of the Parties was violated, and it cites past discipline imposed for similar offenses. It asserts that the past disciplines of other officers by previous Safety Directors and Chiefs of Police prove that a practice existed for less discipline than discharge. It contends that the fact that the Safety Director did not even read the cited authority proves that the City did not consider relevant authority.

For all these reasons, it asks that the Grievance be sustained; that the Grievant be returned to work; that the Grievant be made whole for all losses; and that the undersigned retain jurisdiction to insure that the remedy is properly imposed.

Discussion and Findings

A review of the record reveals that the Grievance must be denied. The basis for this finding is that the City proved that the Grievant engaged in serious misconduct that makes his position as an officer impossible to continue in this jurisdiction.

All discharge cases have two (2) components – the question of whether the facts were proven as alleged, and the question of whether the discipline is just based on the facts that are proven. In this case the facts are varied and inconsistent. Because of the frequency in which the victims' statements were taken, there are differences in those statements (both in and out of court), and the Union focused on these inconsistencies to draw the veracity of those witnesses into question. While such had significant impact in the criminal system, such is less important here. It is well accepted that the standard of proof in labor arbitration is a preponderance of the

evidence. Unlike the criminal system where beyond a reasonable doubt is the standard, the burden is lower, and the truth of the claims is easier to prove.

Further, the notion that minor inconsistencies mean that the witnesses are outright lying is an exaggeration of what impact slight inconsistencies should have in measuring the veracity of a witness. Often witnesses will give slightly different accounts of events, and such is considered normal. When numerous statements are provided for the same events it is reasonable for a person to not give the same precise version of events in each re-telling. The questioner, the phrasing of the questions, the order of the questions, the passage of time, and the way in which memory works all have an impact in how statements are made. The veracity of a witness is not legitimately questioned because of slight variations – the true measure of a person's tendency to tell the truth is when these slight variations are acknowledged; when negative facts are admitted; and when the entire story is measured against other witnesses. Focusing on differences in statements alone will not support a conclusion that witnesses were lying – more is needed to challenge those witnesses.

In addition, as the City persuasively argued, there is no 5th Amendment right against self-incrimination in a civil procedure. Arbitration is at its heart a civil dispute between an employer and a union. If there is no risk of a criminal conviction, there is nothing to justify invocation of the 5th Amendment right. The 5th Amendment is a right that protects a person from risking their liberty, in the form of criminal punishment, by being forced to testify against themselves. There is no such risk in a civil proceeding when the criminal portion has been exhausted, and there is no right against self-incrimination when the threat of criminal prosecution is removed. Therefore, the fact that the Grievant did not testify is important in determining the facts. Since the criminal prosecutions had resolved themselves, then he had no risk. Since he had no risk, it

would have been expected that he would have testified to explain the events from his perspective. It is fair and proper to make a negative inference that he avoided testifying because the truth of his statements would have been against his own interests.

The City argued the point, it cited persuasive precedent, and there is nothing to contradict this fact. Therefore, analysis of the facts will be made against the backdrop of the Grievant's failure to testify. In addition, the scene of the altercation is an environment that must be recognized as being difficult to obtain accurate information.

As noted in the criminal system, the fact that this was a bar fight where all witnesses were under varying levels of alcohol impairment, must be considered in measuring the inconsistencies in the testimony. All involved were drinking, late at night, on a weekend, at a noisy crowded bar. The reliability of any witness is not ideal, and when alcohol is added to the equation the reliability lessens. However, because of the lesser burden the negative impact of the witnesses' reliability is countered by the less restrictive burden of proof.

What must be resolved is which of the facts were proven under this less severe burden. A review of the record, including a large amount of evidence from the investigations, from the trial transcript, and from the myriad sources the Parties relied on in presenting their case, show that the Grievant was proven to have engaged in abhorrent misconduct as the main perpetrator of the actions against Aric Jackson and Jaime Cruxton. A review of the record shows that the City proved that:

- the Grievant and Turner acted inappropriately in seating themselves on either side of Jackson.
- Forrest acted improperly by moving the drinks of Cruxton and her cousin away from their seats;
- these initial actions were done to, at a minimum cause mischief, and at their worst intimidate Jackson and his friends;

- Jackson acted reasonably by moving the stools in response to the actions of the Grievant and Turner;
- the Grievant and Turner were physically invading Jackson's space; talking through him; and acting as if he were not between them solely to bother Jackson;
- the conduct of the Grievant and Turner was severe enough that the bartender determined that it was reasonable for her to attempt to pass a note to Jackson to warn him that they were police;
- someone yelled (probably while Cruxton was in the restroom) "buy every nigger in this bar a beer." It was proven that the Grievant made the statement at least once, and perhaps more times;
- Jackson was given a beer by Turner;
- The issue was escalated after Cruxton returned and was asked by Forrest what she sees in "niggers."
- Cruxton escalated the matter further by telling Forrest that it was a "big dick thing"; implying that he was impotent; and that he would not understand;
- Forrest escalated the matter further by physically invading Cruxton's space and pretending that he was accidentally bumping into her;
- Forrest was proven to have continued to refer to Cruxton as a "nigger lover" and other similar racial epithets with the purpose of attempting to get Cruxton to leave;
- Cruxton escalated the matter by loudly complaining about "racist hillbillies" and people not "minding their own business."
- Forrest escalated the matter by responding to the statement;
- Cruxton escalated the matter by telling Forrest to "mind his own business" and then criticizing his skin condition by advising him to see a dermatologist;
- Forrest escalated the matter from there by physically pulling on Cruxton's seat and making her fall forward into Jackson;
- Jackson did not completely understand what was occurring until that moment, and then yelled at Forrest, loudly, asking what he was doing.

What follows is a series of physical confrontations that escalated until the melee that followed occurred. The fight was the center of the controversy for the criminal court's purposes. For purposes of determining whether the City acted appropriately under this Agreement, the relevancy ends when the Parties become physical. The Grievant's actions up to that point are so egregious that it is not necessary to make further factual determinations. The fight is a peripheral issue for the employment portion of the case because it was the logical end to the events that were touched off almost solely by the Grievant's conduct.

Much of the Union's case was based on alleged inconsistencies in the witnesses' testimony. While this appropriately swayed the criminal court, the inconsistencies were insignificant and because of the lower burden, had little impact. It is important to note that the factual case is not about choosing to believe the Grievant or the complaining witnesses. It is about either believing the complaining witnesses, or not believing anything of the complaining witnesses. Since the Grievant did not testify, there is no counter testimony to measure the other witnesses' testimony against. The Grievant's case relies solely on the claim that all of the witnesses were unreliable, therefore he was not proven to have acted as claimed. It must be recognized that this would be a difficult thing to overcome since it relies on the conclusion that Cruxton, Jackson, McKeown, and Kane were all lying, and unreliable; that all were confused over who created the racial tension in the bar; that the racial epithets were made by someone other than the Grievant or Turner; that Jackson, with his violent propensities, just happened to pick on the wrong guys; and that it must have been someone other than the two officers who sat on either side of him, creating the scene. When phrased in this context, the Grievant's case becomes difficult to sustain.

Indeed, in order to believe the Grievant, the complaining witnesses' accounts would have to be completely fabricated. Whatever inconsistencies the Union was able to establish, the evidence was that Forrest engaged himself in activity that is revolting at its core. His misconduct was serious; he was proven to be the central perpetrator; and he was proven to escalate the matter when nearly everyone else involved was trying to just ignore or stop him.

The inconsistencies of the complaining witnesses, even if sufficient to challenge portions of their accounts, was not sufficient to ignore the center of their version of events – the Grievant was proven to have engaged in an ongoing effort to intimidate, frighten, and abuse his power as a known police officer to make bar patrons unwelcome. He did so because a white woman was dating a black man and they were in “his” bar. He acted with the knowledge that he could violate well-accepted social barriers and he did so because he was a police officer in a bar where the owners knew he was a police officer; where the owners were his friends; and where he thought he could get away with it. The actions of the Grievant were proven to be that of a bully who abused his power; and he did so because he did not accept the miscegenation that he saw.

This description of his proven actions is worse when the specifics are recounted. The record shows that he said, several times, “buy every nigger in this place a beer.” Like the criminal trial judge concluded, it must be found that McKeown’s credible testimony was proof that this occurred; that it was the Grievant who said it; and that it was said multiple times. But for the calmness of Jackson, and his belief that they were “just drunks,” it would be reasonable to expect this action to have escalated the matter. The Union’s claim that Jackson was the aggressor is impossible to accept based on this earlier misconduct of the Grievant. In response to such an outlandish statement – in public, out loud, and intended specifically for Jackson – and in response to having his companions seats taken -- Jackson did nothing. It is reasonable to

conclude that any claims that Jackson was somehow the aggressor because of later actions must be completely, and absolutely rejected.

Instead of moving on and ignoring Jackson, the Grievant escalated the matter further by asking Jackson's girlfriend what "she saw in niggers." It is hard to choose between these two (2) statements as to which is worse. Perhaps it is unnecessary. Alone either is outrageous; together they prove that the Grievant is a racist. He rejects the notion of a black man and a white woman being together, and he made his beliefs manifest in two (2) separate, distinct acts. Further, he did so because he believed he could get away with it. He not only proved his predilections regarding race, he showed that he was willing to abuse the power he has as a police officer to intimidate others who violate his racist views. While he may have internally believed he was being more mischievous than racist, it is the humor of a bully that no one else finds funny.

The Union's position at this point is that Cruxton escalated the matter by challenging the Grievant's manhood. Implicit in this position is that Cruxton is unreliable as a witness when she made claims against the Grievant, but that she is completely trustworthy when she admits to statements that portrayed her in a bad light. Instead, it must be found that her admission tends to support her credibility. When a witnesses' version of events includes actions that are negative toward themselves, it tends to make them more trustworthy. Here, Cruxton's admission that she made a rather rude retort to the Grievant's outrageous statement supports the conclusion that she was being truthful. If she were hiding any evidence that would question her veracity, this statement would be expected to be it. Instead, she admits it and she must be found as generally reliable as to what occurred at this point in the night.

In addition, the question arises, how could Cruxton escalate something that she was also lying about? Either Cruxton made the thing up, or she escalated something that the Grievant

started. It can't be both. It is reasonable to believe that Cruxton did escalate the matter, if for no other reason than she admitted to having done so. However, the Union's case fails to recognize that she was justified in doing so. In some circumstances language can be so insulting and outrageous that the unreasonable becomes reasonable. In a vacuum it would be hard to imagine a situation where Cruxton's comments were justified. The Grievant's actions make the use of imagination unnecessary.

The Grievant used a word that is not acceptable under any circumstances, and he used it to insult Cruxton's boyfriend of many years. The statement is so rude as to be unanswerable; and it strikes at the heart of Cruxton's private life. Forrest not only questioned her personal choice for a boyfriend, he questioned it based on race. The only reasonable method to fight such insulting language is by hitting it straight on with as much force as possible to stop it from continuing. Cruxton's statements were not an escalation; they were an attempt to stop the Grievant in his tracks. Fighting fire with fire is reasonable and justified in this circumstance. Therefore, the Union's claim that Cruxton is somehow responsible for some of what occurred must be rejected. Until the Grievant entered her life, she was just enjoying a night out with her cousin and boyfriend. But for the Grievant, there is no evidence that Cruxton was anything other than a victim responding to the Grievant's aggression.

As a victim at this point in the night, what follows does not turn into culpability for Cruxton. She was thrown into the altercation by the Grievant's actions, and the Grievant's alone. Once she challenged him, he was proven to have continued to use the word "nigger" loud enough for her to hear. Again, instead of being diverted, the Grievant escalates the matter further. While the Union claims that Cruxton must be partly responsible for the escalation, it is difficult to imagine what she was supposed to do. She countered outrageous comment with

outrageous comment, and she demanded to be left alone. The Grievant refused and escalated the matter. Given these facts, it is illogical for the Union to insist that Cruyton was the offender.

Unlike the case with Turner, this case contains racially motivated appalling behavior; and it was done because the Grievant thought he could get away with it. The facts were proven without the Grievant's testimony, and his failure to testify indicated his guilt. In addition, his refusal to inform police that he was an officer indicates knowledge that he had done wrong. All of these facts show that the Grievant engaged in serious misconduct. What remains is the question of just cause.

A review of the record shows that the Grievant's action were sufficiently serious that the City acted within its power to discharge him. The gross violation of trust along with his racist activities make it justifiable to end his employment. The Grievant worked in a large City with a large black population. He showed that he not only had beliefs against black people, his prejudice was against the most basic of rights. He showed that his prejudices were sufficiently strong that he was willing to challenge complete strangers over their personal relationship, and the basis for his challenge was solely racial.

The legitimate question that arises is that if he is willing to act this outrageously when there is little at stake, how does he act when the issues are much more serious? If a few drinks cause him to manifest his prejudice, how far will that otherwise hidden propensity drive him when the decisions are difficult, and a citizen's rights are at stake? If in sobriety he can suppress this belief, how will it affect him when his job causes him to answer a domestic violence call between people of different races? What if the call is between a white victim and a black accused? Will his actions always support the white person? Perhaps his prejudice will color his action to be against the white person as he did with Cruyton. Regardless of where these

questions lead, they all support the conclusion that the City has a legitimate and important motive in dismissing the Grievant. Therefore, it must be found that the just cause standards supports the City's discharge decision.

This finding must stand even in the face of the cited prior discipline. Typically such citations would carry great weight. However, the City was able to prove that the Grievant's conduct was sufficiently egregious that the cited disciplines are not comparable. Even the Burner case is distinguishable. Unlike this case, the alleged victim failed to appear to testify under oath. It must be recognized that without a victim any case against an accused is difficult to win. The facts have parallels, but the fact that Jackson and Cruyton cooperated through much of the prior litigation is an important distinguishing characteristic. What was difficult to prove as a factual matter in the Burner case was overcome here.

Moreover, it must be found that the racial component takes on more significance with the passage of time. Unlike most comparative analysis of other discipline cases, when there are racial elements it is fair to distinguish between older cases and those that are more recent. As time moves forward, it is reasonable to recognize the fact that acts of racial prejudice have become not only less acceptable, but more offensive. What was once commonplace many years ago, is now clearly unacceptable. As time passes, the use of racial epithets has gone from unacceptable, to outrageous, to sometimes criminal. Indeed, it must be recognized that the State of Ohio has made racially based "hate crimes" a separate and distinguishable crime. This shows that race-based actions, which have been unacceptable for many years, have become less so, and therefore more and more offensive as acts of misconduct.

In contrast, and as an example, a case where an employee physically assaults their supervisor is as egregious now as it has always been. There is nothing new about an employee

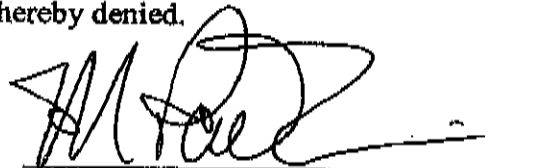
assaulting their supervisor, and it is fair to impose the same discipline now as might have been imposed many years ago. When a racial component is added, it is fair to recognize that it has become more offensive as time has passed. Therefore, the Burner case, having occurred ten years prior, is sufficiently distinguishable as to not have as much impact on the discharge decision as it might have had if the two (2) events were closer in time.

For these reasons, the Grievance must be, and is denied.

Award

The Grievance is hereby denied.

July 30, 2008
Cincinnati, Ohio


Michael Paolucci