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I. FINDLAY'S EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case is not one of great general interest because the Appellants Proposition of Law No. 1 asks this Court to adopt a rule that may well serve to vitiate disciplinary procedures in many of the State's political subdivisions. There is nothing in the Public Employees Collective Bargaining Act restricting negotiation rights outside of RC 4117.10, which is not implicated here. The negotiating parties are free to delegate rule making authority and negotiate policies and procedures outside of the four corners of their agreement. The City of Findlay created a Disciplinary Matrix, with the assistance of the Union, pursuant to rule making authority provided by Article 4 and Section 10.01 of their Collective Bargaining Agreement.

Proposition of Law No. 2 is simply a restatement of well-established law governing review of an arbitrator's decision in binding arbitration. In this matter the arbitrator failed to follow unambiguous instruction regarding the disciplinary process. There was no substitution of judgment as alleged by Appellants (hereinafter Union or OPBA) because the arbitrator's discretion was limited to applying the discipline set forth in the Matrix. The arbitrator was found to have exceeded his authority by both the Court of Common Pleas and the Court of Appeals.

Appellants' Propositions of Law No. 1 is based on the two-part test for just cause established by this Court in *Board of Trustees of Miami Township v. Fraternal Order of Police, OLC, Inc.*, 81 Ohio St.3d 269, 271-272. This Court, in *Miami Township*, approved a two-step analysis declaring that an arbitrator under the standard of just cause is authorized to determine (1) whether the alleged misconduct occurred and (2) whether the level of discipline is appropriate under the circumstances. The Court, however, was careful to explain that the two-

step analysis does not apply if the contract restricts the arbitrator's authority in some other way.

The Miami Township Court declared:

“[T]he parties to a collective bargaining agreement cannot anticipate every possible breach of the agreement that may occur during its life and then write an appropriate remedy for each such situation into the agreement. This fact does not, however, preclude an arbitrator from awarding a remedy.” [*Queen City Lodge No. 69, Fraternal Order of Police, Hamilton Cty., Ohio v. Cincinnati*, 63 Ohio St.3d 403, 405, 588 N.E.2d 802 (1992)]. Specific to the case at bar, the parties cannot anticipate the type of discipline appropriate to every possible infraction, and thus without further instruction from the collective bargaining agreement, the arbitrator must be able to review the type of discipline. Accordingly, we hold that where an arbitrator's decision draws its essence from the collective bargaining agreement, and in the absence of language in the agreement that would restrict such review, the arbitrator, after determining that there was just cause to discipline an employee, has the authority to review the appropriateness of the type of discipline imposed.

(*Id.*, at 272).

In this case, the level of discipline issued by the Findlay Police Department was predetermined by a Disciplinary Matrix providing a level of discipline for each infraction dependent on its seriousness and the number of prior infractions. Under the Matrix once it is determined that an infraction has been committed, the penalty assessed is mandated. The Matrix further provides that if the class of violation permits two levels of discipline, the choice between the two is solely within the province of the Chief of Police. (See, *infra*, Pg. 5).

The Ohio Public Employees Collective Bargaining Act, R.C. Chapter 4117, provides public employees with the right to negotiate wages, hours, terms and conditions of employment with their employers. In adopting this law the General Assembly removed itself and the courts of Ohio from having to continually legislate or adjudicate employment relations with Ohio's political subdivisions. The parties were given the right to negotiate their own disciplinary and grievance procedures and refer contested matters to arbitration rather than court if they wish. The

contracting parties, under the law can require that all discipline be based on just cause or any other standard they choose. The parties can also include in the contract instructions to the arbitrator restricting arbitral authority. Courts are authorized to review the arbitrator's decision to determine if the arbitrator violated the criteria set forth at RC 2711.10 and 2711.11.

In this case, the process worked exactly as designed. The contract provided Findlay with the ability to create Rules and Regulations and expressly provided the Union with the right to object to the rules through the contract's grievance procedure. The Findlay Police Department created the Disciplinary Matrix with the assistance of the local Union representatives to predetermine levels of discipline based on the offense. Consequently, the second step of the two-step process was removed from an arbitrator's consideration.

David Hill committed his second Class C violation when he referred to Patrolman Morgan Greeno as "Whoregan," and permitted other patrolmen to use the term. The term was used to intimidate Greeno who was scheduled to appear as a witness against Hill in a prior disciplinary matter.

Findlay terminated Hill according to Class C, Step 2 of the Disciplinary Matrix. Hill proceeded to arbitration. The arbitrator found that the violation indeed occurred, and was deserving of serious discipline, but chose not to follow the Matrix. Findlay filed an application to vacate the Arbitrator's decisions because the Arbitrator was not authorized to amend the discipline. The Cuyahoga County Court of Common Pleas vacated the Arbitrator's award and reinstated Hill's termination. The Court of Appeals affirmed.

There is no reason for this Court to consider the Appellants' Propositions of Law. There is no issue of great or general public concern. If the OPBA finds fault with the Matrix its remedy is at the negotiating table.

II. STATEMENT OF CASE AND FACTS

The City of Findlay is in full agreement with the facts as found by the Eighth District Court of Appeals. (See, Court of Appeals Opinion, pars. 2-13, Appellants' Appendix Pgs. 3-21).

The discharge of David Hill resulted from the following acts of misconduct:

1. On July 6, 2012, Sergeant Hill received a written reprimand for attaching a taser to a 14 year old boy and discharging the electrical current for no legitimate law enforcement purpose.
2. On July 27, 2012, Sergeant Hill, while conducting roll call, disparaged the mental health of a newly promoted sergeant to a fully assembled roll call, and expressed his displeasure at the new sergeant's assignment to his platoon by removing his firearm, placing it in his mouth, and feigning suicide. He was found to have engaged in conduct unbecoming an officer. Sergeant Hill was issued a 15 day suspension, which was reduced in binding arbitration to ten days based on the strict requirements of the Findlay Police Department's Disciplinary Matrix.
3. On November 13, 2012, Sergeant Hill was observing roll call being conducted by Sergeant Harmon. During the roll call, Sergeant Hill referred to Patrolman Morgan Greeno as "Whoregan" in front of the assembled officers. Patrolman Greeno was scheduled to testify at an upcoming arbitration involving discipline of Sergeant Hill for the July 27, 2012 roll call incident. Sergeant Hill was terminated for the second offense of conduct unbecoming an officer according to the Findlay Police Department Disciplinary Matrix.

The Disciplinary Matrix is contained in the Findlay Police Department's Rules and Regulations. The Matrix lists Class C offenses as follows:

Class C Offenses – Serious violations of disregard of policy.

- Conduct Unbecoming an Officer (3.A.2)
- Sexual, Racial, Protected Status Harassment/Hostile Work Environment (3.A.12.b)
- Public Statements and Appearances (3.A.23.a1-44)
- False Statements/Truthfulness (3.A.10)
- Obedience to Laws, Regulations, and Orders (3.A.1)

Based on the Class of Misconduct and the number of offenses, discipline is issued based on the following Matrix:

MATRIX LAYOUT

CLASS	STEP 1	STEP 2	STEP 3
A	Level 1	Level 1 or 2	Level 2
B	Level 2	Level 3	Level 4
C	Level 4	Level 4 or 5	Level 5
D	Level 5		

- Violations are divided into classes, based on the seriousness of the offense.
- If the involved employee has no previous violations, discipline will be administered under “Step 1.” Successive violations will place the involved employee into the next progressive step. In the event that the involved employee progresses beyond Step 3, discipline will progress to “Step 1” of the next progressive class. (i.e., a fourth violation, on a “Class A” offense will place the affected employee on “Step 1” on “Class B.”)
- Previous violations will no longer have any force or effect, in accordance with the following schedule:

MEMORANDUM OF DISCIPLINE	NOT CONSIDERED AFTER
Verbal reprimand	1 year
Written reprimand	2 years
Suspension, 1-4 days	3 years
Suspension, 5 days or more	5 years

- The involved employee will then receive a disciplinary action within the range of the following scale, based upon the indicated discipline level. If more than one discipline level is indicated, the Chief of Police has sole discretion in determining which of the two levels is appropriate, based on the facts of the case and history of the involved employee.

LEVEL	ACTION
1	Informal Counseling or Verbal Reprimand
2	Written Reprimand
3	1-2 day suspension and/or loss of leave
4	3-10 day suspension and/or loss of leave
5	Termination

The merits of the July 27, 2012 discipline were presented in arbitration. The Chief of Police issued Hill a 30 day suspension with fifteen days held in abeyance for his misconduct.

Hill appealed to arbitration. The arbitrator found that Hill engaged in conduct unbecoming an officer and was deserving of punishment. However, he declared just cause required him to strictly adhere to the Disciplinary Matrix. The arbitrator reduced the 15 day suspension to a ten day suspension to comport with Class C, Step 1 of the Matrix.

The act of referring to Officer Morgan Greeno as “Whoregan” in front of an assembled roll call on November 13, 2012, resulted in an array of charges. The Chief of Police terminated Hill as prescribed by the Disciplinary Matrix. The matter was presented in arbitration on May 8, and May 21, 2013. The arbitrator found that Hill intentionally co-joined the word “whore” with Morgan noting that the word “whore” does not simply come out of one’s mouth as a “slip of the tongue.” (Arbitrator’s Opinion and Award, Pgs. 18, 22, Appellants’ Appendix Pgs. 60-64). The remark was found to be demeaning and constituted conduct unbecoming an officer. It was also established that Hill heard other patrolmen using the term and failed to correct them. Arbitrator Mancini did not find a violation of the sexual harassment policy, but did find that a severe disciplinary penalty was in order. (See Arbitrator’s Opinion and Award, Pg.22, Appellants’ Appendix, Pg. 64).

The arbitrator then found that this was Hill’s second Class C violation in a very short time. (*Id.*, at 23, Appendix 65). He agreed that the Matrix should be applied. (*Id.*, at 22, Appellants’ Appendix Pg. 64). He noted that a second Class C violation under the Matrix calls for discipline at either level 4 or level 5. Level 4 is a 3-10 day suspension and/or loss of leave, and Level 5 is termination. The arbitrator nonetheless chose to apply his own level of discipline, and returned Hill to work without back pay.

Ignored by Arbitrator Mancini was an integral part of the Matrix stating that, “If more than one discipline level is indicated, the Chief of Police has sole discretion in determining

which of the two levels is appropriate, based on the facts of the case and the history of the involved employee.”

The OPBA filed a timely Application to Confirm the Award in the Cuyahoga County Court of Common Pleas. Findlay filed an Application to Vacate or Modify the Award. The Cuyahoga County Court of Common Pleas granted Findlay’s Application determining that the arbitrator exceeded his authority and upheld Hill’s discharge. The Eighth District Court of Appeals affirmed.

III. ARGUMENT OPPOSING APPELLANTS’ PROPOSITIONS OF LAW

Appellants’ Proposition of Law No. 1

Any limitation on an arbitrator’s ability to review and modify disciplinary action under the “just cause” standard must be specifically bargained for by the parties and contained within the four corners of the collective bargaining agreement.

In Chapter 4117 of the Ohio Revised Code, the Ohio General Assembly enacted a law providing Ohio public employees with the right to organize and negotiate collective bargaining agreements. The mandatory subjects of negotiation include all matters pertaining to wages, hours, terms, and conditions of employment. R.C. 4117.08. Terms and conditions include the procedures and rules governing the discipline of employees. The General Assembly did not provide instruction on the type of disciplinary procedure to be adopted. There is nothing describing the standard of proof to be required, nor the level of discipline to be imposed. The entire subject is left to the discretion of the negotiating parties. Appellants’ Proposition of Law No.1 would undermine the legislature’s intent, and likely undo many existing disciplinary procedures.

While most public employee contracts require the adjudication of discipline on the basis of just cause alone, some do not. Often, parties include language in their agreements to limit the discretion of arbitrators based. Such restrictions are both permissible and enforceable.

The Eighth District Court of Appeals in its Opinion cited this Court's decision in *Bd. of Trustees of Township v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 81 Ohio St.3d for the proposition that the parties are free to restrict an arbitrators authority. The Court of Appeals found that *Miami Township, supra.*, approved the two step process for just cause unless the arbitrator's discretion is restricted by the parties. See, Supra Pg. 2.

This Court also declared in *Miami Township* that contracts based on principles of just cause – permitting discipline to take into account the nature of the violation, the employee's discipline record, and the employee's record of performance – invites arbitral review because “the type of discipline issued is not automatic for a particular offense.” (*Id.*)

Based on the foregoing, the Eighth District Court of Appeals, declared:

The fact that an arbitrator may review the appropriateness of the discipline imposed after determining that just cause exists for discipline does not mean, however, that the arbitrator can issue an arbitration award, modifying the discipline imposed, that conflicts with the express terms of the agreement. Where, the collective bargaining agreement sets forth “predetermined” levels of discipline or otherwise limits the authority of the arbitrator to review the discipline imposed, those limitations will be enforced. See, e.g., *Ohio Office of Collective Bargaining*, 59 Ohio St.3d 177, 572 N.E.2d 71.

(Eighth District Court of Appeals Opinion, Par. 37, Appellants' Appendix Pg. 25).

In *Ohio Office of Collective Bargaining v. Ohio Civil Service Employees Assn., Local 11, AFSCME, AFL-CIO*, 59 Ohio St.3d 177, (1991), this court recognized that while an arbitrators decision is granted great deference it will be overturned when the award conflicts with the express terms of the agreement.

The employer in the *Ohio Office of Collective Bargaining* was the Northwest Ohio Development Center (NODC). The NODC housed mentally disadvantaged individuals and provided instruction on basic skills and the elimination of undesirable behaviors. (*Id.*, at 177).

The employee was party to a collective bargaining agreement stating as follows:

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

(*Id.*, at 182).

The employee was terminated for abusing a patient. The arbitrator bifurcated the hearing to first decide whether a patient was abused. After finding that patient abuse occurred, the arbitrator considered the appropriateness of the discipline. Instead of affirming the termination as instructed by the contract, the arbitrator amended the discipline, much like in this case, to reinstatement with no back pay. The Franklin County Court of Common Pleas vacated the arbitrator's award as he exceeded his authority. The Court of Appeals affirmed.

This Court granted jurisdiction noting that whether the arbitrator exceeded his authority was the central issue. (*Id.*, 179). The Court cited R.C. Section 2711.10(D) and the well-established case law allowing the courts of common pleas to vacate or modify arbitration awards when an arbitrator exceeds the authority. It recognized that although courts should defer to arbitral decisions, the authority of an arbitrator is not unlimited. The United States Supreme Court was cited in support as follows:

“ . . . an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence

from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." (*Id.*, at 180) (Emphasis added)

United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, at 597 (1960).

See also, *S.D. Warren Co. v. United Paperworkers' Intl. Union*, 845 F.2d 3 (C.A. 1, 1988).

The Appellant cites *City of Dayton v. AFSMCE, Ohio Council 8*, 2nd Dist. Montgomery No. 21092, 2005 – Ohio – 6392 at Par. 19, for the proposition that “the existence of civil service and work place rules do not preclude an arbitrator from reviewing the degree of discipline, and that any penalty for a violation of rules adopted by management remains subject to the just cause standard in the collective bargaining agreement.” (Memorandum in Support of Jurisdiction of Appellants, Page 10).

The *City of Dayton* case did not reach the conclusion claimed by Appellants. The civil service rules and work place rules identified a series of potential penalties that were available. *Id.*, Pars 18, 19. A specific penalty was not mandated by the rules, and there was no indication whether the contract delegated rule making authority to the employer. When neither the Employer nor the arbitrator are obligated to apply a particular penalty the ultimate choice remains in the realm of just cause. In this case, the Findlay Disciplinary Matrix mandates specific penalties based on the seriousness of the charge and the frequency of the infractions.

The Matrix is an inherent part of the contract because the OPBA granted rule making authority to Findlay, because a prior arbitration opinion interpreted the Matrix as included in the disciplinary procedure, and the local OPBA members participated in its creation.

Appellants propose an issue asking if reference to the Disciplinary Matrix by an arbitrator causes it to become part of the collective bargaining agreement. (Appellants' Memorandum in Support of Jurisdiction, Pg. 1). The answer is yes. When the parties agreed to binding

arbitration, they also agreed that an arbitrator's decision would become the common rule of the workplace. Clearly, an arbitrator's decision would not be final and binding if the same issue can be relitigated before a newly appointed arbitrator. If either party is dissatisfied with an arbitrator's interpretation of a contract, the remedy is to negotiate a change in the language.

The term "final and binding" is viewed as the parties' attempt to not only resolve a particular grievance, but to also provide finality and continuity in defining contract terms.

Arbitrator Volz explained this purpose as follows:

It must be assumed that the parties are interested in achieving the same result in similar cases and establishing a consistent body of arbitral interpretation of the same provisions of the contract under similar facts. (Emphasis Added).

(Peabody Coal Co., 89 LA 885, 887 (Volz, 1987).

Arbitrator Alan Miles Ruben provided a most eloquent description of the effect of binding arbitration on contract interpretation as follows:

Were the parties free to repeatedly submit the same issue to arbitral resolution, "shopping" for a different result, the "common rule" of the work place would be destroyed. Contract terms are expected to be applied uniformly to all similarly situated employees. A provision cannot be allowed to mean one thing for one employee and something else for another employee. If that situation were to prevail, the collective bargain made for employees in the unit would break down and be replaced, in effect, by a series of individual bargains. Irrational discriminations, where similarly situated employees are treated dissimilarly, would then become the rule in a universe of chaos.

Accordingly, regardless of the decision an arbitrator might be inclined to render, were a dispute brought to him as a matter of first impression, he is bound to defer to the opinion of a prior arbitrator upon the same issue.

Burnham Corp., 88 LA 931, 934-935 (Ruben, 1987); See also, GAF Bldg.

Materials Corp., 112 LA 871, 876 (Marcus, 1999). (Prior awards should be given

effect lest the remedy be to simply file a new grievance and find a new arbitrator.

The appropriate remedy is at the negotiating table).

In this case, the arbitrator in the July 27, 2012 disciplinary matter, modified Findlay's chosen penalty to conform with the discipline stated in the Matrix. He stated that he was compelled to strictly apply the Matrix by principles of just cause, and reduced the suspension to the ten days stated the Matrix. This ruling became the common rule of the contract. It is the prevailing interpretation of that specific language until renegotiated.

The Court of Common Pleas and the Eighth District Court of Appeals also found that the collective bargaining agreement provides Findlay with the authority to promulgate rules and regulations. The Court of Appeals noted that the contract also provided that the OPBA must challenge the rules created by the Employer through the grievance procedure. (Opinion, Court of Appeals, Para.11, Appellant's Appendix Pg. 8). The OPBA did not challenge the legality of the Matrix prior to Hill's termination, and clearly embraced it when used to reduce Hill's prior suspension.

The Eighth District Court of Appeals also found that the collective bargaining agreement delegated rule-making authority to Findlay. The Court of Appeals declared that this rule-making authority included the Union's right to challenge the rule, and that all issues must be resolved through the grievance procedure. (Court of Appeals Judgment, Paras. 11, 12, 13, Appendix 7-9).

Section 10.01 of the collective bargaining agreement states:

The Union agrees that its membership shall comply with Police Department and City of Findlay Rules and Regulations, including those relating to working conditions, conduct, and performance. The Employer agrees that Police Department and City of Findlay Rules and Regulations, which affect working conditions, conduct, and performance shall be subject to the grievance procedure if they violate this Agreement.

(See, Court of Appeals Opinion, Para. 11, Appendix 8).

Additionally, the CBA contains a management rights clause in which Findlay reserved for itself the statutory and common law rights to manage the Department of Police. Article 4.01, also cited by the Court of Appeals, that:

Unless expressly provided to the contrary by a specific provision of this Agreement, the Employer reserves and retains, solely and exclusively, all of its statutory and common law rights to manage the operation of its Department of Police. Such rights shall include, but are not limited to, the following: (a) to develop, revise, or eliminated work practices, procedures and rules in the operation of the Department of Police and to maintain discipline; *** (c) to transfer, promote or demote employees, or to layoff, terminate or otherwise to relieve employees from duty for just cause ***.

(Court of Appeals Opinion, Para. 12, Appellant's Appendix 8).

Chief Horne testified that the Matrix was created by collaboration between the former Chief and David Hill serving as Union president. Chief Horne described the Matrix and its function to the Arbitrator as follows:

But we have used the matrix frequently, I try to adhere to that as much as possible. I felt that the old way was a little too arbitrary. When Sergeant Hill and then Chief Spraw had worked this matrix out I was in agreement with it because I felt that it was - - it gave the employee a fair shake, they knew where they were at, they knew the violations, if you commit this, this is what you're possibly dealing with. In the past, the chiefs gone by, I felt that it was a little arbitrary, and I thought it left too much up to the chief where, if I don't like Sergeant Hill, I'm going to fire you, but if Captain Young does that, because I like Captain Young, I'm going to just give you a written reprimand or stern talking-to. I felt this was it narrowed it down and it was fair to the employee. Even though I didn't have a part in negotiating that or working that out, I was in agreement with it.

(Tr. 235).

Appellants' Proposition of Law No. 2

A reviewing court exceeds the scoped review afforded to it under R.C. 2711.10 and R.C.2711.11 when it substitutes its findings of fact an interpretation of contract language for that of the arbitrator.

In Proposition of Law No. 2, the Appellant claims that the trial court exceeded its statutory authority by not deferring to the arbitrator's interpretation of the Matrix as a guideline. The trial court, on the other hand, determined that the arbitrator was obligated to follow the Matrix as it mandated a specific penalty and the language is unambiguous.

In contracts in which the grounds for discipline, and the appropriateness of the penalty, are based on the application of just cause principles, there are many variables through which an arbitrator can modify the employer's choice of discipline. These variables are restricted when contracts predetermine the level of discipline. When the penalty is contractually prescribed, an arbitrator is not authorized to issue a penalty modified to his liking. As noted by Chief Horne, it is the type of arbitrariness that the Matrix was intended to avoid.

The arbitrator recognized that a second Class C violation required either Level 4 or 5 discipline. Instead of applying the Matrix, the arbitrator determined that he had "normal authority" to amend the discipline to anywhere between 3 to 10 days and termination. The Appellants, emphasizing the term "guideline," argue that amending the level of discipline in such fashion was permissible.

At page 12 of its Memorandum in Support of Application for Jurisdiction, the Appellants report that under the Disciplinary Matrix an employee who is disciplined will, "receive a disciplinary action within the range of the following scale, based upon the indicated discipline." This does not provide the Arbitrator with the right to modify discipline to somewhere in between

Level 4 (three to 10 day suspension) or Level 5 (termination). That discretion lies solely with the Chief of Police. The Matrix states:

The involved employee will then receive a disciplinary action within the range of the following scale, based upon the indicated discipline level. If more than one discipline level is indicated, the Chief of Police has sole discretion in determining which of the two levels is appropriate, based on the facts of the case and history of the involved employee.

(Supra, page 5).

According to the Matrix, the Arbitrator did not have the authority to amend the Chief's decision. When he did so, he was not construing the contract, but rather, was applying his own brand of industrial justice. The trial court correctly vacated the Arbitrator's Award because he exercised authority he did not have.

Proposition of Law No. 2 is not an issue of public or great general interest. Jurisdiction should be denied.

IV. CONCLUSION

In view of the foregoing law and argument it is respectfully requested that the Appellants request for jurisdiction be denied.

Respectfully submitted,

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V. CERTIFICATE OF SERVICE

The City of Findlay's Response to Appellants Memorandum in Support of Jurisdiction was served on Appellants counsel by regular US mail at the address listed on the cover page on this the 26th day of October, 2015.

/s/ William F. Schmitz
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