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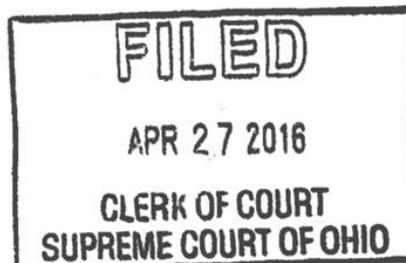
IN THE SUPREME COURT OF OHIO

OHIO PATROLMEN'S BENEVOLENT ASSOCIATION,	:	CASE NO.: 2015-1581
	:	
and	:	ON APPEAL FROM THE CUYAHOGA
	:	COUNTY COURT OF APPEALS,
DAVID HILL,	:	EIGHTH APPELLATE DISTRICT
	:	
APPELLANTS,	:	COURT OF APPEALS
vs.	:	CASE NO. CA-14-102282
	:	
CITY OF FINDLAY,	:	
	:	
APPELLEE.	:	

**MERIT BRIEF OF APPELLANTS OHIO PATROLMEN'S
BENEVOLENT ASSOCIATION AND DAVID HILL**

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STATEMENT OF FACTS

The Ohio Patrolmen's Benevolent Association ("OPBA") is the labor organization recognized by the City of Findlay (the "City") as the exclusive representative for a bargaining unit of Sergeants in the City's police department. (Supp. 4.).¹

At all relevant times, Sergeant David Hill ("Hill") was a bargaining unit member covered by the Collective Bargaining Agreement ("CBA") between the parties.

Hill was hired as a police officer in the Findlay Police Department in or around 1999. (Appx. 45.). He was promoted to Sergeant in November, 2005. (Id.).

In November, 2012, Hill was assigned as one of two Sergeants supervising the midnight shift, which consisted of between ten to fifteen officers. (Id.).

Sergeants in the Findlay Police Department have numerous supervisory duties which include conducting roll call at the commencement of each shift. (Appx. 45.). During a typical roll call, which may last as long as fifteen to twenty minutes, Sergeants distribute assignments and pass on relevant information for the particular day. (Id.).

In addition, roll call provides time for the officers to catch up with each other and often includes discussion of current events and light-hearted banter. (Appx. 46.).

¹ As noted by the Eighth District Court of Appeals, in its Journal Entry and Opinion, which is on appeal here, it is not clear which version of the collective bargaining agreement was relied on Arbitrator James M. Mancini in deciding the grievance appeal that underlies this case. (Appx. 10.). As further noted by the Court of Appeals, there was no need to resolve that issue since "the relevant provisions are substantively similar, if not identical." (Id.). Thus, OPBA will continue to refer to the CBA with effective dates of January 1, 2011 through December 31, 2012, due to the fact that the successor Agreement was not yet executed at the time of Sergeant David Hill's termination from employment. (Supp. 70). However, both CBAs are contained in the Supplement to this Brief.

On November 13, 2012, as both Sergeants assigned to the midnight shift were on duty, Hill sat with his subordinates, while his colleague, Sergeant Harmon, conducted roll call. (Id.).

Following roll call, the conversation shifted to, *inter alia*, the upcoming Christmas party at the local FOP Lodge. (Appx. 46.). Since Hill was the President of the local Lodge, he fielded inquiries concerning the identity of the members of the Christmas party planning committee. (Id.).

In response to one such inquiry, Hill identified Police Officer Morgan Greeno ("Greeno") as a committee member by referring to her as "Whoregan." (Appx. 46.). Greeno was present when Hill referred to her in the foregoing manner. Greeno did not protest at that time, however, she subsequently filed a "harassment" complaint against Hill. (Id.).

Greeno's complaint was investigated by Lieutenant Robert Ring who interviewed the other officers present.²

Upon conclusion of his investigation, Lieutenant Ring "recommended that Sergeant Hill be given a thirty-day suspension and demoted from his position of Sergeant to one of patrol officer." (Appx. 49.).

Lieutenant Ring's investigative report was forwarded to Captain Sean Young who recommended that Hill be terminated.

² In addition to complaining about Hill's one-time use of the term "Whoregan" to identify her, Greeno also complained that Hill "condoned or participated in comments being made to her by other officers on the shift suggesting that she was having a sexual relationship with the building custodian and, as a result, had become pregnant." (Appx. 47.). While Hill denied ever participating in the aforementioned banter, he acknowledged having witnessed it on occasion, and believed that Greeno "would play along and did not appear offended." (Id.).

Police Chief Gregory Horne concurred in Captain Young's recommendation and "indicated that he followed the Department's Discipline Matrix in terminating the Grievant."³ (Appx. 51.).

Shortly thereafter, on or about January 8, 2013, Hill filed and properly processed a grievance challenging his termination, pursuant to the relevant provisions of the CBA.⁴ (Appx. 45.).

The grievance was denied by the City and, subsequently, it was properly processed to arbitration by Hill and the OPBA. (Appx. 40.).

The arbitration hearing was conducted on May 8th and 21st, 2013, before Arbitrator James M. Mancini ("Mancini"). (Appx. 45.).

After considering all of the record evidence and the post-hearing briefs of the parties, (Appx. 45, 59.), Mancini, concluded, as follows:

In summary, this arbitrator finds from the evidence presented that the Grievant committed a serious violation of departmental rules during a roll call on November 13, 2012 when he referred to Officer Morgan Greeno as "Whoregan." The evidence clearly establishes that Sgt. Hill deliberately made the "Whoregan" remark in front of other patrol officers. As stated by Lt. Ring, the term "whore" does not just come out of one's mouth as a "slip of the tongue." It was shown that Officer Greeno was offended and embarrassed by the remark. The Grievant also was guilty of failing to carryout [sic] his duties as a sergeant on the midnight shift in not putting an end to unwanted comments made by other officers about Officer Greeno having a relationship with Randy, the building custodian. However, this arbitrator must find that the evidence fails to clearly demonstrate that Sgt. Hill violated the department's policy regarding sexual harassment. As the policy states, a one time remark such as calling Officer Greeno "Whoregan" is insufficient to establish a case of sexual harassment. Moreover, the evidence also did not show that Officer

³ The "Discipline Matrix" is part of a City policy which is a guideline utilized by the City in meting out discipline. (Supp. 71.). It is in no fashion incorporated into the CBA between the parties and it was not negotiated between the parties.

⁴ Specifically, the grievance alleged that Hill was terminated without just cause in violation of Article 39, Section 39.04 of the relevant CBA. (Appx. 51.).

Greeno was treated unfairly by Sgt. Hill who provided her with satisfactory evaluations. The City simply failed to clearly prove that Sgt. Hill created a hostile work environment for Officer Greeno.

In that not all of the charges brought against Sgt. Hill were clearly established in this case, the discharge penalty imposed must be set aside. As a result, the Grievant is to be immediately reinstated to his previous sergeant position with full seniority.⁵ However, with respect to the proven charges against Sgt. Hill, this arbitrator finds that a severe disciplinary penalty is in order. The City cited a prior arbitration decision concerning the Department's Discipline Matrix Guidelines. This arbitrator would agree that the Discipline Matrix should be applied in this case.

(Appx. 65-66.).

Ultimately, Mancini granted the grievance, in part, and reinstated Hill, with seniority, but, without back-pay.⁶ (Appx. 68.).

Subsequent to Mancini's decision, the City refused to reinstate Hill. Accordingly, the parties filed cross-applications for judicial relief in the Cuyahoga County Court of Common Pleas, pursuant to Ohio Revised Code ("R.C.") Chapter 2711. (Appx. 40.).

Specifically, OPBA presented a Motion to Confirm and Enforce the arbitration award and the City moved to vacate and/or modify or correct the arbitration award.

(Id.).

On or about November 10, 2014, in an abbreviated Opinion and Order, the Common Pleas Court, first, set forth the applicable standard of review, as follows:

Arbitration awards carry a presumption of validity. Brumm v. McDonald & Co. Securities, Inc., 78 Ohio App.3d 96, 103, 603 N.E.2d 1141 (4th Dist. 1992). They can be overturned, however, by a court of law if "[t]he

⁵ It is important to note that Mancini concluded that the discharge penalty should be set aside before ever opining as to the application of the "Discipline Matrix Guidelines." As a result, it is clear that Mancini simply looked to the "Discipline Matrix" for guidance in fashioning the level of penalty, rather than considering the application of the "Discipline Matrix" as mandatory.

⁶ In effect, Mancini's decision resulted in Hill serving a five-month suspension without pay. (Appx. 5.).

arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” R.C. 2711.10(D). The Supreme Court of Ohio has held that a reviewing court is limited to determining whether the award draws its essence from the CBA and whether the award is unlawful, arbitrary, or capricious. Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn., 49 Ohio St. 3d 129, 551 N.E.2d 186 (1990). “An arbitrator’s award draws its essence from a collective bargaining agreement when there is a rational nexus between the agreement and the award, and where the award is not arbitrary, capricious or unlawful.” Mahoning Cty. Bd. of Mental Retardation & Developmental Disabilities v. Mahoning Cty. TMR Edn. Assn., 22 Ohio St. 3d 80, 84, 488 N.E.2d 872 (1986).

(Appx. 41.) (Emphasis added).

The trial court then failed to follow the well-established precedent of this Court by vacating Mancini’s Opinion and Award because it disagreed with Mancini’s application of the disciplinary policy guidelines to the facts of this case. (Appx. 42.).

As a result, OPBA appealed the Opinion and Order of the Common Pleas Court to the Eighth District Court of Appeals (“Eighth District” or “Court of Appeals”).

On or about August 13, 2015, the Eighth District painstakingly recited the law applicable to its review in this type of case, *inter alia*, as follows:

Arbitration provides the parties with “a relatively speedy and inexpensive method of conflict resolution and has the additional advantage of unburdening crowded court dockets.” Mahoning Cty. Bd. of Mental Retardation v. Mahoning Cty. TMR Edn. Assn., 22 Ohio St.3d 80, 84, 488 N.E.2d (1986). “The whole purpose of arbitration would be undermined if courts had broad authority to vacate an arbitrator’s award.” Id. at 83-84.

As a result, the authority of courts to vacate an arbitration award is “extremely limited.” “Cedar Fair, L.P. v. Falfas, 140 Ohio St.3d 447, 2014-Ohio-3943, 19 N.E.3d 893, ¶ 5. Courts must accord “substantial deference” to an arbitrator’s decision. N. Royalton v. Urich, 8th Dist. Cuyahoga No. 99276, 2013-Ohio-2206, ¶ 14, quoting Cuyahoga Metro. Hous. Auth. v. SEIU Local 47, 8th Dist. Cuyahoga No. 88893, 2007-Ohio-4292. Arbitration awards are generally presumed to be valid, and a common pleas court reviewing an arbitrator’s decision may not substitute its judgment for that of the arbitrator. N. Royalton at ¶ 14, citing Bowden v. Weickert, 6th Dist. Sandusky No. S-05-009, 2006-Ohio-471, ¶ 50. An

appellate court's review of an arbitration award is similarly limited, confined to an evaluation of the trial court's order confirming, modifying or vacating the arbitration award. Miller v. Mgt. Recruiters Internatl., Inc. 18 Ohio App.3d 645, 2009-Ohio-236, 906 N.E.2d 1162, ¶ 9 (8th Dist.), citing Lynch v. Halcomb, 16 Ohio App.3d 223, 475 N.E.2d 181 (12th Dist.), paragraph two of the syllabus; Orwell Natural Gas Co. v. PCC Airfoils, L.L.C., 189 Ohio App.3d 90, 94-95, 2010-Ohio-3093, 937 N.E.2d 609, ¶ 8 (8th Dist.). Appellate review does not extend to the merits of an arbitration award absent evidence of material mistake or extensive impropriety – which has not been alleged here. Id.

As this court explained in Motor Wheel Corp. v. Goodyear Tire & Rubber Co., 98 Ohio App.3d 45, 647 N.E.2d 844 (8th Dist. 1994):

The limited scope of judicial review of arbitration decisions comes from the fact that arbitration is a creature of contract. Contracting parties who agree to submit disputes to an arbitrator for final decision have chosen to bypass the normal litigation process. If parties cannot rely on the arbitrator's decision (if a court may overrule that decision because it perceives factual or legal error in the decision), the parties have lost the benefit of their bargain. Arbitration, which is intended to avoid litigation, would instead become merely a system of "junior varsity trial courts" offering the losing party complete and rigorous *de novo* review. See Natl. Wrecking co. v. Internatl. Bhd. of Teamsters, Local 741, 990 F.2d 9057 (7th Cir. 1993).

(Appx. 18-19.).

In addition, the Court below then correctly described the lynchpin of the arbitration case by acknowledging that "[w]hether the City had "just cause" to terminate Sergeant Hill was a factual determination to be made by the arbitrator in accordance with the terms of the CBA."⁷ (Appx. 23.).

The Court of Appeals further indicated that the finding by the Arbitrator that just cause existed to discipline Hill was not seriously in dispute. (Appx. 24).

⁷ The Eighth District also properly recited to the binding precedent of this Court recognizing that "just cause" has two components: "(1) whether a cause for discipline exists and (2) whether the amount of discipline was proper under the circumstances." (Appx. 23.). Moreover, the Court below at least acknowledged the fact that an arbitrator has "broad authority to fashion a remedy." (Appx. 24.).

Finally, the Court defined the gravamen of issue between the parties, as follows:

Rather, the parties dispute whether the arbitrator's determination that termination was too severe a sanction under the circumstances and his subsequent arbitration award – overturning his termination and imposing a five-month suspension and reinstatement without back pay – drew its essence from the CBA.

(Id.).

While the Eighth District correctly recited the applicable law and properly framed the issue in dispute between the parties, Appellants will unequivocally demonstrate below that the Court of Appeals erred in applying that law by affirming the trial court's decision to vacate the Arbitrator's award.

ARGUMENT

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.

It has long been black letter law in the State of Ohio that Revised Code Chapter 2711 provides for only a limited judicial review of arbitration awards. Courts must afford the arbitrator's decision substantial deference because the law favors and encourages arbitration as a matter of policy. Mahoning Cty. Bd. of Mental Retardation v. Mahoning Cty. TMR Educ. Assn., 22 Ohio St.3d 80,84; 488 N.E.2d 872 (1986). As such, arbitration awards are presumed valid and a reviewing court may not substitute its judgment for that of the arbitrator. Findlay City Sch. Dist. Bd. of Educ. v. Findlay Educ. Assn., 49 Ohio St.3d 129, 132; 552 N.E.2d 186 (1990).

"Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and the

meaning of the contract that they have agreed to accept.” Southwest Ohio Regional Transit Authority v. Amalgamated Transit Union, Local 627, 91 Ohio St.3d 108, 110, 742 N.E.2d 630 (2001) citing United Paperworkers Internatl. Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 37-38 (1987).

An arbitrator acts within his authority so long as the award “draws its essence from the collective bargaining agreement.” Queen City Lodge No. 69, Fraternal Order of Police Hamilton Cty. Ohio, Inc. v. Cincinnati, 63 Ohio St.3d 403, 406, 588 N.E.2d 802 (1992) (quoting United Steelworkers of America v. Ent. Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) (Whittaker, J. dissenting)). An award draws its essence from the agreement “when there is a rational nexus between the agreement and the award, and where the award is not arbitrary, capricious, or unlawful.” Mahoning, supra., at paragraph one of the syllabus. An arbitration award departs from the essence of a collective bargaining agreement when it: conflicts with the express terms of the agreement; and/or the award is without rational support or cannot be rationally derived from the terms of the agreement. Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emps. Assn., Local 11, AFSCME AFL-CIO, 59 Ohio St.3d 177, 183, 572 N.E.2d 71 (1991).

In this case, the arbitrator’s broad remedial authority stemmed from the CBA, in Article 39, which mandated that “[d]iscipline shall be imposed only for just cause.”⁸ (Supp. 27).

⁸ The parties clearly agreed that the issue before the arbitrator in this case was “whether the City had just cause to terminate the Grievant and if not, what is the appropriate remedy.” (Appx. 59).

When asked to determine whether an employee's discipline was for "just cause," this Court has held that an arbitrator is required to engage in a two-step analysis: (1) whether a cause for discipline exists; and (2) whether the amount of discipline administered under the circumstances is appropriate. Board of Trustees of Miami Township v. Fraternal Order of Police, OLC, Inc., 81 Ohio St.3d, 269, 271-272, 690 N.E.2d 1262 (1998). As such, this Court has held that when the arbitrator determines there was just cause for disciplining an employee, the arbitrator also has authority to review and modify the type of discipline imposed. Id.

As this Court has previously stated, "[a]uthorities uniformly agree that the power to award a remedy is generally part and parcel of the arbitration process."⁹ Queen City Lodge No. 69, FOP, supra., 63 Ohio St.3d 403, 405 citing Hill & Sinicropi, Remedies in Arbitration (2 Ed. 1991) 47, ("Unless there is clearly restrictive language withdrawing the subject matter or a particular remedy from the jurisdiction of the arbitrator, courts will generally hold that the arbitrator possesses the power to make the award and fashion a remedy even though the agreement is silent on the issue of remedial authority.").

The only contractual limits on the arbitrator's authority, in this case, are contained in the CBA in Article 41, as follows:

41.03 The arbitrator shall have no power or authority to add to, subtract from, or in any other manner alter the specific terms of this Agreement; nor to make any award requiring the commission of any act prohibited by law; nor to make any award that itself is contrary to law or violates any terms and conditions of this Agreement.

(Supp. 31).

⁹ In fact, the arbitrator has "broad authority to fashion a remedy." 63 Ohio St.3d 403, 406.

In Board of Trustees of Miami Twp., supra., this Court considered virtually the same restriction on the Arbitrator's authority, as set forth above, and held:

. . . 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 discipline imposed.

In the case *sub judice*, the collective bargaining agreement does not prevent the arbitrator from reviewing the appropriateness of the type of discipline imposed. The only stated restriction is that "the arbitrator shall have no power to add to, subtract from, or change any of the provisions of the Agreement."

81 Ohio St.3d p. 272.

Here, the Arbitrator acted well within his authority under the CBA and this Court's well established precedent by carefully examining the alleged misconduct and fashioning an appropriate remedy under the just cause provision of the CBA.¹⁰

The Court of Appeals committed reversible error in concluding that the Arbitrator exceeded his authority under the CBA. (Appx. 30.).

Specifically, the Eighth District erred by determining that the Arbitrator was restricted in fashioning a remedy by a City policy that was never bargained by the parties and was not attached to or incorporated into the CBA, in any manner.¹¹ (Appx 28-32.).

¹⁰ As previously set forth, the Arbitrator, in performing the two-step "just cause" analysis set forth above, concluded in the first step of the analysis that the City failed to prove the most serious charge against Hill - - sexual harassment, and thus, the penalty of termination was too severe under all of the circumstances. (Appx. 66.).

¹¹ Article 10, Section 10.01 of the CBA indicates, in relevant part, that "[t]he 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." (Supp. 8.). The foregoing language, does not even reference the Disciplinary Procedures and/or the Discipline Matrix. Moreover, the Disciplinary

The City policy at issue, in this case, is titled Findlay Police Department Disciplinary/Recognition Procedures (“Disciplinary Procedures”) Section 26.1.2. This policy was unilaterally re-issued, by the City, on March 1, 2012, during the term of the CBA. (Supp. 71.). The policy has an attached Appendix A which is called the Discipline Matrix (“Matrix”). (Supp. 81.).¹²

The Discipline Matrix, which is expressly referred to as providing guidelines for the applicable forms of discipline, (Supp. 73.), is set forth at ¶15 of the decision of the Court of Appeals, as follows:

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”)

Procedures and Discipline Matrix were never intended as an appendix or amendment to the CBA. Thus, the language in the CBA at Section 10.01 is not sufficient to incorporate the Discipline Matrix into the CBA. Moreover, Article 46 of the CBA indicates that “[a]ll appendices and amendments to this Agreement shall reduced [sic] to writing, dated and signed by all parties to this Agreement....” (Supp. 33.). Thus, the Discipline Matrix is not a binding part of the CBA, by the express terms of the contract.

¹² The Disciplinary Procedures at p. 3, Paragraph 2, “Forms of Discipline,” Section a., specifically set forth that “[i]n initiating discipline, the Employer agrees to the following forms of discipline, in accordance with the guidelines listed in the Disciplinary Matrix (“Appendix A”). (Supp. 73.). (Emphasis added).

* * *

- 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

(Appx. 12-13.).

The Disciplinary Procedures, as referenced above, and the foregoing Discipline Matrix were unilaterally amended and reissued by the City after execution of the relevant CBA and are in no manner part of the CBA in this case.

Yet, the entire rationale of the Courts below is to the contrary.

The trial court expressly found that “the arbitrator exceeded and imperfectly executed his power by failing to properly apply the Matrix. In doing so, the arbitrator acted arbitrarily and capriciously.”¹³ (Appx. 42.).

In affirming the trial court, the Court of Appeals erred when it similarly found:

This is not a case in which the trial court usurped the role of the arbitrator and improperly substituted its view of the facts and interpretation of the CBA for that of the arbitrator. While the arbitrator had the authority to interpret the CBA and to award an appropriate remedy under the CBA, once the arbitrator determined (1) that the discipline matrix applied in determining the appropriate sanction for Sergeant Hill’s misconduct and (2) that in applying the discipline matrix, Sergeant Hill’s conduct constituted a Step 2, Class C offense subject to discipline at level 4 or 5 of the discipline matrix, the arbitrator did not then have arbitral authority to

¹³ The Trial Court also erred by improperly substituting its judgment for that of the arbitrator in the application of the Discipline Matrix.

modify the disciplinary action imposed, which under the discipline matrix and the CBA was within the "sole discretion" of Chief Horne. Because the CBA expressly provides that the arbitrator "shall have no power or authority to * * * alter the specific terms of the [CBA] * * * nor to make any award that * * * violates any of the terms and conditions of the [CBA] * * * we agree with the trial court that the arbitrator exceeded and imperfectly executed his authority under the CBA in modifying the discipline imposed on Sergeant Hill from termination (the disciplinary action imposed by Chief Horne) to a five-month suspension and reinstatement without back pay. The arbitration award, therefore, does not draw its essence from the CBA and is arbitrary, capricious and unlawful. Accordingly, the trial court did not err in vacating the arbitrator's decision.

(Appx. 31-32.).

In fact, this is precisely a case in which the trial court "usurped the role of the arbitrator and improperly substituted its view of the facts and interpretation of the CBA for that of the arbitrator." (Id.).

The Arbitrator's authority, in this case, was totally based upon his review and implementation of the contractual provision that required that any discipline meted out by the City be based upon just cause.

The Arbitrator's analysis of the discipline imposed here was completely in accordance with the *bi-partite* "just cause" standard consistently applied by this Court, as follows:

"In applying the test of "just cause" the arbitrator is generally required to determine two factors: (a) has the commission of the misconduct, offense or dereliction of duty, upon which the discipline administered was grounded, been adequately established by the proof; and (b) if proven or admitted, the reasonableness of the disciplinary penalty imposed in the light of the nature, character and gravity thereof - - for as frequently as not the reasonableness of the penalty (as well as the actual commission of the misconduct itself) is questioned or challenged in arbitration.

In the absence of contract language expressly prohibiting the exercise of such power, the arbitrator, by virtue of his authority and duty to fairly and finally settle and adjust (decide) the dispute before him, has the inherent power to determine the sufficiency of the cause and the reasonableness of

the penalty imposed.” Id. at 327, quoting Great Atlantic & Pacific Tea Co. (1962), 63-1 Labor Arbitration Awards, P 8027, at 3090. See, also Volz & Goggin, Elkouri & Elkouri: How Arbitration Works (5 Ed. 1997) 886-888.

Board of Trustees of Miami Twp. v. FOP, OLC, Inc., supra., 81 Ohio St.3d at p. 272. (Emphasis added).

In this case, Mancini first determined that the City failed to prove the most serious allegation of misconduct against Hill. As previously set forth, the most serious allegation was the allegation of sexual harassment and/or creating a hostile work environment. (Appx. 63.). Then, the Arbitrator concluded that “[i]n that not all of the charges brought against Hill were clearly established in this case, the discharge penalty imposed by the city must be set aside.” (Appx. 66.).

It was not until that time, after already deciding to set aside the discharge penalty that the Arbitrator first looked to the Discipline Matrix for guidance in fashioning the level of penalty to be administered.

This is consistent with this Court’s previous observation that “[a]n arbitrator has broad authority to fashion a remedy, even if the remedy contemplated is not explicitly mentioned in the labor agreement.”¹⁴ Queen City Lodge No. 69, FOP, supra., 63 Ohio St.3d at p. 407. Moreover, “an arbitrator is presumed to possess implicit remedial power, unless the agreement contains restrictive language withdrawing a particular remedy from the jurisdiction of the arbitrator.” (Id.). Finally, “[h]e may, of course look for

¹⁴ In Summit County Children Services Board v. Communication Workers of America, Local 4546, 113 Ohio St.3d 291, 2007-Ohio-1949; 865 N.E.2d 31, this Court approved the application of the “Daugherty Test” for evaluating just cause by stating at ¶19: “if the parties do not expressly prohibit its use in the CBA and if they leave the term “just cause” undefined, they risk the arbitrator’s looking outside the CBA for guidance in defining, interpreting and applying that phrase.”

guidance from other sources,” in fashioning a remedy. United Steelworkers of American v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597 (1963).

In this case, the Court of Appeals erred in concluding that the CBA contained “restrictive language withdrawing a particular remedy from the jurisdiction of the Arbitrator.”

That flawed conclusion, was based on the assumption that the Discipline Matrix was part of the CBA, when it manifestly was not.

This is clearly illustrated beginning at ¶37 of the Appeals Court decision, which states, as follows:

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 1767, 572 N.E.2d 71.

In *Ohio Office of Collective Bargaining*, the Ohio Supreme Court held that the arbitrator exceeded his authority in reinstating a hospital aide after the arbitrator found she had abused a patient. Although the arbitrator found that the employee had committed abuse, the arbitrator found the employer lacked just cause for termination and chose to reinstate her, reasoning that the employer failed to give the employee proper notice and the penalty was disproportionate to the penalties that had been given to similarly situated employees. Id. at 182 and fn.5. The collective bargaining agreement provided:

The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.” Id. at 182. The collective bargaining agreement further provided, with respect to disciplinary action, that “[d]isciplinary action shall not be imposed upon an employee except for just cause” but also expressly stated “[i]n cases involving termination, if the arbitrator finds that there has been an abuse of a patient * * * the arbitrator does not have

authority to modify the termination of an employee committing such abuse.” *Id.* The court held that the arbitrator’s award, which modified the termination of the employee, conflicted with the express terms of the collective bargaining agreement, imposed additional requirements for termination not expressly provided for in the agreement, and could not be rationally derived from the terms of the agreement. *Id.* at 823.

(Appx. 27-28.). (Emphasis added).

The reliance of the Court below on Ohio Office of Collective Bargaining, is misplaced here. This is not a case where the CBA contained language expressly limiting the Arbitrator’s authority to fashion a remedy. The Discipline Matrix was not bargained for, was not expressly set forth in the CBA, was not attached to the CBA and was not even incorporated by reference into the CBA.

This was succinctly set forth by Judge Boyle, in her dissent, below, where she stated:

It is my view that the arbitrator did not exceed his authority because the city’s Disciplinary/Recognition Procedures, which include the disciplinary matrix, were not part of the parties’ collective bargaining agreement. Rather, the city of Findlay created, developed, and implemented these procedures; they were not mentioned anywhere in the CBA.

The CBA here provided that the arbitrator had “no power to add to, subtract from or modify any of the terms of [the CBA], nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.” It did not restrict the arbitrator’s authority to modify the discipline as the CBA did in Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emp. Assn., Local 11, AFSCME, AFL-CIO, 59 Ohio St.3d 177, 572 N.E.2d 71 (1991). In Ohio Office, the Supreme Court held that an arbitrator exceeded his authority in reversing an employee’s termination when the CBA specifically stated that “[i]n 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.” **There is no such restriction here limiting the arbitrator’s authority.**

(Appx. 33-34.). (Emphasis added).

Consequently, rather than Ohio Office of Collective Bargaining, *supra.*, this case is much more akin to Southwest Ohio Regional Transit Authority (“SORTA”), *supra.* In SORTA, this Court considered the termination of a union member who was summarily discharged after a failed drug test, pursuant to a “zero tolerance policy.”

The matter was grieved to an arbitration panel pursuant to the CBA. The panel determined that the termination was based solely upon the violation of the drug policy and that the “drug policy’s automatic discharge sanction for testing positive conflicted with and therefore violated the “sufficient cause” discharge standard set out in the CBA.”

SORTA then appealed the arbitration award to the Hamilton County Court of Common Pleas, which confirmed the award holding that it drew its essence from the CBA.

The Court of Appeals reversed and vacated the arbitration award.

On appeal, this Court reinstated the arbitrator’s award by observing the following:

SORTA states that it adopted its drug policy pursuant to Section 26(a) of the CBA. SORTA argues that the award, that reinstated Sundstrom, did not draw its essence from the CBA because it ignored the automatic discharge sanction required by SORTA’s drug policy. We disagree.

We find that any sanction for a violation of a rule adopted by SORTA pursuant to Section 26(a) of the CBA was subject to the “sufficient cause” standard for dismissing employees found in Section 3(b) of the CBA. See Local No. 7, United Food & Commercial Workers Internatl. Union v. King Soopers, Inc. (C.A. 10, 2000), 222 F.3d 1223. In King Soopers, the union and King Soopers negotiated a CBA that provided that no union employee would be terminated without “good and sufficient cause.” *Id.* at 1225. However, King Soopers also unilaterally adopted a “no call/no show” policy that provided that three unexcused absences would result in immediate discharge. Lally Parbhu, a union member and employee at King Soopers, failed to provide an excuse for a two-week absence. King Soopers dismissed her pursuant to the no-call/no-show policy.

The union filed a grievance protesting Parbhu’s dismissal. The arbitrator issued an award that reinstated Parbhu, finding that while it was possible

that a violation of the no-call/no-show policy could be grounds for immediate termination, Parbhu's discharge did not meet the test of just cause.

King Soopers appealed, and the appellate court affirmed the arbitrator's award that reinstated Parbhu, reasoning that "although the CBA negotiated between King Soopers and the Union gives King Soopers 'the right * * * to make necessary reasonable rules and regulations for the conduct of business, providing that said rules and regulations are not in conflict with the terms of [the CBA] in any way,' * * *, the right to make such rules is not the right to equate the violation of such rules with 'good and sufficient cause' for termination. To hold otherwise would be to allow King Soopers to unilaterally define the meaning of 'good and sufficient cause,' a right which was not contemplated by the CBA and for which King Soopers must negotiate with the Union." (Emphasis added.) 222 F.3d at 1227.

We agree with, and apply, the reasoning of King Soopers to this case. While SORTA's drug policy may be facially valid, we find that SORTA did not have the right to unilaterally adopt automatic termination without possibility of reinstatement as a sanction for testing positive, because such a sanction conflicts with the "sufficient cause" requirement for dismissal found in Section 3(b) of the CBA. Just as the court noted in King Soopers, allowing SORTA to enforce automatic termination would allow an employer to unilaterally adopt a sanction that conflicts with the sufficient-cause requirement for dismissal that was negotiated into the CBA, thereby undermining the integrity of the entire collective bargaining process. The proper avenue for SORTA to adopt such a sanction would be through the collective bargaining process, not through a unilateral decision.

Id., 91 Ohio St.3d 108 110-111. (Emphasis added).

See also, International Assn. of Firefighters, Local 67 v. City of Columbus, 95 Ohio St.3d 101; 2002-Ohio-1936; 766 N.E.2d 139. (The City cannot agree to one thing at the bargaining table and then "take the benefits away with rules and regulations which are narrowly construed.")

In this case, allowing the Police Chief to automatically terminate Hill, pursuant to the "Discipline Matrix," which is not part of the CBA, would have the effect of eliminating

the “just cause” provision from the CBA, thereby “undermining the integrity of the entire collective bargaining process.” SORTA, supra.

Similarly, in City of Dayton v. AFSCME, Ohio Council 8, 2005-Ohio-6392; 2005 Ohio App. Lexis 5745 (2nd Dist.), the Montgomery County Court of Appeals considered a case where an employee was terminated for leaving an anonymous message, on a shared computer system at work, that was perceived as a death threat.

The employee was terminated and an arbitrator reinstated him with a thirty (30) day suspension.

The employer appealed and the trial court vacated the arbitrator’s award.

In reversing the trial court and reinstating the arbitrator’s award, the Second District generally identified the applicable standard of review, as follows:

Upon review, we conclude that the trial court erred in vacating the arbitrator’s reinstatement order under R.C. § 2711.10(D). The overriding issue in this case is whether the City had just cause to fire Milem. Resolution of this issue required the arbitrator to make two determinations: “(1) whether a cause for discipline exists and (2) whether the amount of discipline was proper under the circumstances.” Board of Trustees of Miami Twp. v. Fraternal Order of Police, Ohio Labor Council, Inc., 81 Ohio St.3d 269, 272, 1998 Ohio 629,690 N.E.2d 1262, quoting Schoonhoven, Fairweather’s Practice and Procedure in Labor Arbitration (3 Ed. 1991). In the absence of contract language to the contrary, the arbitrator had the inherent power to determine the adequacy of the cause and the reasonableness of the penalty imposed. *Id.* If the arbitrator did not exceed his power in resolving these issues, then his award should not have been vacated under R.C. §2711.10(D) even if the trial court disagreed with it. *Id.* at 273-274; see also United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc. (1987), 484 U.S. 29, 38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (“As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed a serious error does not suffice to overturn his decision.”); City of Cleveland v. Fraternal Order of Police, Lodge No. 8 (1991), 76 Ohio App. 3d 755, 758, 603 N.E.2d 351 (“When parties agree to submit their dispute to binding arbitration, they agree to accept the result, regardless of its legal or factual accuracy.”).

The Court then considered the employer's specific argument that the penalty was required by the civil service rules and workplace rules, and observed:

In vacating the arbitrator's award, the trial court reasoned that the civil service rules and workplace rules, which the CBA incorporated by reference, authorized the City to discharge a worker for conduct unbecoming an employee, the unauthorized use of public equipment, the violation of any law, and engaging in threatening or abusive behavior. We do not dispute this proposition. The civil service rules and workplace rules did identify dismissal as one potential form of punishment for such offenses, along with other less severe sanctions such as demotion or suspension. Moreover, the CBA gave the City authority to "suspend, discipline, demote or discharge for just cause[.]"

It does not follow, however, that management effectively "reserved the right" to discharge Milem under the facts of this case, as the City argues on appeal. The fact that the civil service rules and workplace rules identify a range of potential penalties, including discharge, that may be imposed for misconduct of the type at issue here does not mean that the arbitrator was precluded from second-guessing the City's punishment of choice. To the contrary, any sanction for the violation of a rule adopted by management remains subject to the just-cause standard set forth in the CBA. Stated differently, management's right to make and enforce workplace rules and regulations does not carry with it an unreviewable right to determine that a violation of those rules warrants discharge for just cause. See, e.g., Southwest Ohio Regional Transit Auth., 91 Ohio St.3d at 110-111, 2001 Ohio 294, citing Local No. 7, United Food & Commercial Workers Internatl. Union v. King Soopers, Inc. (10th Cir. 2000), 222 F.3d 1223; see also First National Supermarkets, Inc. v. Retail, Wholesale & Chain Store Food Employees Union Local 338 (2nd Cir. 1997), 118 F.3d 892. Although the CBA granted the City the right to discharge Milem for just cause and the civil service/workplace rules identified misconduct that could result in discharge, it remained up to the arbitrator to determine whether Milem's particular actions in this case gave the City just cause to fire him.

(Id. at ¶18 and ¶19). (Emphasis added).

Finally, in her dissent, in the Court below, Judge Boyle insightfully indicated:

Therefore, even though the Disciplinary/Recognition Procedures and disciplinary matrix were outside of the CBA, the arbitrator did not exceed his authority in relying on it in part. In disciplinary-arbitration cases, an arbitrator would have a difficult time comparing the severity of discipline in similar cases or assessing the reasonableness of an employee's conduct

without referencing the employer's disciplinary rules manual. See Cincinnati v. Queen City Lodge No. 69, Fraternal Order of Police, 164 Ohio App. 3d 408, 2005-Ohio-6225, 842 N.E.2d 588 (1st Dist.). Thus, the arbitrator here could look to the city's Disciplinary/Recognition Procedures and disciplinary matrix (even though it was extraneous to the CBA), find that it applied when conducting his assessment and rely on it in part, and still modify the city's choice of discipline under the authority of the CBA if he determined the city's discipline was not reasonable.

Even assuming for the sake of argument that the Disciplinary/Recognition Procedures and disciplinary matrix were part of the CBA, which they are not, it is well established that an arbitrator has full discretion to fashion a remedy – “even if the remedy contemplated is not explicitly mentioned in the labor agreement.” Miami Twp., 81 Ohio St.3d 273, 690 N.E.2d 1262. In this case that would mean (again, assuming the matrix was part of the CBA) that the arbitrator could fashion any remedy – even if it was not mentioned in the matrix.

It is also irrelevant that the disciplinary matrix gave the police chief the sole discretion to determine which of the two disciplinary levels applied (it stated: “if more than one discipline level is indicated, the Chief of Police has sole discretion to determine which of the two levels is appropriate[.]”). **It is well established black letter law that the police chief's choice of discipline remains subject to the just cause standard set forth in the CBA.** See Miami Twp. at syllabus. Stated another way, “management's right to make and enforce workplace rules and regulations does not carry with it an unreviewable right to determine that a violation of those rules warrants discharge for just cause.” Dayton v. AFSCME, Ohio Council 8, 2d Dist. Montgomery No. 21092, 2005-Ohio-6392, ¶ 19.

Indeed, if a city could simply add such a maxim (i.e., stating that the police chief has sole discretion to determine discipline) in its unilateral discipline policy, and it had the effect of limiting what an arbitrator could do, then all employers would have to do is include this rule in their discipline procedures to effectively remove any power from an arbitrator and bypass the collective bargaining process. This would essentially turn many decades of well-established labor law on its head.

(Appx. 35-37). (Emphasis added).

In sum, in the present case, the Court of Appeals determined that a disciplinary policy and matrix contained outside the four corners of the CBA limited the arbitrator's ability to modify the discipline imposed on Hill. According to the Court, the just cause

provisions in the CBA gave the arbitrator the authority to interpret the CBA and award the appropriate remedy. However, without any explanation, the court also concluded that once the arbitrator determined that the extraneous disciplinary policy and matrix should be applied to the case, the arbitrator “did not have the arbitral authority to modify the disciplinary action imposed, which under the discipline matrix and CBA was within the ‘sole discretion’ of Chief Horne.” (Appx. 32.). Under the approach of the Court of Appeals, any time an arbitrator references an employer policy that exists outside the four corners of the agreement, that policy becomes a binding part of the CBA, simply by virtue of the fact that the arbitrator referenced it.

This approach directly contradicts the foregoing, long-established precedent of this Court defining an arbitrator’s powers.

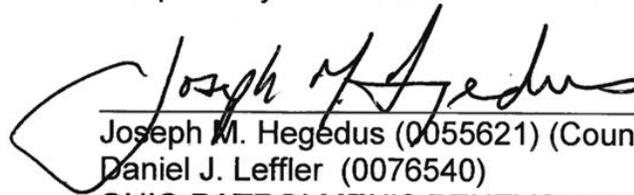
Further, the Court of Appeals, in this case, redefined the just cause provisions contained in the CBA and bestowed upon the employer an unreviewable right to discipline employees. It did this, by finding that the arbitrator’s reference to the extraneous disciplinary policy bound the parties to the steps of the Discipline Matrix, thereby bestowing upon the police chief sole discretion to determine the appropriate level of discipline. This rationale negates an essential component of the just cause provision, that the parties bargained for in the CBA, which grants an arbitrator authority to review the appropriateness of the discipline. The Court of Appeals’ approach also flies in the face of prior decisions of this Court which preclude the utilization of extraneous rules and policies to redefine terms expressly contained in a CBA and/or to impose additional requirements not expressly provided for in the CBA.

Finally, the Eighth District's application of the extraneous disciplinary policy and matrix subtracts from the just cause provisions of the CBA in that it takes away the Arbitrator's ability to engage in analysis of the second prong of the "just cause" standard enunciated in Board of Trustees of Miami Township, supra. Specifically, the Court's application of the unilateral policy and matrix emasculates the Arbitrator's ability to review the reasonableness of the discipline and fashion a remedy in the case where the discipline is found to be unreasonable, thereby empowering the employer with an unreviewable right to discipline its employees. This preeminent power granted by the Eighth District to the employer, below, completely disregards both the negotiated just cause provision in the CBA and the binding precedent of this Court. As a result, the Journal Entry and Opinion of the Court of Appeals must be reversed.

CONCLUSION

For the foregoing reasons the decision of the Eighth District Court of Appeals should be reversed and the Opinion and Award of Arbitrator Mancini should be confirmed.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief was sent by ordinary U.S. Mail to counsel of record this 27th day of April 2016:

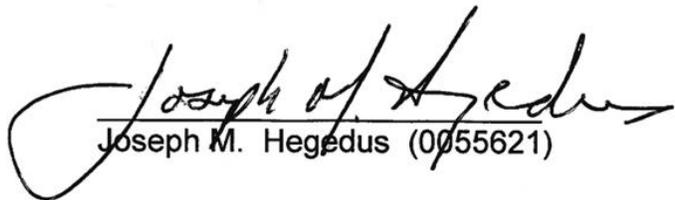
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APPENDIX

IN THE SUPREME COURT OF OHIO

**OHIO PATROLMEN'S BENEVOLENT
ASSOCIATION**

and

DAVID HILL

Appellants,

vs.

CITY OF FINDLAY

Appellee

**On Appeal from the Cuyahoga County
Court of Appeals, Eighth Appellate
District**

**Court of Appeals
Case No. CA-14-102282**

**NOTICE OF APPEAL OF APPELLANTS OHIO PATROLMEN'S BENEVOLENT
ASSOCIATION AND DAVID HILL**

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Notice of Appeal of Appellants Ohio Patrolmen's Benevolent Association and David Hill

Appellants Ohio Patrolmen's Benevolent Association and David Hill hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. CA-14-102282 on August 13, 2015.

This case is one of public or great general interest.

Respectfully submitted,

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Certificate of Service

I hereby certify that this foregoing Notice of Appeal has been served by regular U.S. mail this 25th day of September 2015 on the following:

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102282

**OHIO PATROLMEN'S BENEVOLENT
ASSOCIATION, ET AL.**

PLAINTIFFS-APPELLANTS

vs.

CITY OF FINDLAY

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-13-815571 and CV-13-817979

BEFORE: E.A. Gallagher, J., Jones, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: August 13, 2015

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EILEEN A. GALLAGHER, J.:

{¶1} Plaintiffs-appellants, the Ohio Patrolmen's Benevolent Association (the "union") and David Hill (collectively, "appellants"), appeal from a decision of the Cuyahoga County Court of Common Pleas vacating an arbitration award that modified disciplinary action taken by defendant-appellee the city of Findlay (the "city") against Hill, a sergeant in its police department. Appellants contend that the arbitrator acted within his authority under the collective bargaining agreement in modifying the discipline imposed by the city from termination to a five-month suspension and reinstatement without back pay after finding that the city had just cause to discipline him for violations of various police department rules and that the trial court, therefore, erred in vacating the arbitration award under R.C. 2711.10(D). For the reasons that follow, we affirm the trial court's judgment.

Procedural History and Factual Background

{¶2} On November 21, 2012, Morgan Greeno, a police officer with the Findlay Police Department, filed a complaint with the department regarding an incident that had occurred following a midnight shift roll call involving her direct supervisor, Sergeant Hill on November 13, 2012. After roll call that evening, Sergeant Hill and others were discussing the upcoming Fraternal Order of Police Christmas party, and one of the officers asked Sergeant Hill who was on the committee to coordinate the party. Sergeant Hill began listing the names

of the officers who had volunteered to work on the committee. When he came to Officer Greeno, he did not refer to her by name, but instead referred to her as "Whoregan," "essentially conjugating the word[s] whore and Morgan." Officer Greeno indicated that the comment upset her, in particular because it was made by a supervisor and the entire shift was in the room when the comment was made and because she thought the comment may have stemmed from Officer Greeno's anticipated testimony against Sergeant Hill in a disciplinary arbitration scheduled for later that month. Officer Greeno also complained that Sergeant Hill had condoned or participated in "jokes" other officers on her shift had made regarding her having a sexual relationship with the building's custodian and having become pregnant as a result.

{¶3} Lieutenant Robert Ring investigated Officer Greeno's claims. He interviewed Officer Greeno, Sergeant Hill and the other officers who were present at roll call that evening and questioned them regarding Sergeant Hill's alleged reference to Officer Greeno as "Whoregan."

{¶4} Sergeant Hill admitted that he had referred to Greeno as "Whoregan" during roll call but claimed that it was simply a mistake, i.e., a "slip of the tongue." He denied having ever used the term before and denied that he ever treated Officer Greeno unfairly. Sergeant Hill also denied having ever made any comments to Officer Greeno about her having a sexual relationship with the custodian. He claimed those comments came from other officers on the shift and

were typical of the banter engaged in by officers following roll call. Although he claimed his reference to Officer Greeno as "Whoregan" was accidental and that he intended nothing derogatory by it, Sergeant Hill did not apologize to Officer Greeno and did not attempt to retract his comment or otherwise explain to her why he had referred to her in that way.

{¶5} The other officers who were present during roll call that evening told Lieutenant Ring that they had heard Sergeant Hill refer to Officer Greeno as "Whoregan" but did not believe that it was "a deliberate comment." The officers told Lieutenant Ring that they did not think the comment was "that big of a deal" and stated that they perceived Sergeant Hill's remark as "more of a 'tongue tie'" or "an attempt at humor that was taken the wrong way." The officers stated that they had not previously heard Sergeant Hill use that term or call Officer Greeno any other derogatory names.

{¶6} In his report of his investigation, Lieutenant Ring stated that it was unacceptable for a male supervisor to refer to a female subordinate as a "whore" regardless of the context or setting and that he believed it was unlikely that Sergeant Hill had used the term "accidentally" because "[t]he term whore does not just come out of one's mouth as a 'slip of the tongue.'" He concluded that even if the alleged comments regarding Officer's Greeno's "pregnancy" were not considered, Sergeant Hill's derogatory reference to Officer Greeno as "Whoregan" violated several department rules, including rules relating to respect of

subordinates, the standard of conduct toward fellow employees and sexual harassment.

{¶7} As part of his investigation, Lieutenant Ring also reviewed Sergeant Hill's personnel file and disciplinary record. This was not the first time Sergeant Hill had violated police department rules and regulations. In July 2012, Sergeant Hill was charged with violating the department's social media policy and issued a written reprimand after he tased a 14-year-old boy while the boy's father (another Findlay police officer) recorded the tasing and the video was later posted on Facebook. Sergeant Hill, who, at the time, was the department's taser instructor, had defended his actions by claiming that the child had asked to be tased and that his father had given Sergeant Hill permission to tase him. Several weeks later, Sergeant Hill was suspended for ten days for violating department rules after he expressed his displeasure at another officer's (Sergeant Harmon's) promotion to sergeant by disparaging the officer's mental health in front of his subordinates and placing the barrel of his .45 caliber service weapon into his mouth, feigning a suicide attempt, after the announcement was made.

{¶8} Based on his derogatory reference to Officer Greeno as "Whoregan" and his prior disciplinary issues, Lieutenant Ring recommended that Sergeant Hill be suspended for 30 days and demoted from his position as sergeant to a position of police officer.

{¶9} Lieutenant Ring's investigative report was forwarded to Captain Sean Young. Captain Young agreed with Lieutenant Ring's finding that Sergeant Hill's derogatory reference to Officer Greeno as "Whoregan" was more than a "slip of the tongue" and that he had allowed or participated in "jokes" by other officers regarding a fictitious relationship between Officer Greeno and the building's custodian. He determined that such actions by a supervisor constituted "gross misconduct" in violation of several department rules and regulations. Based on his prior disciplinary issues and Officer Greeno's allegations, Captain Young stated that he did not believe Sergeant Hill's unacceptable behavior was correctable and recommended that Sergeant Hill be terminated.

{¶10} Police Chief Gregory Horne reviewed the reports and recommendations from Lieutenant Ring and Captain Young and agreed that Sergeant Hill's conduct as set forth in the reports violated department rules and that Sergeant Hill should be terminated. Chief Horne sent Sergeant Hill a notice of disciplinary action, advising him of the rule violations he had committed and his proposed disciplinary action of termination based on Chief Horne's application of the department's "discipline matrix" to Sergeant Hill's offenses and disciplinary history.

{¶11} The city and the union are parties to a collective bargaining agreement (the "CBA"). The CBA incorporates the city's and police department's

rules and regulations and requires that disputes between the city and the union concerning the application or interpretation of the CBA, including disciplinary issues, must be resolved through the CBA's grievance-arbitration procedure.

Article 10.01 of the CBA¹ 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.

{¶12} Article 4.01 of the CBA effective January 1, 2011 provides, in relevant part:

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 eliminate 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 * * * .²

¹The parties apparently disagree as to which version of the CBA controls the arbitrator's decision. Appellants attached a copy of the CBA effective January 1, 2011 to December 31, 2012 to their motion to confirm the arbitration award. The city attached a copy of the CBA effective January 1, 2013 to December 31, 2015 to its motion to vacate the arbitration award. It is unclear from the record which version of the CBA the arbitrator relied upon in rendering his decision in the case. We need not resolve the issue here because as it relates to the issues in this case, the relevant provisions are substantively similar, if not identical. For example, Article 10.1 is the same in both versions of the CBA.

² Article 4.01 of the CBA effective January 1, 2013 similarly provides, in relevant part:

Article 39.04 states that “[d]iscipline shall be imposed only for just cause.”³

{¶13} The discipline matrix is part of the police department’s “Disciplinary/Recognition Procedures” (“disciplinary procedures”), re-issued March 1, 2012, which sets forth the department’s “disciplinary system.” The stated purpose of the disciplinary procedures is “[t]o provide for compliance with Department policies and procedures by members of the Department, as well as provide for and to ensure consistency in disciplinary actions.” With respect to “punitive disciplinary action,” section V(A)(3)(b) of the disciplinary procedures states that “[t]he level of disciplinary action will be geared to the employee’s disciplinary history and the severity of the offense.”

{¶14} The “disciplinary system” applicable to employees covered by the CBA is set forth in section V(B) of the disciplinary procedures. That section provides in relevant part:

1. Disciplinary Violations * * *
 - a. Any employee may be disciplined for the following infractions:

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. Employer[s] rights shall include, but are not limited to, the following: the right to * * * (5) suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees; (10) develop, revise, or eliminate work practices, procedures and rules in the operation of the Department of Police and to maintain discipline * * *.

³In the CBA effective January 1, 2013, this provision appears in Article 39.07.

- i. Any infraction of the Rules and Regulations,
- ii. Or any other failure of good behavior or any other acts of misfeasance, malfeasance, or nonfeasance which adversely affects the ability of the Department to provide services to the public.

b. No employee shall be disciplined except for just cause.

2. Forms of discipline

a. In initiating discipline, the employer agrees to the following forms of discipline, in accordance with the guidelines listed in the Disciplinary Matrix (Appendix "A"):

- i. Notice of Verbal Reprimand
- ii. Written Reprimand
- iii. Suspension without pay ***
- iv. Reduction in classification
- v. Termination

c. Except in situations of gross misconduct, the employer agrees to use progressive discipline.

{¶15} The discipline matrix sets forth a three-step process of progressive discipline, with each step involving a successive violation within the corresponding classification of offense. Under the discipline matrix, rule violations are divided into one of four classes — A, B, C or D — based on the seriousness of the offense. A level of disciplinary action is then assigned to the offense, based on the class of the offense and whether the employee has had prior rule violations. As explained in the disciplinary procedures:

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")

- 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

{¶16} Following his receipt of the notice of disciplinary action, Sergeant Hill filed a grievance, appealing the proposed disciplinary action, claiming that his proposed termination lacked just cause in violation of the CBA. The matter

proceeded to a hearing before the city's service-safety director, Paul Schmelzer. Schmelzer directed that the officers present during the roll call be re-interviewed to determine the perceived nature of the "Whoregan" remark and to gain further insight regarding Officer Greeno's allegations that joking of a sexual nature had occurred. Based on the results of the investigation and his consideration of the "applicability and importance of the discipline matrix," Schmelzer agreed with the police chief's decision and ordered that Sergeant Hill be terminated.

{¶17} Sergeant Hill and the union challenged his termination, and the issue was submitted to binding arbitration in accordance with the CBA. As agreed by the parties, the issue to be resolved by the arbitrator was "did the [city] have just cause for terminating the sergeant, and if not, what's the remedy."

{¶18} On August 29, 2013, after two days of hearings on the matter, the arbitrator issued his decision, denying the grievance in part and upholding it in part. The arbitrator determined that the city had just cause to impose "severe discipline" against Sergeant Hill for his "disrespectful conduct in referring to Officer Greeno as 'Whoregan' in front of other officers" and "failing to carry out his supervisory duties to stop other officers from making inappropriate remarks about her" but that because "not all of the charges brought against Sgt. Hill were clearly established," i.e., the evidence "failed to clearly demonstrate that Sgt. Hill sexually harassed Officer Greeno in violation of department policy,"

termination was not an appropriate sanction and "the discharge penalty imposed must be set aside."⁴ With respect to what "severe disciplinary penalty" should be imposed for the violations Sergeant Hill had been found to have committed, the arbitrator concluded that the "Discipline Matrix should be applied in this case."

{¶19} Applying the discipline matrix, the arbitrator determined that Sergeant Hill had engaged in "conduct unbecoming an officer," a Class C offense. He further held that because this was Sergeant Hill's second Class C offense within a short period of time — having committed a similar offense in the incident relating to Sergeant Harmon — it was a Step 2, Class C offense, such that a "level four or five' form of discipline would be in order." The arbitrator held that this meant "the discipline could range from a 3-10 day suspension up to termination" under the discipline matrix. Based on Sergeant Hill's conduct in this case and prior disciplinary record, the arbitrator determined that it would be "appropriate" to reduce the disciplinary penalty from termination to a "lengthy disciplinary suspension." The arbitrator ordered that Sergeant Hill be immediately reinstated to his former sergeant position with full seniority but declined to award any lost wages. With the denial of back pay and

"The arbitrator rejected the city's claim that Sergeant Hill had violated the department's sexual harassment policy or created a hostile work environment based on his findings that Sergeant Hill had only once referred to Greeno as "Whoregan" and did not personally participate in teasing Greeno regarding her "pregnancy." The arbitrator held that sexual harassment as defined under the department's policy requires "repeated" conduct.

reinstatement, the arbitrator, in effect, required Sergeant Hill to serve a five-month suspension for his misconduct.

{¶20} Despite the arbitration award, the city failed to reinstate Sergeant Hill to his former position. Accordingly, on October 15, 2013, appellants filed an application to confirm and enforce the arbitration award in the Cuyahoga County Court of Common Pleas. On November 27, 2013, the city filed an application to vacate and/or modify or correct arbitration award in a separate action in common pleas court, alleging that the arbitrator had exceeded and imperfectly executed his authority and that the arbitration award failed to draw its essence from the CBA. The trial court consolidated the two cases.

{¶21} On November 12, 2014, the trial court granted the city's motion to vacate and denied the union's motion to confirm the arbitration award, concluding that the arbitrator had exceeded and imperfectly executed his authority under the CBA "by failing to properly apply the [discipline matrix]" after he specifically determined that the discipline matrix should be applied to determine the appropriate disciplinary action for Sergeant Hill's rule violations.

As the trial court explained:

Arbitrator Mancini, upon review of the record, determined that the Discipline Matrix should be applied in this case. In applying the Matrix, he determined that Hill had committed a Step 2, Class C Offense. Under the Matrix Layout, the appropriate discipline level is Level 4 or Level 5. A level 4 disciplinary action is a 3-10 day suspension and a Level 5 disciplinary action is termination. The Matrix Layout additionally states that "[i]f 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." Arbitrator Mancini, however, stated that discipline could range from a 3-10 day suspension *up to* termination and returned Hill to duty without back pay. This decision was not authorized by the Matrix. Under the unambiguous terms of the Matrix, after determining that Hill committed a Step 2, Class C offense, two discipline levels could apply: Level 4 or Level 5 with the Chief of Police having sole discretion between the two. Because Chief Horne chose termination, Hill could only be terminated.

{¶22} Sergeant Hill and the union appealed the trial court's decision granting the city's motion to vacate the arbitration award, raising the following three assignment of error for review:

ASSIGNMENT OF ERROR NO. 1: The trial court erred in ruling that the arbitrator acted arbitrarily and capriciously and exceeded his authority in rendering his award.

ASSIGNMENT OF ERROR NO. 2: The trial court erred in vacating the arbitration award on the basis of a perceived legal error in the arbitrator's application of the collective bargaining agreement and disciplinary policy.

ASSIGNMENT OF ERROR NO. 3: The trial court erred in vacating the arbitration award by substituting its interpretation of the parties' collective bargaining agreement for the arbitrator's interpretation.

{¶23} Appellants' assignments of error are interrelated and will, therefore, be considered together. In each of their assignments of error, appellants argue that the trial court "overstepped the bounds of its permitted standard of review," applying its own interpretation of the CBA, rather than deferring to the arbitrator's interpretation of the CBA, in vacating the arbitration award. Appellants contend that because the trial court exceeded its

scope of review, its decision must be reversed and the arbitration award enforced. We disagree. We find that the trial court properly determined that the arbitrator's award did not draw its essence from the CBA. Therefore, the trial court did not err in vacating the arbitration award.

{¶24} Voluntary termination of legal disputes by binding arbitration is highly favored under the law. *Cleveland v. Interntl. Bhd. of Elec. Workers Local 38*, 8th Dist. Cuyahoga No. 92982, 2009-Ohio-6223, ¶ 16, citing *Kelm v. Kelm*, 68 Ohio St.3d 26, 27, 623 N.E.2d 39 (1993). Arbitration provides the parties with "a relatively speedy and inexpensive method of conflict resolution and has the additional advantage of unburdening crowded court dockets." *Mahoning Cty. Bd. of Mental Retardation v. Mahoning Cty. TMR Edn. Assn.*, 22 Ohio St.3d 80, 84, 488 N.E.2d 872 (1986). "The whole purpose of arbitration would be undermined if courts had broad authority to vacate an arbitrator's award." *Id.* at 83-84.

{¶25} As a result, the authority of courts to vacate an arbitration award is "extremely limited." *Cedar Fair, L.P. v. Falfas*, 140 Ohio St.3d 447, 2014-Ohio-3943, 19 N.E.3d 893, ¶ 5. Courts must accord "substantial deference" to an arbitrator's decision. *N. Royalton v. Urich*, 8th Dist. Cuyahoga No. 99276, 2013-Ohio-2206, ¶ 14, quoting *Cuyahoga Metro. Hous. Auth. v. SEIU Local 47*, 8th Dist. Cuyahoga No. 88893, 2007-Ohio-4292. Arbitration awards are generally presumed to be valid, and a common pleas court reviewing an

arbitrator's decision may not substitute its judgment for that of the arbitrator. *N. Royalton* at ¶ 14, citing *Bowden v. Weickert*, 6th Dist. Sandusky No. S-05-009, 2006-Ohio-471, ¶ 50. An appellate court's review of an arbitration award is similarly limited, confined to an evaluation of the trial court's order confirming, modifying or vacating the arbitration award. *Miller v. Mgt. Recruiters Internatl., Inc.*, 180 Ohio App.3d 645, 2009-Ohio-236, 906 N.E.2d 1162, ¶ 9 (8th Dist.), citing *Lynch v. Halcomb*, 16 Ohio App.3d 223, 475 N.E.2d 181 (12th Dist.), paragraph two of the syllabus; *Orwell Natural Gas Co. v. PCC Airfoils, L.L.C.*, 189 Ohio App.3d 90, 94-95, 2010-Ohio-3093, 937 N.E.2d 609, ¶ 8 (8th Dist.). Appellate review does not extend to the merits of an arbitration award absent evidence of material mistake or extensive impropriety — which has not been alleged here. *Id.*

{¶26} As this court explained in *Motor Wheel Corp. v. Goodyear Tire & Rubber Co.*, 98 Ohio App.3d 45, 647 N.E.2d 844 (8th Dist.1994):

The limited scope of judicial review of arbitration decisions comes from the fact that arbitration is a creature of contract. Contracting parties who agree to submit disputes to an arbitrator for final decision have chosen to bypass the normal litigation process. If parties cannot rely on the arbitrator's decision (if a court may overrule that decision because it perceives factual or legal error in the decision), the parties have lost the benefit of their bargain. Arbitration, which is intended to avoid litigation, would instead become merely a system of "junior varsity trial courts" offering the losing party complete and rigorous de novo review. See *Natl. Wrecking Co. v. Internatl. Bhd. of Teamsters, Local 731*, 990 F.2d 957 (7th Cir.1993).

Id. at 52. Parties who agree to resolve their disputes through binding arbitration have bargained for and agreed to accept the arbitrator's findings of fact and interpretation of the agreement, even if the arbitrator's decision is based on factual errors or an incorrect legal analysis:

“Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract.”

Southwest Ohio Regional Transit Auth. v. Amalgamated Transit Union, Local 627, 91 Ohio St.3d 108, 110, 742 N.E.2d 630 (2001), quoting *United Paperworkers Internatl. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987); see also *Cedar Fair*, 140 Ohio St.3d 447, 2014-Ohio-3943, 19 N.E.3d 893, at ¶ 6 (“So long as arbitrators act within the scope of the contract, they have great latitude in issuing a decision. An arbitrator's improper determination of the facts or misinterpretation of the contract does not provide a basis for reversal of an award by a reviewing court, because ‘[i]t is not enough * * * to show that the [arbitrator] committed an error—or even a serious error.’”), quoting *Stolt-Nielsen, S.A. v. AnimalFeeds Internatl. Corp.*, 559 U.S. 662, 671, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010). A reviewing court cannot reject an arbitrator's findings of fact or interpretation of the agreement simply

because it disagrees with them. *Southwest Ohio Regional Transit Auth.* at 110. So long as an arbitrator is arguably construing the agreement, the court is obliged to affirm his decision. *Cleveland v. Fraternal Order of Police, Lodge No. 8*, 76 Ohio App.3d 755, 758, 603 N.E.2d 351 (8th Dist.1991).

{¶27} Notwithstanding these principles, an arbitrator can exceed his or her powers by going beyond the authority provided in the bargained-for agreement or by going beyond their contractual authority to craft an appropriate remedy. *Cedar Fair*, 140 Ohio St.3d 447, 2014-Ohio-3943, 19 N.E.3d 893, at ¶ 7. Under R.C. 2711.10(D), “the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if * * * [t]he arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”

{¶28} In considering whether the arbitrator has exceeded his or her powers where a challenge is made to an arbitration award under R.C. 2711.10(D), the trial court must determine whether the award “draws its essence from the agreement” and is not unlawful, arbitrary or capricious. *Mahoning Cty. Bd. of Mental Retardation*, 22 Ohio St.3d 80, 84, 488 N.E.2d 872 (1986), paragraph one of the syllabus; *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.*, 49 Ohio St.3d 129, 132-133, 551 N.E.2d 186 (1990) (“[A] court’s inquiry [pursuant to Section] 2711.10(D) is limited: ‘Once it is determined that

the arbitrator's award draws its essence from the * * * agreement and is not unlawful, arbitrary, or capricious, a reviewing court's inquiry for purposes of vacating an arbitrator's award pursuant to R.C. 2711.10(D) is at an end.""). An arbitrator's authority is confined to interpreting and applying a collective bargaining agreement. The arbitrator "does not sit to dispense his own brand of industrial justice." *Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emps. Assn., Local 11, AFSCME, AFL-CIO*, 59 Ohio St.3d 177, 180, 572 N.E.2d 71 (1991), quoting *United Steelworkers of Am. v. Ent. Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) ("[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement * * *. 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.").

{¶29} An arbitration award "draws its essence" from an agreement where there is a "rational nexus" between the agreement and the award. *Cleveland v. Cleveland Assn. of Rescue Emps.*, 8th Dist. Cuyahoga No. 96325, 2011-Ohio-4263, ¶ 9, citing *Assn. of Cleveland Fire Fighters, Local 93 of the Internatl. Assn. of Fire Fighters v. Cleveland*, 99 Ohio St.3d 476, 2003-Ohio-4278, 793 N.E.2d 484, ¶ 13. An arbitration award "departs from the essence" of an agreement when: "(1) the award conflicts with the express terms of the

agreement, and/or (2) the award is without rational support or cannot be rationally derived from the terms of the agreement.” *Cedar Fair* at ¶ 7, quoting *Ohio Office of Collective Bargaining*, 59 Ohio St.3d 177, 572 N.E.2d 71, at syllabus. The arbitrator must apply the contract agreed to by the parties, not “create[], in effect, a contract of his own.” *Ohio Office of Collective Bargaining* at 183.

{¶30} In reviewing an arbitrator’s award, the court must, therefore, “distinguish between an arbitrator’s act in excess of his powers and an error merely in the way the arbitrator executed his powers. The former is grounds to vacate, the latter is not.” *Piqua v. Fraternal Order of Police, Ohio Labor Council, Inc.* 185 Ohio App.3d 496, 2009-Ohio-6591, 924 N.E.2d 876, ¶ 18 (2d Dist.).

{¶31} Whether the city had “just cause” to terminate Sergeant Hill was a factual determination to be made by the arbitrator in accordance with the terms of the CBA. As the Ohio Supreme Court has recognized, a “just cause” determination typically involves two components: “(1) whether a cause for discipline exists and (2) whether the amount of discipline was proper under the circumstances.” *Bd. of Trustees of Miami Twp. v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 81 Ohio St.3d 269, 272, 690 N.E.2d 1262 (1998), quoting *Schoonhoven, Fairweather’s Practice and Procedure in Labor Arbitration* (3d Ed. 1991); see also *Summit Cty. Children Servs. Bd. v. Communication Workers, Local 4546*, 113 Ohio St.3d 291, 2007-Ohio-1949, 865 N.E.2d 31, ¶ 21

("[A]n arbitrator's inquiry into whether there is "good cause" is one that almost always involves two factors — whether the misconduct alleged has been proven and whether the discipline imposed for the misconduct was reasonable.").

{¶32} In this case, the parties do not dispute the arbitrator's finding that the city had just cause to discipline Sergeant Hill under the CBA. Rather, the parties dispute whether the arbitrator's determination that termination was too severe a sanction under the circumstances and his subsequent arbitration award — overturning his termination and imposing a five-month suspension and reinstatement without back pay — drew its essence from the CBA.

{¶33} Citing *Bd. of Trustees of Miami Twp.*, 81 Ohio St.3d 269, 272, 690 N.E.2d 1262, appellants contend that an arbitrator has "broad authority to fashion a remedy" even if it is not expressly recognized by the CBA and that so long as the arbitrator's remedy "represents a fair solution to the dispute," the remedy should be affirmed. Appellants argue that the arbitration award drew its essence from the CBA because the just cause standard for discipline contained in the CBA gave the arbitrator the authority to review the appropriateness of the discipline on Sergeant Hill. Specifically, appellants argue that "when the arbitrator determines there was just cause for disciplining an employee, the arbitrator also has authority to review and modify the type of discipline imposed" and "does not need additional specific contractual provisions to provide permission to review and modify discipline if it is deemed excessive."

In other words, appellants contend that the just cause standard for discipline contained in the CBA gave the arbitrator full authority to review the appropriateness of the discipline on Sergeant Hill and, once he determined that just cause existed for disciplinary action, to impose whatever sanction or remedy the arbitrator deemed appropriate under the circumstances. We disagree.

{¶34} In *Bd. of Trustees of Miami Twp.*, the city terminated a police officer for theft in office. *Id.* at 269-270. The arbitrator found that there was no just cause to discipline the officer for theft in office but that there was sufficient just cause to discipline the employee for having been untruthful. *Id.* at 271. The arbitrator determined that the appropriate sanction for having been untruthful was a 30-day suspension and restitution of the money he took, overturning his termination. *Id.* The township filed a complaint in the common pleas court requesting that the court vacate the arbitrator's award and reinstate the officer's termination. *Id.* at 270. The common pleas court upheld the arbitrator's award and ordered that the officer be reinstated. *Id.* The court of appeals reversed and remanded the matter for a new arbitration hearing. *Id.* The union appealed to the Ohio Supreme Court, which accepted discretionary review of the case, and reversed the judgment of the appellate court and reinstated the trial court's judgment. *Id.* at 270, 274.

{¶35} The township argued that once the arbitrator determines that there was just cause to discipline an employee, the arbitrator must defer to the

decision of the employer as to the type of discipline imposed. *Id.* at 271. The union argued that once an arbitrator determines there is just cause to discipline an employee, the arbitrator has the authority to review the appropriateness of the discipline imposed. The court agreed with the union, explaining that “unless otherwise restricted by the collective bargaining agreement, the arbitrator has the authority to review the type of discipline imposed”:

“[T]he parties to a collective bargaining agreement can not 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.

{¶36} The court held that the language of the collective bargaining agreement at issue did not prevent the arbitrator from reviewing the appropriateness of the type of discipline imposed because “[t]he only stated restriction [in the agreement] is that ‘the arbitrator shall have no power to add to, subtract from, or change any of the provisions of this Agreement.’” *Id.* The

court further noted that “[i]n fact, the agreement invites review by stating that ‘discipline shall take into account the nature of the violation, the employee[']s record of discipline and the employee’s record of performance and conduct’” and that under such a provision “the type of discipline is not automatic for a particular offense.” *Id.*

{¶37} 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.

{¶38} In *Ohio Office of Collective Bargaining*, the Ohio Supreme Court held that the arbitrator exceeded his authority in reinstating a hospital aide after the arbitrator found she had abused a patient. Although the arbitrator found that the employee had committed abuse, the arbitrator found the employer lacked just cause for termination and chose to reinstate her, reasoning that the employer failed to give the employee proper notice and the penalty was disproportionate to the penalties that had been given to similarly situated employees. *Id.* at 182 and fn.5. The collective bargaining agreement provided:

"The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement." *Id.* at 182. The collective bargaining agreement further provided, with respect to disciplinary action, that "[d]isciplinary action shall not be imposed upon an employee except for just cause" but also expressly stated "[i]n cases involving termination, if the arbitrator finds that there has been an abuse of a patient * * * the arbitrator does not have authority to modify the termination of an employee committing such abuse." *Id.* The court held that the arbitrator's award, which modified the termination of the employee, conflicted with the express terms of the collective bargaining agreement, imposed additional requirements for termination not expressly provided for in the agreement, and could not be rationally derived from the terms of the agreement. *Id.* at 183. As such, the common pleas court properly vacated the arbitration award reinstating the employee. *Id.* at 178.

{¶39} In this case, although the arbitrator had authority to review the discipline imposed on Sergeant Hill as part of his just cause determination, that review was constrained by the CBA. Article 41.03 of the CBA sets forth the scope of the arbitrator's authority agreed to by the parties as follows:

The arbitrator shall have no power or authority to add to, subtract from, or in any other manner alter the specific terms of this Agreement; nor to make any award requiring the commission of any

act prohibited by law; *nor to make any award that itself is contrary to law or violates any of the terms and conditions of this Agreement.*

(Emphasis added.)⁵

{¶40} Appellants contend that the discipline levels specified in the discipline matrix were merely “guidelines” and that the arbitrator, therefore, was not compelled to follow the disciplinary matrix once he determined that just cause existed for discipline, but rather, could impose any sanction he deemed fair and appropriate. They contend that the arbitrator’s interpretation of the discipline matrix as “mean[ing] [that] discipline could range from a 3-10 day suspension up to termination” (given the level of the offense and Sergeant Hill’s disciplinary history) and his application of that interpretation to reduce the sanction Sergeant Hill received were rationally tied to the CBA’s requirement that “just cause” exist for discipline. As such, appellants contend, the arbitrator acted within his authority under the CBA and the trial court erred in substituting its interpretation and judgment for that of the arbitrator.

{¶41} In this case however — as set forth in the arbitrator’s decision — the arbitrator interpreted the CBA (and its just cause standard for disciplinary action) as requiring the application of the discipline matrix to determine the appropriateness of the discipline imposed on Sergeant Hill, not that it was simply a “guideline” for an appropriate penalty. Arbitration Opinion and Award

⁵Article 41.03 is the same in both versions of the CBA.

at 22 (“This arbitrator would agree that the Discipline Matrix should be applied in this case.”).⁶ The arbitrator then proceeded to apply the discipline matrix to the facts, concluding that based on his misconduct related to Officer Greeno and his prior disciplinary history, Sergeant Hill had committed a Step 2, Class C offense. Applying the discipline matrix, the arbitrator further determined that the appropriate discipline level for Sergeant Hill’s Step 2, Class C offense is Level 4 or Level 5 disciplinary action. Arbitration Opinion and Award at 23 (“The Discipline Matrix provided that for a second offense of this type, a ‘level four or five’ form of discipline would be in order.”).

{¶42} It is here where the arbitrator exceeded his authority under the CBA. Under the discipline matrix, Level 4 disciplinary action is a 3-10 day suspension and Level 5 disciplinary action is termination. Most significantly, however, the discipline matrix expressly provides that “[i]f 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.” Accordingly, under the plain and unambiguous

⁶Although the disciplinary policy states at article 26.1.2(V)(B)(2)(a) that “[i]n initiating discipline the employer agrees to the following forms of discipline, in accordance with the *guidelines* listed in the Disciplinary Matrix,” the language used in determining the proper sanction to be imposed under the discipline matrix is mandatory, not permissive, e.g., “[i]f the involved employee has no previous violations, discipline *will* be administered under ‘Step 1’”; “[s]uccessive violations *will* place the involved employee into the next step”; “[i]n the event that the involved employee progresses beyond Step 3, discipline *will* progress to ‘Step 1’ of the next progressive class”; “[t]he involved employee *will* then receive a disciplinary action within the range of the following scale, based upon the indicated discipline level.” (Emphasis added.)

language of the discipline matrix — which the arbitrator determined controlled under the CBA — only one of two discipline levels could be applied to Sergeant Hill's commission of a Step 2 Class offense: Level 4 (a 3-10 day suspension) or Level 5 (termination), with the Chief Horne having sole discretion between the two. Even assuming that the parties were bound by the arbitrator's misinterpretation of the discipline matrix as providing for a "range of discipline" for a Step 2, Class C offense, the arbitrator had no authority to disregard the express requirement that "[i]f more than one discipline level is indicated, the Chief of Police has sole discretion in determining which of the two levels is appropriate * * *." See, e.g., *Ohio Office of Collective Bargaining*, 59 Ohio St.3d at 180-181, 572 N.E.2d 71 ("It is not a question of a strained interpretation by the arbitrator with which we might agree or disagree, but rather a reading of the plain language of the contract which removes from the arbitrator the authority to determine a remedy once she concludes that a certain rule has been breached."), quoting *S.D. Warren Co. v. United Paperworkers' Internatl. Union* 3, 845 F.2d 3, 8 (1st Cir.1988), cert. denied, 488 U.S. 992 (1988). There is no dispute that in the exercise of that discretion, Chief Horne chose Level 5, termination.

{¶43} This is not a case in which the trial court usurped the role of the arbitrator and improperly substituted its view of the facts and interpretation of the CBA for that of the arbitrator. While the arbitrator had the authority to

interpret the CBA and to award an appropriate remedy under the CBA, once the arbitrator determined (1) that the discipline matrix applied in determining the appropriate sanction for Sergeant Hill's misconduct and (2) that in applying the discipline matrix, Sergeant Hill's conduct constituted a Step 2, Class C offense subject to discipline at level 4 or 5 of the discipline matrix, the arbitrator did not then have arbitral authority to modify the disciplinary action imposed, which under the discipline matrix and the CBA was within the "sole discretion" of Chief Horne. Because the CBA expressly provides that the arbitrator "shall have no power or authority to * * * alter the specific terms of the [CBA] * * * nor to make any award that * * * violates any of the terms and conditions of the [CBA]," we agree with the trial court that the arbitrator exceeded and imperfectly executed his authority under the CBA in modifying the discipline imposed on Sergeant Hill from termination (the disciplinary action imposed by Chief Horne) to a five-month suspension and reinstatement without back pay. The arbitration award, therefore, does not draw its essence from the CBA and is arbitrary, capricious and unlawful. Accordingly, the trial court did not err in vacating the arbitrator's decision. Appellants' assignment of error is overruled.

{¶44} Judgment affirmed.

It is ordered that appellee recover from appellants the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

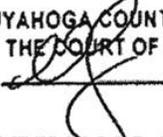
A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


EILEEN A. GALLAGHER, JUDGE

LARRY A. JONES, SR., P.J., CONCURS;
MARY J. BOYLE, J., DISSENTS (WITH SEPARATE OPINION ATTACHED)

FILED AND JOURNALIZED
PER APP.R. 22(C)

AUG 13 2015

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By  Deputy

MARY J. BOYLE, J., DISSENTING:

{¶45} I respectfully dissent. It is my view that the arbitrator did not exceed his authority because the city's Disciplinary/Recognition Procedures, which include the disciplinary matrix, were not part of the parties' collective bargaining agreement. Rather, the city of Findlay created, developed, and implemented these procedures; they were not mentioned anywhere in the CBA.

{¶46} The CBA here provided that the arbitrator had "no power to add to, subtract from or modify any of the terms of [the CBA], nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement." It did not restrict the arbitrator's authority to modify the discipline as the CBA did in *Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emp. Assn., Local 11, AFSCME, AFL-CIO*, 59

Ohio St.3d 177, 572 N.E.2d 71 (1991). In *Ohio Office*, the Supreme Court held that an arbitrator exceeded his authority in reversing an employee's termination when the CBA specifically stated that "[i]n 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." There is no such restriction here limiting the arbitrator's authority.

{¶47} Therefore, once the arbitrator determined that the city had just cause to discipline Sergeant Hill, the arbitrator had broad authority to fashion a remedy. See *Bd. of Trustees of Miami Twp. v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 81 Ohio St.3d 269, 690 N.E.2d 1262 (1998). In *Miami Twp.*, the Ohio Supreme Court made it clear 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 the syllabus.

{¶48} Thus, it is my view that it is irrelevant that the arbitrator found that the disciplinary matrix applied, but then imposed a different discipline. The arbitrator had full authority to fashion his own remedy under the collective

bargaining agreement because the matrix was not part of the collective bargaining agreement. *Id.* at 273.

{¶49} In *Miami Twp.*, the Supreme Court further explained that in disciplinary cases, the arbitrator must determine “[if] the commission of the misconduct, offense, or dereliction of duty, upon which the discipline administered was grounded, has been adequately established by the proof; and * * * if proven or admitted, the reasonableness of the disciplinary penalty imposed in light of the nature, character and gravity thereof[.]” *Id.* at 272. Therefore, even though the Disciplinary/Recognition Procedures and disciplinary matrix were outside of the CBA, the arbitrator did not exceed his authority in relying on it in part. In disciplinary-arbitration cases, an arbitrator would have a difficult time comparing the severity of discipline in similar cases or assessing the reasonableness of an employee’s conduct without referencing the employer’s disciplinary rules manual. *See Cincinnati v. Queen City Lodge No. 69, Fraternal Order of Police*, 164 Ohio App.3d 408, 2005-Ohio-6225, 842 N.E.2d 588 (1st Dist.). Thus, the arbitrator here could look to the city’s Disciplinary/Recognition Procedures and disciplinary matrix (even though it was extraneous to the CBA), find that it applied when conducting his assessment and rely on it in part, and still modify the city’s choice of discipline under the authority of the CBA if he determined the city’s discipline was not reasonable.

{¶50} Even assuming for the sake of argument that the Disciplinary/Recognition Procedures and disciplinary matrix were part of the CBA, which they are not, it is well established that an arbitrator has full discretion to fashion a remedy — “even if the remedy contemplated is not explicitly mentioned in the labor agreement.” *Miami Twp.*, 81 Ohio St.3d at 273, 690 N.E.2d 1262. In this case, that would mean (again, assuming the matrix was part of the CBA) that the arbitrator could fashion any remedy — even if it was not mentioned in the matrix.

{¶51} It is also irrelevant that the disciplinary matrix gave the police chief the sole discretion to determine which of the two disciplinary levels applied (it stated: “If more than one discipline level is indicated, the Chief of Police has sole discretion to determine which of the two levels is appropriate[.]”). It is well established black letter law that the police chief’s choice of discipline remains subject to the just cause standard set forth in the CBA. *See Miami Twp.* at syllabus. Stated another way, “management’s right to make and enforce workplace rules and regulations does not carry with it an unreviewable right to determine that a violation of those rules warrants discharge for just cause.” *Dayton v. AFSCME, Ohio Council 8*, 2d Dist. Montgomery No. 21092, 2005-Ohio-6392, ¶ 19.

{¶52} Indeed, if a city could simply add such a maxim (i.e., stating that the police chief has sole discretion to determine discipline) in its unilateral

discipline policy, and it had the effect of limiting what an arbitrator could do, then all employers would have to do is include this rule in their discipline procedures to effectively remove any power from an arbitrator and bypass the collective bargaining process. This would essentially turn many decades of well-established labor law on its head.

{¶53} The essence of the arbitrator's ruling is that Sergeant Hill's misconduct did not warrant discharge in light of the city's failure to establish all of the allegations against him. Regardless of whether we agree with that assessment, we are not at liberty to overturn it. *S.W. Ohio Regional Transit Auth. v. Amalgamated Transit Union, Local 627*, 91 Ohio St.3d 108, 110, 742 N.E.2d 630 (2001).

{¶54} As the Ohio Supreme Court has noted, "the whole purpose of arbitration would be undermined if courts had broad authority to vacate an arbitrator's award." *Mahoning Cty. Bd. of Mental Retardation & Dev. Disabilities v. Mahoning Cty. TMR Edn. Assn.*, 22 Ohio St.3d 80, 83-84, 488 N.E.2d 872 (1986). Moreover, once just cause is found, "an arbitrator is presumed to possess implicit remedial power, unless the agreement contains restrictive language withdrawing a particular remedy from the jurisdiction of the arbitrator." *Queen City Lodge No. 69, Fraternal Order of Police, Hamilton Cty., Ohio, Inc. v. Cincinnati*, 63 Ohio St.3d 403, 588 N.E.2d 802 (1992)

syllabus. Again, the agreement here did not have such restrictive language limiting the arbitrator's authority to fashion a remedy.

{¶55} It is my view that the trial court and the majority are substituting their judgment for that of the arbitrator. The arbitrator based his modification of the city's discipline relying in part on the city's own disciplinary matrix. I do not believe the arbitrator exceeded his authority in doing so. Thus, I would find that the arbitrator's award draws its essence from the collective bargaining agreement and is not arbitrary, capricious, or unlawful, and therefore I would not, under the facts of this case, "substitute [my] judgment for that of the arbitrator." *Queen City Lodge at 407; Mahoning Cty. Bd. of Mental Retardation & Developmental Disabilities*, paragraph one of the syllabus.

{¶56} Accordingly, I would reverse the judgment of the trial court and reinstate the arbitrator's award modifying the city's discipline of Sergeant Hill from termination to an extended suspension of five months without back pay.



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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

FILED

OHIO PATROLMEN'S BENEVOLENT ASSOCIATION,
ET AL

Plaintiff

Case No: CV-13-815571

2014 NOV 12 P 12:37

Judge: STEVEN E GALL

CLERK OF COURTS
CUYAHOGA COUNTY

CITY OF FINDLAY, OHIO

Defendant

JOURNAL ENTRY

96 DISP.OTHER - FINAL

OPINION AND ORDER. COURT COSTS ASSESSED TO OPBA AND DAVID HILL. OSJ. FINAL.
COURT COST ASSESSED AS DIRECTED.

OSJ.
Judge Signature Date

that, under the Matrix, discipline could range from a 3-10 day suspension up to termination. Arbitrator Mancini found that the termination penalty should be reduced to a disciplinary suspension and returned Hill to duty without back pay. The OPBA and Hill seek to confirm the arbitration award and Findlay seeks to vacate and/or modify or correct the arbitration award.

Law & Analysis

Arbitration awards carry a presumption of validity. *Brumm v. McDonald & Co. Securities, Inc.*, 78 Ohio App.3d 96, 103, 603 N.E.2d 1141 (4th Dist.1992). They can be overturned, however, by a court of law if “[t]he arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” R.C. 2711.10(D). The Supreme Court of Ohio has held that a reviewing court is limited to determining whether the award draws its essence from the CBA and whether the award is unlawful, arbitrary, or capricious. *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.*, 49 Ohio St. 3d 129, 551 N.E.2d 186 (1990). “An arbitrator’s award draws its essence from a collective bargaining agreement when there is a rational nexus between the agreement and the award, and where the award is not arbitrary, capricious or unlawful.” *Mahoning Cty. Bd. of Mental Retardation & Developmental Disabilities v. Mahoning Cty. TMR Edn. Assn.*, 22 Ohio St. 3d 80, 84, 488 N.E.2d 872 (1986).

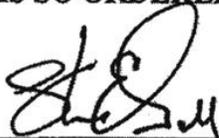
Arbitrator Mancini, upon review of the record, determined that the Discipline Matrix should be applied in this case. In applying the Matrix, he determined that Hill had committed a Step 2, Class C Offense. Under the Matrix Layout, the appropriate discipline level is Level 4 or Level 5. A Level 4 disciplinary action is a 3-10 day suspension and a Level 5 disciplinary action is termination. The Matrix Layout additionally states that “[i]f 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.” Arbitrator Mancini, however, stated that discipline could range from a 3-10 day suspension *up to* termination and returned Hill to duty without back pay. This decision was not authorized by the Matrix. Under the unambiguous terms of the Matrix, after determining that Hill committed a Step 2, Class C offense, two discipline levels could apply: Level 4 *or* Level 5 with the Chief of Police having sole discretion between the two. Because Chief Horne chose termination, Hill could only be terminated.

The court also takes note that while the OPBA and Hill argue that the Matrix is a guideline and not part of the Collective Bargaining Agreement, the Matrix has been applied in arbitration decisions in the past. Additionally, Arbitrator Mancini specifically stated the Discipline Matrix should be applied and then proceeded to depart from the plain language of the Matrix.

Therefore, the court finds that the arbitrator exceeded and imperfectly executed his power by failing to properly apply the Matrix. In doing so, the arbitrator acted arbitrarily and capriciously. The OBPA and Hill’s application to enforce the arbitration award is denied. Findlay’s application to vacate the arbitration award is granted.

IT IS SO ORDERED:



JUDGE STEVEN E. GALL

Date: _____

11/10/14

SERVICE

A copy of this Opinion and Order was sent via regular mail, this 10th day of

November, 2014 to the following:

Michelle T. Sullivan, Esq.
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Cleveland, Ohio 44113
Attorney for Respondent



JUDGE STEVEN E. GALL

**IN THE MATTER OF ARBITRATION
BETWEEN**

CITY OF FINDLAY)	<u>OPINION AND AWARD</u>
)	
)	
AND)	
)	DAVID HILL TERMINATION
)	
OHIO PATROLMEN'S BENEVOLENT)	
ASSOCIATION)	

JAMES M. MANCINI, ARBITRATOR

APPEARANCES:

FOR THE UNION

Michelle T. Sullivan, Esq.

FOR THE CITY

Gary C. Johnson, Esq.

SUBMISSION

This matter concerns a grievance filed on January 8, 2013 by Sgt. David Hill. The Grievant claimed that he had been unjustly terminated in violation of the Collective Bargaining Agreement between the City of Findlay (hereinafter referred to as the City or Employer) and the Ohio Patrolmen's Benevolent Association (hereinafter referred to as the Union of OPBA). The arbitration hearing was held on May 8 and 21, 2013 in Findlay, Ohio. The parties subsequently presented post-hearing briefs.

BACKGROUND

The Grievant, David Hill, has been employed as a sergeant with the Findlay Police Department since November 2005. Prior to that time, he served as a full-time patrolman for six years. At the time of his termination, the Grievant was one of two sergeants working on the midnight shift.

Sgt. Hill's duties included doing the roll call at the start of the shift. The shifts are supervised by two sergeants with ten to fifteen officers on each shift. Roll call lasts about fifteen to twenty minutes with sergeants making assignments and giving patrol officers all the pertinent information of the day. Once the roll call is completed, the sergeants then turn in the district assignments to the dispatchers. During this time, the

officers have time to talk amongst themselves. According to the Grievant and two other officers who testified, they typically joke around with one another following roll call.

On November 13, 2012, the Grievant along with Sgt. Dan Harmon were on duty during the midnight shift. Sgt. Harmon was running the roll call with the Grievant sitting with the other patrol officers in the room. Following the roll call, the officers started several conversations amongst themselves including one about the upcoming FOP Christmas party. In that Sgt. Hill was President of the local FOP lodge, they were asking questions of him as to who would be on the committee for the Christmas party. The Grievant testified that as he was looking around the room for those on the committee, he saw Officer Morgan Greeno. The Grievant stated that as he attempted to say "Morgan," the word "Whoregan" came out of his mouth. Officer Greeno stated that she heard the Grievant refer to her as "Whoregan" but did not say anything at the time. The Grievant and Officer Greeno carried on their conversation about the upcoming Christmas party for another twenty minutes. According to Sgt. Hill, at no time did Officer Greeno ever tell him that his reference to her as "Whoregan" offended her. Officer Greeno subsequently filed a harassment complaint against the Grievant over his reference to her as "Whoregan." During the investigation of the incident by Lieutenant Robert Ring, other officers who heard the "Whoregan" reference did not believe that it was a mean spirited comment. Some felt that it was a mere slip of the tongue by the Grievant. When Lieutenant Ring interviewed Sgt. Hill, he too stated that it was a slip of the tongue.

Officer Greeno filed a harassment complaint on November 21, 2012 with the department. She advised Lt. Ring of the harassment she was receiving from the Grievant as well as other police officers on her shift. Officer Greeno stated that the Grievant's reference to her as "Whoregan" essentially conjugated the word "whore and Morgan." She stated that Sgt. Hill as her supervisor should not refer to his officers in such a demeaning manner. Officer Greeno also indicated to Lt. Ring that Sgt. Hill had condoned or participated in comments being made to her by other officers on the shift suggesting that she was having a sexual relationship with the building custodian and as a result had become pregnant. The Grievant denied ever making jokes about Officer Greeno having a romantic relationship with Randy, the building custodian. According to the Grievant when other officers would make jokes about this topic, Officer Greeno would play along and did not appear to be offended.

Lt. Ring conducted the investigation of the sexual harassment complaint filed by Officer Greeno. According to the lieutenant's report, Greeno was visibly upset when he spoke to her and was angry about what had happened. She also mentioned that she felt the Grievant's comment may have stemmed from her impending testimony at the time against Sgt. Hill in a disciplinary arbitration which was set for November 28, 2012. Lt. Ring also spoke to Sgt. Harmon who conducted the roll call on November 13th. Sgt. Harmon indicated that he had heard Sgt. Hill call Officer Greeno "Whoregan." However Sgt. Harmon stated that he had never heard Sgt. Hill refer to Greeno as "Whoregan" on

any other occasion. The lieutenant also received written statements from other officers who were present on the day in question. Officer Chris Huber indicated that he did not think the comment made by Sgt. Hill in calling Officer Greeno a "Whoregan" was a big deal. Officer Jason Morey stated the comment made by Sgt. Hill simply "slipped out" and was not intentional. Officer Darin Lawrence stated that Sgt. Hill's use of the word was more of a "tongue tie" than a deliberate comment. Officer Joe Smith felt that it was made with an attempt at humor that was taken the wrong way. When the lieutenant interviewed Sgt. Hill, he stated that it was a "slip of the tongue" and that he has never unfairly treated Officer Greeno. Sgt. Hill further indicated that he was thinking of two things at once and the phrase came out by mistake. He denied meaning anything derogatory by it. The Grievant denied calling Officer Greeno a "Whoregan" as a result of a pending arbitration hearing. Sgt. Hill also stated that he never made any comments to Officer Greeno about her having a sexual relationship with Randy the custodian. Rather, the Grievant indicated that those comments came from other officers on the shift and it was a typical type of banter engaged in at roll call.

Lt. Ring in his summary of the investigation stated that it was unacceptable for a supervisor to refer to a female subordinate as a whore regardless of the setting. He also did not believe that Sgt. Hill made the comment accidentally. He stated that the term "whore" is a sexual one and when relayed from a male supervisor to a female subordinate constituted sexual harassment. He noted that Sgt. Hill did not immediately apologize or

try to explain the comment to Officer Greeno. The lieutenant concluded that Sgt. Hill calling Officer Greeno "Whoregan" violated several departmental guidelines including those prohibiting sexual harassment of another officer. After reviewing the Grievant's prior record, Lt. Ring recommended that Sgt. Hill be given a thirty day suspension and demoted from his position as sergeant to one of patrol officer.

Lt. Ring's investigative report was forwarded to Captain Sean Young. Captain Young after reviewing the investigation determined that the Grievant's reference to Officer Greeno as "Whoregan" was more than a slip of the tongue. The captain noted that this was the second incident involving Sgt. Hill's attempt to use humor in front of the patrol officers he supervised. The captain listed all of the prior misconduct engaged in by Sgt. Hill including his taser of a juvenile, the accidental discharge of a taser into the leg of Officer Brian White, and placing his loaded service weapon in his mouth during one of his roll calls. Captain Young also found that Sgt. Hill had participated in jokes about Officer Greeno having a romantic relationship with Randy, the building custodian. Captain Young determined that such actions from a supervisor constituted gross misconduct on the part of Sgt. Hill and violated departmental rules and regulations. Captain Young noted that the prior suspension of Sgt. Hill had little affect on correcting his negative behavior. He also pointed out that Officer Greeno was scheduled to testify at an arbitration hearing regarding disciplinary action being sought against Sgt. Hill and as a result there was a question as to whether or not the Grievant calling Officer Greeno

"Whoregan" amounted to intimidation. Captain Young concluded that he did not believe the Grievant's unacceptable behavior was correctible. He found the violations committed by Sgt. Hill to be egregious and totally unacceptable for a supervisor. As a result, he recommended that the Grievant be terminated.

Police Chief Gregory R. Horne reviewed the recommendations made by both Captain Young and Lt. Ring and found that they both thought that the Grievant had engaged in serious misconduct. Chief Horne felt that Sgt. Hill's reference to Officer Greeno as "Whoregan" was an attempt to demean Officer Greeno in front of the officers at roll call. He believed that it created a hostile work environment and constituted sexual harassment. Chief Horne also charged the Grievant with engaging in bias treatment of Officer Greeno with respect to her evaluations. The Chief noted the prior incidents involving the Grievant included his placing a loaded firearm in his mouth to show displeasure over a promotion of Sgt. Harmon. For that incident, he received a ten day suspension. The Chief also relied upon the charge made by Officer Greeno that Sgt. Hill had failed to address comments made by other officers that she was having an affair with the building custodian and had become pregnant. The Chief found that the pattern of conduct engaged in by Sgt. Hill was egregious and that his prior suspension had no apparent effect on correcting his conduct. The Chief also noted that several promotions had come up and the Grievant's wife was up for one of them and did not receive the promotion. He believed that this frustrated Sgt. Hill. The Chief concluded that because

of the gun in the mouth incident and the "Whoregan" comment referencing Officer Morgan Greeno, he could no longer control Sgt. Hill and the only way to stop such conduct was to terminate him. The Chief indicated that he followed the department's Discipline Matrix in terminating the Grievant.

Subsequently, Sgt. Hill filed his grievance herein claiming that he had been terminated without just cause. The matter proceeded to a hearing before Safety Director Paul Schmelzer. He ordered that Lt. Ring interview several roll call attendees once again to determine whether they had heard the "Whoregan" statement and also to gain further incite into whether joking around of a sexual nature had taken place. The lieutenant re-interviewed several officers who were there for the roll call. They each indicated that they had heard the reference to Morgan Greeno as "Whoregan." Several of the officers indicated that they had heard comments by others about a relationship between Officer Greeno and Randy, the building custodian. For example, Officer Jason Morey stated that the Greeno/Randy jokes had been occurring for some time and Officer Greeno was actively involved in most of the conversations. He stated that he never felt that the joking crossed the line and that to his knowledge Officer Greeno never indicated that the joking needed to be stopped. Officer Brian Young as well as Officer Joe Smith basically agreed with that statement. During her testimony, Officer Greeno acknowledged that officers give each other a hard time and joking around was fairly common. She did state that she was offended by the remarks insinuating that she was pregnant with Randy's child.

During her testimony, Officer Greeno acknowledged that she has referred to male officers as "garbage dicks" in reference to the officers sexual history. She has also teased male officers with remarks about them engaging in oral sex with a homeless person named "Chrissy" who had poor hygiene and was well known to all of the other officers.

POSITIONS OF THE PARTIES

POSITION OF THE EMPLOYER

The City contends that the Grievant's numerous offenses have made him unemployable by the police department. The evidence clearly demonstrates that the Grievant committed the offenses with which he has been charged. This includes Sgt. Hill referring to Officer Greeno as "Whoregan" in front of numerous other police officers. Sgt. Hill was properly terminated in accordance with the police department's "Discipline Matrix." There is no basis to mitigate the termination penalty imposed and therefore the City's decision to discharge Sgt. Hill should be upheld.

The City maintains that the evidence clearly shows that the Grievant referred to Officer Greeno as "Whoregan" at a roll call with other officers in attendance. Not only did Sgt. Hill know that he was wrong in calling Greeno "Whoregan," he never attempted to rectify the matter. It is clear that the Grievant intended to demean Officer Greeno. Moreover, the City points out that Sgt. Hill has treated another female officer, Candice Paul, with the same type of disrespect. The evidence shows that the Grievant picked on Officer Paul who is new to the force and even recommended that she be terminated. After Officer Paul was transferred from Sgt. Hill's shift by the Chief, her evaluations improved. Sgt. Hill's treatment of Officer Paul is consistent with the type of treatment he

gave Officer Greeno and indicates that his comment in calling Greeno "Whoregan" was no accident.

The Employer further points out that the Grievant has committed multiple prior disciplinary actions which prohibit the mitigation of his termination in this case. This included disclosing a fellow sergeant's prior mental treatments and also putting a pistol in his mouth at a roll call feigning suicide. It was also established that the Grievant, a taser training instructor, tasered a fourteen year old son of one of his friends just for fun. The Grievant's actions indicate that he is completely out of control and has no consideration for fellow officers, citizens, or the police department. As a result, there should be no mitigation of the Grievant's termination in this case.

The City argues that the termination of the Grievant is warranted through application of the department's Discipline Matrix. The City refers to a prior arbitration which involved disciplinary charges brought against Sgt. Hill for telling patrolmen that a promoted sergeant was recently treated for mental health issues and was now assigned to their shift. It also involved Sgt. Hill placing the barrel of his weapon in his mouth and acting out a suicide. The arbitrator determined that the thirty day suspension was excessive and not in keeping with the Discipline Matrix. The City maintains that the decision by the arbitrator in that case to apply the department's Discipline Matrix must also be applied in this case. The issues before this arbitrator are identical to those in the prior case. The Grievant engaged in demeaning comments to fellow officers and for that reason under the Discipline Matrix, the Grievant's termination is warranted.

POSITION OF THE UNION

The Union contends that the City has failed to establish by clear and convincing evidence that the Grievant engaged in the alleged misconduct. The evidence failed to show that Sgt. Hill sexually harassed or even permitted other officers to sexually harass Officer Greeno. A fair investigation was not conducted and as a result it must be held that just cause was not established for the Grievant's termination in this case. The Union requests that Sgt. Hill be reinstated to his former position as sergeant with no loss of seniority and full back pay.

The Union argues that Officer Greeno cannot claim that she was subjectively offended by Sgt. Hill's referring to her as "Whoregan" on only one occasion which was made in passing at the end of roll call. The evidence showed here that Officer Greeno's own behavior at work undermines any subjective claim that she makes to being offended by Sgt. Hill's remark. The evidence showed that in the course of the joking around which takes place on the shift, Officer Greeno has referred to male officers as "garbage dicks" in reference to the officer's sexual history. She has also teased male officers with vulgar remarks about the officers engaging in oral sex with a homeless person with poor hygiene. These types of remarks are more vulgar and lewd than the isolated "Whoregan" remark which Sgt. Hill inadvertently uttered on November 13, 2012 that Officer Greeno now claims offended her. As a result, a case of sexual harassment cannot be established

here because it is evident that Officer Greeno cannot claim to have been subjectively offended by the "Whoregan" remark.

The Union further maintains that the City failed to prove that Sgt. Hill created a hostile work environment for Officer Greeno. The "Whoregan" comment as well as the teasing about a fictitious relationship between Officer Greeno and the building custodian must be evaluated in light of the general work environment at the department. All witnesses agreed that officers constantly joke around with some jokes becoming vulgar with sexual innuendo. The Union points out that prior to Sgt. Hill, no other officer has ever been disciplined for engaging in this kind of joking around in the department. Moreover, once again Officer Greeno was an active participant in the joking around including the banter about her having a fictitious relationship with Randy, the custodian. Officer Greeno went so far as to bring in a love letter Randy wrote her and had one of the trainees read it at roll call for the amusement of the other officers on the shift. Officer Greeno acknowledged that she did not mind the teasing which came from her peers. The Union notes that Sgt. Hill did not participate in the teasing about Officer Greeno having a relationship with the maintenance man. Considering the environment which existed in the department wherein officers joked around using vulgar and lewd humor at times, it cannot be said that Sgt. Hill's one-time reference to Officer Greeno as "Whoregan" created a hostile work environment for her. It was simply an isolated comment made in passing. As such, the City cannot meet the burden of proving that Sgt. Hill sexually

harassed Officer Greeno or that he permitted the creation of a hostile work environment for her.

The Union also argues that the City committed fatal due process violations throughout the investigation. It was shown that Captain Young prepared an initial draft of his recommendation for the termination of Sgt. Hill after hearing only Officer Greeno's account of the incident. At about the same time, Lt. Ring began his investigation which focused almost exclusively on the "Whoregan" remark. The Union points out that Lt. Ring recommended a thirty day suspension and the a demotion to patrol officer. Moreover, Captain Young did no further investigation of his own and had only the facts gathered in the lieutenant's investigation on which to base his recommendation.

The Union submits that the termination of Sgt. Hill for the "Whoregan" reference was excessive and should be set aside. Contrary to the City's claim, the prior arbitration decision did not stand for the proposition that the Discipline Matrix Guidelines are to be mechanically applied. In the instant case, the City did not meet its burden of proving a case of sexual harassment by Sgt. Hill against Officer Greeno. Rather, name calling of fellow employees is more appropriately classified as a violation of the rule pertaining to Conduct Toward Fellow Employees, a Class A offense. Even if the arbitrator were to find that Sgt. Hill sexually harassed Officer Greeno, the guidelines would place the sexual harassment on the Discipline Matrix as a Class C offense. The corresponding Matrix Guideline recommends a penalty at Step 2 for such offenses ranging from a three-ten day suspension to termination. It is apparent that the City had

other disciplinary options short of termination to apply to Sgt. Hill's case especially considering that he is a long term sergeant who has previously held special assignments of trust and who consistently received excellent performance evaluations.

OPINION

The basic issue presented herein is whether the City had just cause to terminate the Grievant and if not, what is the appropriate remedy. The just cause standard requires clear and convincing proof that the employee has committed the alleged offense and the penalty imposed is warranted under the circumstances presented. Therefore, the City had to satisfy its burden of proving by clear evidence that the Grievant engaged in the alleged misconduct and that his termination was warranted.

As indicated in Chief Horne's disciplinary notice to the Grievant dated January 8, 2013, Sgt. Hill was charged with having violated the department's rules and regulations regarding Conduct Unbecoming an Officer and as the Chief stated the most serious violation being one of the department's sexual harassment policy. The Chief as well as Captain Young stated that the Grievant was terminated for sexually harassing Officer Greeno by referring to her as "Whoregan." The Chief charged Sgt. Hill with creating a hostile work environment by unfairly singling her out and criticizing her work performance. Sgt. Hill was also found guilty of participating in jokes about Officer Greeno and Randy, the janitor.

After a careful review of the record presented, this arbitrator must find that the Grievant inappropriately referred to Officer Morgan Greeno as "Whoregan." The Grievant admits that he referred to Officer Greeno as "Whoregan." Although Sgt. Hill claims that he inadvertently made the "Whoregan" remark, this arbitrator would have to

agree with the finding made by Captain Young who stated that incorporating the word "whore" with Officer Greeno's first name, Morgan, has to be considered more than a mere slip of the tongue or a simple mistake made by Sgt. Hill. As Lt. Ring stated in his report, the term "whore" does not just come out of one's mouth as a "slip of the tongue." Although there was no evidence indicating that the Grievant ever called Officer Greeno "Whoregan" on any other occasion, Sgt. Hill acknowledged that he has heard other officers refer to Officer Greeno in that manner. There is every indication that the Grievant intentionally referred to Officer Greeno as "Whoregan" and that he did so in front of about a dozen officers who were present in the roll call room on November 13, 2012. Several other officers stated to Lt. Ring during his investigation of the incident that they had overheard the "Whoregan" remark made by Sgt. Hill. Therefore, this arbitrator must find that the Grievant engaged in totally improper conduct towards Officer Morgan Greeno when he deliberately referred to her as "Whoregan."

The Union in its vigorous defense of Sgt. Hill's misconduct in this case argues that the "Whoregan" remark was not that serious because Officer Greeno herself has engaged in off-color joking around with the officers on her shift. The evidence did show that Officer Greeno actively participated in the joking about the alleged relationship between herself and Randy, the building janitor. It is also evident that Officer Greeno has teased the male officers with various vulgar remarks with reference to their sexual history. However, it was established that Officer Greeno was deeply offended by Sgt. Hill referring to her as "Whoregan" in front of other officers who were present in the roll

call room. Officer Greeno during her testimony indicated that she found the "Whoregan" remark as being completely disrespectful. Lt. Ring indicated in his investigative report that Officer Greeno was "visibly upset" when he spoke to her about the incident. It is evident therefore that although Officer Greeno herself has engaged in off-color banter with her fellow officers at times, it is clear that Sgt. Hill's reference to her as "Whoregan" was offensive to Officer Greeno and embarrassed her in front of the other officers who were present in the roll call room. For such disrespectful conduct exhibited towards Officer Greeno, Sgt. Hill was deserving of a severe disciplinary penalty.

This arbitrator must also find that the Grievant was guilty of failing to properly carryout his supervisory duties as sergeant by not stopping the unwelcome remarks being made by other officers about Officer Greeno. The evidence showed that officers on Sgt. Hill's shift would frequently make disrespectful remarks about Officer Greeno during roll call. These included remarks that she was having an affair with the building janitor and had become pregnant. While there was no clear evidence that Sgt. Hill ever made any of these remarks himself, it is evident that the disrespectful remarks were made by other officers in his presence. Sgt. Hill admitted that he has heard such remarks about a fictitious relationship between Officer Greeno and the custodian. The Grievant also admitted that he never intervened in an attempt to stop the officers from making the improper remarks. Officer Greeno testified that the comments concerning her having a child with the building maintenance custodian had been going on for some time and that Sgt. Hill had failed to address the matter even after she attempted to let everyone know

that the remarks were no longer being taken as a joke. Although Sgt. Hill did not recall ever hearing Officer Greeno indicate that the remarks were unwanted, it should have been apparent to him given his supervisory authority that such vulgar comments concerning Officer Greeno were totally inappropriate. As Lt. Ring stated, the department cannot have a supervisor who permits things to happen and then expect him to have control over the subordinates he supervises. By allowing patrol officers on his shift to continue to make inappropriate remarks about Officer Greeno, it must be held that Sgt. Hill failed to properly carryout his supervisory duties as a sergeant in the department.

Therefore, this arbitrator finds that it was clearly established that the Grievant engaged in conduct unbecoming an officer in the instant case. The evidence shows that the Grievant inappropriately referred to Officer Greeno as "Whoregan." Contrary to the Grievant's claim, the combination of the words "whore" with Officer Greeno's first name, Morgan, has to be considered to be more than a mere slip of the tongue. Rather, the evidence showed that Sgt. Hill deliberately made the "Whoregan" remark in front of other officers who were present at roll call in order to embarrass Officer Greeno. The Grievant was also guilty of failing to carryout his supervisory duties as sergeant by allowing improper remarks to be made about Officer Greeno and the building custodian by the other patrol officers on his shift. The Grievant's actions in this case violated the department's rule which prohibits officers from engaging in acts that "demean" another employee. As a result, this arbitrator must find that the City had just cause to impose severe discipline against Sgt. Hill in this case.

This arbitrator however cannot find from the record before him that the Grievant was guilty of violating the police department's Sexual Harassment Policy as claimed by the City. The Chief indicated that the most "serious violation" which the Grievant committed in this case was that he violated the department's Sexual Harassment Policy. The Chief testified that he based his conclusion solely on Sgt. Hill's calling Officer Greeno "Whoregan." It is clear however that this one time "Whoregan" remark made by Sgt. Hill cannot reasonably be construed as constituting an improper act of sexual harassment under the department's policy.

The department's Sexual Harassment and Hostile Work Environment Policy clearly states that "a single incident" will not be sufficient to create a hostile work environment. Sexual harassment under that policy is defined as conduct that is "repeated..." The evidence in this case establishes that Sgt. Hill made the "Whoregan" remark on only one occasion, November 13, 2012. Even Officer Greeno acknowledged that she never heard Sgt. Hill make this remark at any other time. All of the patrol officers who were interviewed by Lt. Ring during the investigation of the incident confirmed that they had never heard Sgt. Hill make the "Whoregan" remark at any other time. Therefore, it must be concluded that Sgt. Hill's inappropriate "Whoregan" remark was only made once and never repeated by him. As such, it cannot be said that Sgt. Hill violated the department's policy regarding sexual harassment or creating a hostile work environment.

It is also important to recognize here that the evidence fails to clearly demonstrate that Sgt. Hill ever engaged in the joking around which took place about Officer Greeno allegedly having a fictitious affair with the building janitor. Testimony from other officers including Officers Brian Young, Darin Lawrence and Andrew Welch established that it was only the other officers on the shift who teased Greeno in this manner. Officer Greeno did claim that Sgt. Hill participated in this on-going banter. However each of the other officers who were interviewed by Lt. Ring including Sgt. Harmon provided statements that they never heard Sgt. Hill make any inappropriate comments about Officer Greeno having a fictitious relationship with Randy, the building janitor. In that there is no clear evidence showing that Sgt. Hill participated in this kind of teasing, it cannot be said that he in any way created a hostile work environment for Officer Greeno. Again, it should be reiterated that under the department's policy, Sgt. Hill's one time reference to Officer Greeno as "Whoregan" cannot be construed as creating a hostile work environment for her.

This arbitrator also does not find any merit to the City's claim that Sgt. Hill singled out Officer Greeno and subjected her to unwarranted criticism about her job performance. Officer Greeno in her supplement to her original complaint stated that she was being held to a different standard than others on her shift. However, there was no other evidence produced to support Officer Greeno's claim. Even Lt. Ring during his investigation of Greeno's complaint never made any determination that Sgt. Hill was treating her differently than others on his shift. In Sgt. Hill's evaluation of Officer

Greeno dated August 11, 2012, he generally gave her satisfactory ratings indicating her strengths were her eagerness to learn and her dependability. There simply was insufficient evidence presented to indicate in any way that Sgt. Hill treated Officer Greeno in a disparate manner as compared to other officers on his shift.

This arbitrator is compelled to address another allegation made by the City which came up late in this case. The City produced another officer, Candice Paul, in an attempt to establish that the Grievant also treated her in an unfair manner. Officer Paul, who has been on the police force for approximately two years, testified that at one point she served on the second shift under Sgt. Hill. According to Ms. Paul, she believed the evaluations which she received from Sgt. Hill were unreasonable. Ms. Paul also indicated that she was still kind afraid of working for Sgt. Hill. However, Officer Paul admitted that she could not say that Sgt. Hill was treating female officers differently than the male officers. Officer Paul also indicated that she learned a lot from Sgt. Hill and he gave her good advice. It should be noted that Officer Paul never made any formal accusation of wrongdoing on the part of Sgt. Hill and there was never an investigation by the department of his treatment of Officer Paul. Therefore, this arbitrator must find that the testimony of Officer Paul falls well short of that needed to establish that Sgt. Hill treated female officers more harshly than he did male officers.

In summary, this arbitrator finds from the evidence presented that the Grievant committed a serious violation of departmental rules during a roll call on November 13, 2012 when he referred to Officer Morgan Greeno as "Whoregan." The evidence clearly

establishes that Sgt. Hill deliberately made the "Whoregan" remark in front of other patrol officers. As stated by Lt. Ring, the term "whore" does not just come out of one's mouth as a "slip of the tongue." It was shown that Officer Greeno was offended and embarrassed by the remark. The Grievant also was guilty of failing to carry out his duties as a sergeant on the midnight shift in not putting an end to unwanted comments made by other officers about Officer Greeno having a relationship with Randy, the building custodian. However, this arbitrator must find that the evidence fails to clearly demonstrate that Sgt. Hill violated the department's policy regarding sexual harassment. As the policy states, a one time remark such as calling Officer Greeno "Whoregan" is insufficient to establish a case of sexual harassment. Moreover, the evidence also did not show that Officer Greeno was treated unfairly by Sgt. Hill who provided her with satisfactory evaluations. The City simply failed to clearly prove that Sgt. Hill created a hostile work environment for Officer Greeno.

In that not all of the charges brought against Sgt. Hill were clearly established in this case, the discharge penalty imposed must be set aside. As a result, the Grievant is to be immediately reinstated to his previous sergeant position with full seniority. However with respect to the proven charges against Sgt. Hill, this arbitrator finds that a severe disciplinary penalty is in order. The City cited a prior arbitration decision concerning the department's Discipline Matrix Guidelines. This arbitrator would agree that the Discipline Matrix should be applied in this case. As indicated, the evidence here shows that the Grievant engaged in conduct unbecoming an officer which is a Class C offense

by making a disrespectful remark regarding Officer Greeno by calling her "Whoregan." It is apparent that this is the Grievant's second Class C offense within a very short period of time. As indicated in the prior arbitration, the Grievant committed a similar offense by not treating Sgt. Harmon in a respectful manner which resulted in a ten day suspension. The Discipline Matrix provides that for a second offense of this type, a "level four or five" form of discipline would be in order. Under the Matrix, this would mean that the discipline could range from a 3-10 day suspension up to termination.

This arbitrator finds from the entire record presented including Sgt. Hill's prior disciplinary record that it would be appropriate that the termination penalty imposed be reduced to a disciplinary suspension. As indicated, the instant matter involved Sgt. Hill committing a second serious offense wherein he exhibited a complete lack of respect for another officer. The prior case was especially appalling considering that Sgt. Hill dispersed confidential medical information about a newly promoted sergeant as having been in a mental institution and then placing his .45 caliber pistol in his mouth. Likewise in the instant matter, Sgt. Hill showed a complete lack of respect for Officer Greeno by calling her "Whoregan" in front of other officers. Sgt. Hill must bear responsibility for his actions which precipitated the chain of events which led to his termination. As a result, a lengthy disciplinary suspension is warranted. There is to be no lost wages provided in this case. Such a lengthy disciplinary suspension will serve to impress upon the Grievant that at all times he is to show complete respect for other officers in the

department. In that the grievance is not being upheld or denied in its entirety, it would be appropriate for the parties to share equally in the cost of this arbitration.

A W A R D

The grievance is granted in part. The City had just cause to discipline Sgt. David Hill for his disrespectful conduct in referring to Officer Greeno as "Whoregan" in front of other officers. The Grievant was also guilty of failing to carryout his supervisory duties to stop other officers from making inappropriate remarks about her. However, the evidence failed to clearly demonstrate that Sgt. Hill sexually harassed Officer Greeno in violation of departmental policy. Therefore for the reasons indicated, the termination is to be reduced to a disciplinary suspension. The Grievant is to be immediately reinstated to his former sergeant position with full seniority. However, there is to be no lost wages provided in this case.

AUGUST 29, 2013

James M. Mancini /s/
JAMES M. MANCINI, ARBITRATOR