

IN THE SUPREME COURT OF OHIO

OHIO PATROLMEN’S BENEVOLENT )  
ASSOCIATION, ) Case No.: 2015-1581  
 )  
and )  
 )  
DAVID HILL, ) On Appeal from the Cuyahoga County  
 ) Court of Appeals, Eighth Appellate District  
 )  
Appellants, ) Court of Appeals  
 ) Case No.: CA-14-102282  
vs. )  
 )  
CITY OF FINDLAY, )  
 )  
Appellee. )

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BRIEF ON THE MERITS  
OF APPELLEE CITY OF FINDLAY

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## INTRODUCTORY STATEMENT

This matter arises from an Application to Vacate an Arbitration Award under R.C. 2711.10(D) filed by the City of Findlay (Findlay). This statute permits a court to vacate an award issued in binding arbitration when the arbitrator exceeds his or her authority as provided by a Collective Bargaining Agreement (CBA). The Management Rights clause preserves for Findlay the exclusive right, “to develop, revise, or eliminate work practices and procedures and rules in the operation of the Department of Police and to maintain discipline”. (Appellants’ Supplement, Pgs. 4-5, 38-39). Section 10.03 of each CBA (The Appellant attached to its Appendix both the 2011-2012 and the 2013-2015 contracts) authorizes Findlay to make any changes to the Police Department Rules and Regulations, and Section 10.02 authorizes the OPBA to propose changes to the Labor-Management committee meeting. (Appellants’ Supplement Pgs. 8 and 42). Section 10.01 permits the OPBA to object to the imposition of any new rule or policy by filing a grievance in accordance with the grievance procedure. *Id.*

Findlay added rules, pursuant to this delegation of rulemaking authority, which predetermine discipline based on the severity and frequency of infractions. (Appellees Appendix, Pgs. 21 to 33). The discipline mandated is set forth in a disciplinary matrix (Matrix) which became effective in March of 2012. No objection to creation of the new rules or the Matrix was ever made by the OPBA nor was a grievance filed. Furthermore, the evidence indicates that the OPBA participated in creating the Matrix, and did not seek to negotiate changes in Article 10 nor to limit the contractual authority of the Matrix.

The Appellant, David Hill, was disciplined for Conduct Unbecoming an Officer for misconduct occurring on July, 27, 2012. He was issued a 30 day suspension with 15 days held in abeyance. The matter proceeded to arbitration. On January 1, 2013 Arbitrator Jonathan Klein

reviewed the discipline, found Hill's conduct to be unbecoming, and reduced the suspension to 10 days, because it was the maximum amount permitted by the Matrix. Klein's award unequivocally stated: "under the principles of just cause, the City cannot simply pick and choose when it will apply the Matrix to a particular infraction warranting discipline." (Opinion and Award, Jonathan Klein, Appellee's Supplement Pg. 19) The Appellants did not object to the use of the Matrix in reducing the penalty.

On January 8, 2013, Hill was once again charged with several rule violations including Conduct Unbecoming an Officer. Arbitrator James Mancini found Hill's conduct was unbecoming and that it was the second such violation in a short time. (Appellants' Appendix, Pgs. 66-67). Mancini noted serious discipline was required, but refused to apply the unambiguous language in the Matrix. (Mancini Opinion and Award, Appellants Supplement, Pg. 65). Instead, he fashioned his own remedy which departed from the unambiguous penalties set forth in the Matrix. Furthermore, in applying his own remedy, Arbitrator Mancini ignored Arbitrator Klein's interpretation of the CBA which recognized that just cause for the penalty to be imposed was predetermined, and that the Matrix must be strictly applied as required by the CBA.

The Appellants' Proposition of Law in effect asks this Court to rewrite the CBA in the face of clear language limiting an arbitrator's authority which it cannot do. The Court is only authorized to determine and enforce the intent of the parties, which by its clear language is to establish predetermined disciplinary penalties to be uniformly applied based on the severity and frequency of the violations.

## STATEMENT OF CASE AND FACTS

### **THE CONTRACT'S REQUIREMENTS GOVERNING THE DISCIPLINE OF OPBA MEMBERS INCORPORATING THE DEPARTMENT'S RULES AND REGULATIONS.**

The CBA between the Ohio Patrolmen's Benevolent Association (OPBA) and the City of Findlay contains provisions governing the discipline of OPBA members. The key provision in the 2011-2012 CBA is Section 39.04. It states:

39.04 Discipline shall be imposed only for just cause. The specific acts for which discipline is being imposed, and the penalty proposed, shall be specified in the Notice of Discipline. The Notice served on the employee shall contain a reference to dates, times and places of events giving rise to the discipline, if possible.

(Appellants' Supplement Pg. 26).

The CBA governing employment relations in the 2013-2015 CBA contained the same command that, "Discipline shall be imposed only for just cause," but added procedure to be followed when appealing the discipline. (Appellants' Supplement Pg. 63).

Article 10 in each of the contracts contains language governing rules and regulations.

Article 10 states:

#### **ARTICLE 10                    RULES AND REGULATIONS**

10.01 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.

10.02 When either party to this Agreement proposes a change to the Police Department Rules and Regulations, the proposing party will add the proposed change(s) to the discussion agenda of the next Labor-Management Committee meeting.

10.03 If the Employer makes any changes to the Police Department Rules and Regulations, the Employer shall notify the Union in writing at

least fourteen (14) days prior to the proposed effective date(s) of any such change(s), except in emergency situations. Written notifications shall include the Section(s) being changed, and the text of the change(s). If the emergency clause of this Section is invoked, then the Employer will provide the Union with written notification of the rules change(s) when the emergency has abated. If the emergency clause of this Section is invoked, then the Employer will provide the Union with written notification of the rules change(s) when the emergency has abated.

(Appellants' Supplement, Pgs. 8 and 42).

In Article 10 the OPBA agreed to comply with all Findlay Police Department Rules and Regulations, including those relating to conduct and performance. The Article permits Findlay to make changes in its Police Department Rules and Regulations as long as the Union is notified fourteen (14) days prior to the effective date. Furthermore, any newly established rules are subject to the grievance procedure if they violate the CBA.

In March of 2012, the Findlay Police Department amended its Rules and Regulations to add Disciplinary/Recognition Procedures. (Appellee's Appendix, Pgs. 21 to 33). Included in the Procedures is a disciplinary matrix that predetermines discipline based on the severity of the infraction and frequency of prior discipline. (Appellee's Appendix, Pg. 32). The purpose of the Matrix and the fact that it was created in consultation with the Union was described by Chief Horne of the Findlay Police Department as follows:

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

(R. 13(B) Record of Proceedings, Volume I, Tr. at Pg. 25).

The 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. (Appellee’s Appendix, Pg. 32). A level of disciplinary action is then assigned to the offense, based on its classification and the number of prior infractions. The Matrix provides as follows:

**MATRIX LAYOUT**

<b>Class</b>	<b>Step 1</b>	<b>Step 2</b>	<b>Step 3</b>
A	Level 1	Level 1 or 2	Level 2
B	Level 2	Level 3	Level 4
C	Level 4	Level 4 or 5	Level 5
D	Level 5		

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

<b>Memorandum of Discipline</b>	<b>Not Considered After</b>
Verbal reprimand	1 year
Written reprimand	2 years
Suspension, 1-4 days	3 years
Suspension, 5 days or more	5 years

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

<b>Level</b>	<b>Action</b>
1	Informal Counseling or Verbal Reprimand
2	Written Reprimand
3	1-2 Day Suspension and/or Loss of Leave
4	3-10 Day Suspension and/or Loss of Leave
5	Termination

**THE UNDERLYING FACTS SUPPORTING THE DISCIPLINE OF DAVID HILL**

David Hill’s disciplinary issues began shortly after adoption of the Matrix. On July 6, 2012 Hill received a written reprimand for applying a taser to a fourteen year old boy; while the boy’s father (another Findlay police officer) made a video of the tasing. The video was later posted on Facebook. Hill was the Department’s taser instructor at that time and defended his action by claiming the father gave permission. The written reprimand was for violating the Department’s social media policy regarding its weaponry.

In the summer of 2012, Hill was charged with Conduct Unbecoming an Officer, a Class C offense. The violation occurred at roll call on July 27, 2012. Daniel Harmon was newly appointed to sergeant, and assigned to Sergeant Hill’s shift. Hill verbally proclaimed his displeasure with the promotion and assignment. He told the assembled patrolmen that Harmon was once hospitalized for mental issues. He then expressed his unhappiness in a non-verbal manner by removing his handgun from its holster, placing the barrel in his mouth, and feigning suicide. Charges were subsequently brought against Hill including Conduct Unbecoming an Officer. (Opinion and Award of Jonathan Klein, Appellee’s Supplement Pg. 1).

The usual investigation was conducted and Hill was issued a 30-day suspension with 15 days held in abeyance. Hill appealed the discipline to binding arbitration and a hearing was scheduled for November 28, 2012. Patrolman Morgan Greeno, who had less than one year on the Department, was one of the police officers in attendance at the July 27, 2012 roll call. She was

ordered by the Department to appear at the upcoming arbitration to testify regarding the charges brought against Sergeant Hill.

Hill again engaged in serious misconduct on November 13, 2012. Sergeant Harmon conducted roll call that evening under Hill's supervision. At the conclusion of the business portion the discussion turned to the upcoming OPBA Christmas party. Hill, who was President of the Lodge, was asked who was on the planning committee. He glanced around the room and pointing to Patrolman Morgan Greeno said "Whoregan". (Appellants' Appendix Pg. 46).

Patrolman Greeno filed a harassment complaint with the Department. She met with Lieutenant Ring who testified that she was visibly upset and angry. (Appellants' Appendix, Pg. 47). She mentioned to Lieutenant Ring that the comment may have been in retaliation for her impending testimony in Hill's disciplinary action for demeaning Sergeant Harmon. (Opinion and Award of James Mancini, Appellant's Appendix Pg. 47)

On November 28, 2012 an arbitration was held for the demeaning of Sergeant Harmon. On January 1, 2013, Arbitrator Klein issued an Opinion and Award finding Hill guilty of Conduct Unbecoming an Officer, a Class C violation under the Matrix. (Appellee's Appendix, Pg. 32). Klein reviewed the penalty imposed (30 day suspension with 15 days held in abeyance) and the Matrix. He found that the maximum penalty prescribed for a first Class C violation was a ten day suspension. He therefore reduced the penalty imposed by the Findlay Police Department to ten days noting:

The arbitrator determined that under the principles of just cause, the City cannot simply pick and choose when it will apply the Discipline Matrix to a particular infraction warranting discipline.

(Arbitrator Klein Opinion and Award, Appellee's Appendix, Pg. 19).

Meanwhile, an investigation was conducted by Lieutenant Ring into the “Whoregan” incident. Captain Sean Young reviewed Ring’s report. He determined use of the word “Whoregan” was not a slip of the tongue as Hill portrayed. He found that the “Whoregan” remark gave rise to the question of retaliation against Patrolman Greeno as she was scheduled to testify against Sergeant Hill. (Appellee’s Appendix, Pg. 34) Captain Young found that Hill’s conduct was uncorrectable and recommended termination. The matter was then reviewed by Chief Horne. (Appellees Appendix Pg. 40, 41-46). Chief Horne noted that Hill told Lieutenant Ring that other officers on the shift called her “Whoregan” so much that the word just slipped out. (Appellee’s Appendix’ Pg. 42)

Chief Horne issued a Notice of Discipline to Hill on January 8, 2013 informing him that he was being charged with several rules violations including Conduct Unbecoming an Officer, a Class C offense. *Id.* Chief Horne had recently reviewed the Opinion and Award of Arbitrator Klein stating that the Matrix must be strictly applied. Because this was Hill’s second Class C offense, the Chief was obligated to choose discipline at Level 4 (3 to 10-day suspension) or Level 5 (termination). (Appellee’s Appendix, Pg. 44) According to the Matrix this decision could only be made by Chief Horne. He chose termination. (See Matrix, Appellees Appendix at Pg. 32) Hill appealed the decision to the Safety Service Director who affirmed the Chief’s decision on January 25, 2013. (Appellee’s Appendix, Pg. 47). Hill subsequently filed a grievance and proceeded to binding arbitration.

A hearing was conducted by Arbitrator James Mancini on May 8, and 21, 2013. Mancini found that Hill intentionally conjoined the word “whore” with “Morgan,” and noted Hill heard

other officers make disrespectful remarks about Officer Greeno in his presence. (Appellants' Appendix, Pg. 61). Hill was found to have violated the following rules:

- The Grievant engaged in conduct unbecoming an officer by deliberately referring to Officer Greeno as "Whoregan";
- The Grievant failed to carry out his supervisor duties by allowing improper remarks to be made about Officer Greeno;
- The Grievant violated department rules, which prohibit officers from engaging in acts that demean other employees.

See Mancini Opinion and Award, Appellants' Appendix, Pg. 62.

As a result, Arbitrator Mancini declared that the City had just cause to impose severe discipline. *Id.* at 65,66.

Specifically, Arbitrator Mancini found this to be the Grievant's second Class C offense within a very short time. He acknowledged that permissible discipline under the Matrix was either Step 4 or Step 5, and agreed the Matrix should be applied. (Appellant's Supplement Pg. 66) But the arbitrator did not apply the discipline expressly required by the Matrix. He instead fashioned his own remedy, and returned Hill to duty without back pay. (Appellants' Appendix, Pg. 68)

The City of Findlay appealed the matter as permitted by 2711.10(D). The Cuyahoga County Court of Common Pleas vacated the Award finding that the Arbitrator exceeded his authority. The Eighth District Court of Appeals affirmed the Common Pleas decision in a reasoned and detailed decision. (Appellants' Appendix, Pgs. 3 to 43).

## LAW AND ARGUMENT

### Appellants' Proposition of Law No. 1:

ANY LIMITATION ON AN ARBITRATOR'S ABILITY TO REVIEW AND MODIFY DISCIPLINARY ACTION UNDER THE "JUST CAUSE" STANDARD MUST BE SPECIFICALLY BARGAINED FOR BY THE PARTIES AND CONTAINED WITHIN THE FOUR CORNERS OF THE COLLECTIVE BARGAINING AGREEMENT.

**THE OHIO PUBLIC EMPLOYEES COLLECTIVE BARGAINING ACT WAS ADOPTED TO PROVIDE PUBLIC EMPLOYERS AND THEIR EMPLOYEES WITH THE RIGHT TO NEGOTIATE WAGES HOURS TERMS AND CONDITIONS OF EMPLOYMENT, INCLUDING DISCIPLINARY RULES AND REMEDIES LIMITING THE AUTHORITY OF ARBITRATORS OR OTHER THIRD PARTY NEUTRALS.**

The Ohio General Assembly enacted the Ohio Public Employee Collective Bargaining Act, R.C. Chapter 4117, to provide Ohio public employees with the right to organize and to negotiate wages, hours, terms and conditions of employment. R.C. 4117.08(A). Its provisions are to be liberally construed for the purpose of promoting orderly and constructive relationships between public employers and their employees. R.C. 4117.22. The Act relieved the General Assembly and the courts of Ohio from the burden of continually legislating or adjudicating public employment issues. Under the Act public sector labor disputes are now resolved by the parties themselves either in negotiations or the dispute mechanism of their choice. The Act has worked remarkably well, and was recently given overwhelming approval by Ohio voters.

Matters such as wages, health insurance, vacations, holidays, sick time, probationary periods, and tenure are now the subject of contract and not legislation or litigation. The contracting parties are free to negotiate their own disciplinary and grievance procedures and can base discipline on just cause, good cause, or the whim of the appointing authority if they choose.

The Act requires all agreements to contain a grievance procedure, but permits the parties to determine whether unresolved grievances and disputed contract interpretations will be

resolved in final and binding arbitration. (R.C. 4117.09(B)(1)). If the parties choose to refer disputes to binding arbitration, they are subject solely to their chosen procedure and cannot seek relief in any other forum. (R.C. 4117.10(A)). The only participation permitted by Ohio courts is to review of the arbitrator's decision under the strict criteria set forth in R.C. Chapter 2711.

The Act does not contain any other instructions as to what the agreement shall contain except for declaring certain topics to be non-negotiable. R.C. 4117.10. With regard to discipline, the Act permits the parties to fashion their own procedures, standards, and to restrict the authority of an arbitrator in any way they choose, or not employ an arbitrator if they wish. Most agreements instruct arbitrators that they cannot amend or modify the contract in any way. The primary function of arbitrators and courts in resolving labor disputes is to interpret the intent of the parties from the contract language they chose.

**ARBITRATION AWARDS ARE UPHOLD WHEN THE AWARD DRAWS ITS ESSENCE FROM THE AGREEMENT, BUT ARE ROUTINELY VACATED WHEN THE AWARD EXCEEDS THE AUTHORITY GRANTED BY THE CONTRACT.**

The Appellants report a multitude of case law holding that courts are required to defer to the decision of arbitrators if the award “draws its essence” from the contract. This rule is widely applied. Deference is granted because arbitration “provides the parties with a relatively speedy and inexpensive means of conflict resolution and has the additional advantage of unburdening crowded court dockets. *Mahoning Cty. Bd. of Mental Retardation & Dev. Disabilities v. Mahoning Cty. TMR Edn. Assn.* (1986), 22 Ohio St.3d 80, 83.

The Eighth District Court of Appeals explained the policy reasons for granting such deference in *Motor Wheel Corp. v. Goodyear Tire & Rubber Co.* (8<sup>th</sup> Dist. 1994), 98 Ohio App.3d 45, 52 as follows:

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. Bd. of Teamsters, Local 731*, 990 F.2d 957 (7<sup>th</sup> Cir. 1993).

This Court has held that when the parties agree to use binding arbitration to resolve their disputes they also agree to accept the arbitrator's findings of fact, interpretations of the agreement, and legal analysis, even if incorrect. The Court stated as follows:

"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 Authority v. Amalgamated Transit Union, Local 627* (2001), 91 Ohio St.3d 108, 110.

It is also widely held that a serious mistake by an arbitrator in fact or law is not sufficient reason to vacate an award. In *Cedar Fair, LP v. Falfas*, 2014-Ohio-3943, 140 Ohio St.3d 447 the Court stated that, "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 "it is not enough \* \* \* to show that the [arbitrator] committed an error - - or even serious error." *Id.*, at ¶6, p. 449.

When explaining the extent of the deference granted to Arbitrators courts are careful to acknowledge that an arbitrator is a creature of the contract from which the authority to resolve disputes is derived. Arbitrators act within their authority to craft an award so long as the award

draws its essence from the contract. *Cedar Fair*, at ¶7, 449. But, an award will be consistently vacated when it departs from the essence of the agreement. This Court has instructed that an “award departs from the essence of the contract when: (1) the award conflicts with the express terms of the agreement, and/or (2) the award is without rational support or cannot rationally be derived from the terms of the agreement.” *Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emps. Assn., Local 11, AFSCME, AFL-CIO* (1991), 59 Ohio St. 3d 177. The United States Supreme Court stated that “an arbitrator is confined to interpretation and application of the contract; he does not sit to dispense his own brand of industrial justice. *Id.* at 180 quoting *United Steelworkers of America v. Ent. Wheel and Car Corp.* (1960), 363 U.S. 593 at 597.

**WHEN DISCIPLINE UNDER A CBA IS BASED ON THE UNLIMITED AND UNDEFINED STANDARD OF JUST CAUSE AN ARBITRATOR IS FREE TO LOOK OUTSIDE THE AGREEMENT FOR GUIDANCE ON DEFINING THE TERM, AND IS AUTHORIZED TO FASHION AN AWARD WHICH DECIDES WHETHER THE EVIDENCE SUPPORTS THE CHARGE AND WHETHER THE IMPOSED PENALTY IS APPROPRIATE.**

In *Board of Trustees of Miami Township v. Fraternal Order of Police, Ohio Labor Council* (1998), 81 Ohio St.3d 269 it was held that when discipline under a CBA is premised solely on just cause, and just cause was left undefined, the arbitrator is authorized to determine two factors: (1) has the commission of the offense been adequately established by the proof; and, (2) is the penalty imposed reasonable in light of the nature, character, and gravity of the offense. *Id.* at 272. When discussing the appropriateness of the discipline under just cause, this Court recognized that “without further instruction from the CBA, the arbitrator must be able to review the type of discipline.” *Id.* Since the discipline issued in Miami Township was based solely on just cause, and because the CBA offered no other instructions, the arbitrator in Miami Township was authorized to reduce the discipline imposed from termination to suspension, and the courts must affirm the decision.

In 2007, this Court revisited the manner in which just cause analysis is to be applied in a disciplinary action. *Summit County Children Services Bd. v. Communication Workers of America, Local 4546*, 2007-Ohio-1949, 113 Ohio St.3d 291. The applicable CBA stated, “No person shall be reduced in pay or position, suspended or discharged, except for good cause, nor shall the Employer take any form of corrective action against any employee except for good cause.” *Id.* ¶3. The CBA further stated that all corrective action must be administered in a progressive manner. *Id.*

An employee was charged with violating several workplace rules and terminated. *Id.* at ¶6. The matter proceeded to arbitration and the arbitrator found no just cause for two of the charges, but did find that the grievant admitted to falsifying time cards. *Id.* at ¶8. The arbitrator then applied the “Daugherty” test for just cause. This test, devised by a well-respected arbitrator, is widely used in arbitral law to determine the existence of just cause. *Id.* at ¶9. It poses 7 questions that must be answered in the affirmative to establish just cause. *Id.* at fn 1. The arbitrator in Summit Children Services found that the seventh inquiry was not satisfied and the employer therefore lacked just cause for termination. *Id.*

The Employer sought vacation of the award through R.C. 2711.10 because the arbitrator used the “Daugherty” test instead of applying the plain meaning of “good cause” which was undefined by the CBA. The common pleas court vacated the arbitrator’s award because it applied the “Daugherty” test, and the Summit County Court of Appeals affirmed. Each court held that the arbitrator was confined to the ordinary definition of “good cause” and application of the Daugherty test exceeded his authority. On appeal this Court reinstated the arbitrator’s decision finding that the Daugherty test is part of the plain and ordinary meaning of good cause

in labor arbitrations, and the parties should have expected an arbitrator to use industrial common law for guidance in determining the definition of just cause. *Id.* at ¶¶15, 17.

This Court cited with full approval the matter of *Conoco, Inc. v. Oil, Chem. & Atomic Workers International Union* (N.D. Okla. 1998), 26 F.Supp.2d 1310. *Conoco* provided background on the wide use of the Daugherty test describing it as appropriate in almost every just cause discharge matter. *Id.* at ¶16. Approving the arbitrators use of the Daugherty test, the *Conoco* court stated:

“[Because] the test was developed in 1972 and has apparently been widely used and relied upon since that time, the parties should have known in 1996 when they entered into the CBA that such a test might be used to interpret a phrase left undefined by the agreement. Thus, the arbitrator, in looking to [the Daugherty test for good cause], properly resorted to industrial common law or guidance in interpreting an undefined phrase.

*Conoco*, at ¶17.

This Court fully embraced the *Conoco* decision warning, “Given that the definition of ‘good cause’ can be nebulous and elusive, a consistent framework for determining good cause is critical.” *Id.* at ¶18. In final analysis, this Court stated:

Although we hold that the arbitrator’s use of the Daugherty test in this case was proper, we do not suggest that it is the only proper definition or that parties to a CBA are required to use the Daugherty test. But as the court in *Conoco* observed in rejecting the employer’s argument that it had not agreed to the test, 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.” 26 F.Supp.2d at 1317-1318.

**AN ARBITRATOR’S DISCRETION IN DISCIPLINARY MATTERS CAN BE LIMITED IN THE CBA BY RECOGNITION OF PREDETERMINED PENALTIES EITHER EXPRESSLY STATED IN THE CBA, ADOPTED BY REFERENCE, OR CREATED THROUGH A CONTACTUAL DELEGATION OF AUTHORITY.**

Realizing that the definition of just cause is indeed nebulous, some parties have amended contracts to restrict the authority of arbitrators. An acceptable way of limiting an arbitrator’s

discretion under just cause analysis is predetermining the penalty. By doing so, the second prong of just cause analysis, under *Miami Township, supra*, is removed from the arbitrator's consideration. Arbitrators' awards that do not strictly apply predetermined penalties as derived in a CBA are routinely vacated.

In *Summit County Board of Mental Retardation and Developmental Disabilities v. American Federation of State, County, and Municipal Employees* (9<sup>th</sup> Dist. 1998), 39 Ohio App.3d 175, an arbitrator was called upon to determine whether a bus driver could be terminated for the admitted failure to report an accident to the transportation supervisor. The driver said that she meant to report the damage but became distracted by severe domestic problems. *Id.* at 175-176.

Article V, Section 9(6) of the applicable CBA stated all accidents must be immediately reported to the police and to the Transportation Supervisor as well as all required paperwork completed as soon as possible, and that "Failure to do so will result in automatic dismissal." *Id.* at 177. The arbitrator, citing mitigating factors, including the grievant's domestic problems, reduced the termination to a suspension without back pay. *Id.* at 176. An application to vacate was filed by the employer pursuant to R.C. 2711 and the court found that the arbitrator exceeded his authority by not applying the predetermined penalty. The Ninth District Court of Appeals affirmed noting that none of the arbitrator's findings support his departure from the unambiguous terms of the CBA. *Id.* at 178.

This Court also held that an arbitrator's discretion in determining the appropriate penalty can be limited by the CBA, and that an arbitrator exceeds his authority by issuing an award that conflicts with the limitation. In *Ohio Office of Collective Bargaining v. Ohio Civil Service Employees Assn., Local 11, AFSCME* (1991), 590 Ohio St.3d 177 the Court was called on to

review a grievance arising from the termination of an aide employed by a facility for mentally challenged individuals. The grievant was terminated for abusing a patient.

The applicable CBA contained a disciplinary procedure that stated:

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

*Id.* at 182.

The arbitrator bifurcated the arbitration to first determine whether the patient was abused. Following the initial hearing the arbitrator found that abuse occurred. Instead of then halting the proceedings and affirming the termination as required by the CBA, the arbitrator heard additional evidence, which was found to mitigate the discharge, and reinstated the grievant. The Employer appealed under R.C. 2711 claiming the arbitrator exceeded his contractual authority. The Franklin County Court of Common Pleas agreed, and the Court of Appeals affirmed.

This Court granted jurisdiction recognizing that the central issue is whether the arbitrator exceeded his authority. Guidance regarding an arbitrator's obligations was found in *United Steelworkers of America v. Enterprise Wheel and Car Corp.* (1960), 363 U.S. 593 where the United States Supreme Court stated:

“..... an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.”

*Id.* at 597.

It was further recognized that an arbitrator's award must be given considerable latitude, but that the latitude is not unlimited. The arbitrator is confined to the interpretation and

application of the contract, but is without authority to disregard or modify plain and unambiguous provisions. *Ohio Office of Collective Bargaining*, supra, at 180; citing *Detroit Coil Co. v. Internatl. Assn. of Machinist and Aerospace Workers, Lodge No. 82* (CA Co., 1979), 594 F.3d 575.

This Court vacated the arbitrator's award finding that it violated the clear and unambiguous terms of the contract by grafting a just cause requirement onto the clause mandating termination for abuse of a patient. *Id.* at 182, 183. By doing so, the Court found, that the arbitrator created, in effect, a contract of his own, rather than applying the contract agreed to by the parties. *Id.* at 183.

The Fourth District Court of Appeals was confronted with a similar issue in *Hocking Technical College v. Hocking Technical College Education Association, CEA/NEA, et al.*, (1997), 120 Ohio App.3d 155. Article XII, paragraph 4 of the pertinent CBA stated:

Any employee accumulating five (5) unexcused absences in any consecutive sixty (60) calendar day period, or seven (7) unexcused absences in any consecutive 365 calendar day period will be subject to discharge for just cause.

*Id.* at 160.

The evidence established that the employee was tardy 29 times between September 21, 1993 and April 8, 1994 and absent without excuse seven times in the same period. The employee was discharged and grieved through binding arbitration. The Arbitrator, citing mitigating circumstances, reinstated the employee with back pay.

A motion to vacate was filed by the College pursuant to R.C. 2711.10, and the court of common pleas vacated the award. The Fourth District Court of Appeals affirmed, relying on *Ohio Office of Collective Bargaining*, supra, and its own decision in *Fraternal Order of Police*,

*Ohio Labor Council v. Mahoning County Sheriff's Department* (Mar. 22, 1995), 1995 Ohio App. LEXIS 1182, Mahoning App. No. 94 CA 81, unreported which states:

Where the collective bargaining agreement contains a provision that certain conduct will result in a specific discipline, an arbitrator must affirm the discipline once it has been determined that the violation occurred.

Because the award did not draw its essence from the agreement, it was vacated and termination was reinstated.

**PREDETERMINED PENALTIES APPEARING IN RULES AND POLICIES MUST BE APPLIED WHEN THEY ARE REFERENCED IN THE CBA OR ARE CREATED BY AN EXPRESS DELEGATION OF AUTHORITY IN THE CBA.**

The above cases clearly stand for the proposition that the contracting parties are free to predetermine just cause for the penalty to be imposed for particular infractions. In each of the cases, the penalty was expressly set forth in the CBA. However, express recitation of the penalties within the contract is not required to give predetermined penalties the force of contract. Arbitrators must apply predetermined penalties contained in policies and workplace rules that are created by reference or through an express delegation of authority by the CBA.

In *Cambridge v. AFSCME, Ohio Council 8, AFL-CIO, Local 236, et al.*, (5<sup>th</sup> Dist. No. 1999CA30), 2000 Ohio App. LEXIS 1587 the Guernsey County Court of Appeals enforced a work rule that required termination after three absences from work without leave or call-in notice. The rule was created by the employer, but was not contained within the four corners of the CBA. An employee was subsequently terminated for violating the rule. A grievance was filed and proceeded to binding arbitration. The arbitrator reduced the penalty to a five-day suspension due to several mitigating factors. The employer appealed. The Fifth District Court of Appeals vacated the award finding the workplace rule to be an integral part of the agreement pursuant to a provision in the CBA granting the, “full right and responsibility to direct the operations of the

department, to promulgate rules and regulations and to otherwise exercise the prerogatives of management.” *Id.* at Pgs. 3, 4. The court held:

When an agreement explicitly grants to management the sole right to establish work rules without consultation or consensus, an arbitrator may not rewrite them to fit his/her specific definition of just cause. The decision herein to disregard the clear findings of a work rule violation wherein the discipline was termination was in express conflict with the agreement. The power to modify a per se just cause rule cannot be read into the agreement. The arbitrator’s decision was not derived from the agreement. We further find the stipulation cannot rewrite the agreement. As previously quoted from Article 7, Section 7.3, Step 5, the arbitrator cannot “add to, subtract from, modify, change or alter” the agreement.

*Id.* at 6, 7.

In *City of Dayton v. AFSCME, Ohio Council 8*, 2005-Ohio-6392, Case No. 21092 (CA Montgomery County, 2005), the trial court vacated an arbitrator’s award ordering reinstatement of a terminated employee. The Court did so on the basis of civil service and workplace rules which were incorporated in the CBA by reference. The court found that the workplace rules reserved for the City the right to discharge the grievant. The grievant appealed the decision.

Upon review, the Montgomery County Court of Appeals reviewed the record and fully approved the propositions that workplace rules referenced in the CBA have the force of contract. *Id.* at ¶18. However, the court of appeals noted that the workplace rules identified dismissal as only one of a few available forms of punishment. *Id.* It did not command specific penalties for specific violations. Because the civil service/workplace rules identified misconduct that could possibly result in discharge, or possibly a suspension, it remained up to the arbitrator to determine whether the particular misconduct gave the City just cause to terminate the grievant. *Id.* at ¶19. (Emphasis original).

In *Bruno’s Inc. v. United Food and Commercial Workers Intl.* (11<sup>th</sup> Cir. 1998), 858 F.2d 1529 the employer adopted a policy setting forth discipline to be imposed when a cashier

neglected to charge customers for items on the lower compartments of shopping carts. Thirteen employees were suspended through use of undercover shoppers. The union took the matter to arbitration and the arbitrator found there was no just cause for discipline and wrote a new policy that was more to his liking. The employer appealed.

The Eleventh Circuit Court of Appeals vacated the arbitrator's award because the CBA gave *Bruno's* the right to establish and maintain reasonable rules and regulations governing the operations of its stores. Additionally, the court struck the arbitrator's attempt to amend the policy stating that no one other than *Bruno's* could create policy.

**THE FINDLAY POLICE DEPARTMENT ADOPTED SECTION 26.1.2, DISCIPLINARY/RECOGNITION PROCEDURES, OF ITS RULES AND REGULATIONS AND THE MATRIX CONTAINED THEREIN PURSUANT TO THE DELEGATION OF RULE MAKING AUTHORITY PROVIDED BY ARTICLE 10 OF THE CBA, AND THE PROCEDURES AND MATRIX CONTAINED THEREIN ARE NOW INCORPORATED INTO THE CBA BECAUSE THE OPBA FAILED TO EXERCISE ITS RIGHT TO GRIEVE OR OBJECT THEIR IMPOSITION AS REQUIRED BY ARTICLE 10.**

Both the Cuyahoga County Court of Common Pleas and the Eighth District Court of Appeals found the Matrix to be an integral part of the CBA. As such, each court determined that the arbitrator exceeded his authority by not applying the discipline required by the Matrix, and each court ordered that the Award be vacated.

The CBA contains two contractual provisions authorizing it to establish enforceable work rules. First, as noted by Arbitrator Klein, there is a Management Rights clause which reserves to Findlay the right to develop, revise, or eliminate work practices, procedures and rules in the operation of the Department of Police and to maintain discipline. This provision appears in both the 2011-2012 CBA and the 2013-2015 CBA. (Appellants' Supplement, Pgs. 4-5 and Pgs. 39-39).

In addition, in Article 10 the OPBA agreed to comply with Police Department and City of Findlay Rules and Regulations, including those relating to working conditions, conduct, and performance. Furthermore, the OPBA agreed to allow Findlay to make changes or write new rules as long as it receives notice at least 14 days prior to the effective date. The City agreed that newly created rules and regulations, which affect working conditions, conduct, and performance shall be subject to the grievance procedure if they violate the Agreement. Article 10, Rules and Regulations, states as follows:

#### ARTICLE 10                    RULES AND REGULATIONS

10.01 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.

10.02 When either party to this Agreement proposes a change to the Police Department Rules and Regulations, the proposing party will add the proposed change(s) to the discussion agenda of the next Labor-Management Committee meeting.

10.03                    If the Employer makes any changes to the Police Department Rules and Regulations, the Employer shall notify the Union in writing at least fourteen (14) days prior to the proposed effective date(s) of any such change(s), except in emergency situations. Written notifications shall include the Section(s) being changed, and the text of the change(s). If the emergency clause of this Section is invoked, then the Employer will provide the Union with written notification of the rules change(s) when the emergency has abated.

See, Appellants' Supplement, Pages 8 and 42.

Pursuant to the delegation of authority in Article 10, the Findlay Police Department adopted Section 26.1.2 Recognition/Disciplinary Procedures, which includes the Disciplinary Matrix. The effective date is March 1, 2012. There was no objection from the Union, and no

grievance was filed as permitted by Article 10. Furthermore, Article 10 of the 2011-2012 CBA remained unchanged in the 2013-2015 CBA.

The Purpose of the Disciplinary/Recognition Procedures is set forth at Section II as follows:

## II. PURPOSE

To 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. In addition, the directive will also establish the framework for recognizing exceptional employee achievement and heroism. (Emphasis Added).

(Appellee's Appendix, Pg. 21).

The Matrix is incorporated into the Disciplinary/Recognition Procedures at Section V.(B)(2) which states:

### 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).

A review of the Disciplinary/Recognition Procedures reveals that it contemplates the fact that most of its employees enjoy the benefits of a negotiated contract. The Procedure is careful recognize rights found in the CBA. Section V.(B) recognizes the distinction by reciting the basic tenets of disciplining OPBA members. The Procedure lists as one of its sources the CBA between Findlay and the OPBA. (Appellee's Appendix Pg. 21).

Section V.(B)(4) carefully delineates the appeal procedure contained in the OPBA contracts. Non-Union employees are provided a similar procedure which stops short of binding arbitration. Section V.(C)(4).

The Matrix is recited in its entirety at page 5 of this brief. It is attached in the City of Findlay's Appendix, at page 32. The critical portion of the Matrix states:

Level	Action
1	Informal Counseling or Verbal Reprimand
2	Written Reprimand
3	1-2 Day Suspension and/or Loss of Leave
4	3-10 Day Suspension and/or Loss of Leave
5	Termination

The Matrix unambiguously states that discipline will be imposed within the range of the indicated discipline level. Further, it provides that if more than one discipline level is indicated, the choice between the two is at the sole discretion of the Chief of Police based on the facts and history of the employee.

In that regard, the Chief of Police reviewed the investigation of Lieutenant Ring, and the recommendations of Captain Young, and decided that Hill's conduct was not correctable as the prior discipline had no effect on this type of behavior. (Appellee's Appendix, Pg. 43). In his concluding remarks, Chief Horne expressed concern over future treatment of Officer Greeno due to her pending testimony. He stated:

Further compounding this comment is the fact that Officer Greeno was set to be a witness against him in an arbitration hearing. This does appear that he was speaking from the heart and I believe the statement was what he thinks of her and how he would continue to think of her as a result. This appears to be retaliatory in nature. I also noted the discipline that is pending. This shows very poor judgment as well as a lack of personal discipline.

As a result, I recommend that his employment with the Findlay Police Department should be terminated.

Appellees Appendix, Pg. 40.

Consequently, when Arbitrator Mancini determined that Hill committed his second Class C violation his inquiry was nearly at an end. His only remaining authority was solely to determine that the Matrix was applied correctly.

**THE ARBITRATOR DID NOT POSSESS THE CONTRACTUAL RIGHT TO FASHION AN ALTERNATE REMEDY WHEN GRIEVABLE DISCIPLINARY RULES, PREDETERMINING THE APPROPRIATE PENALTY WERE INCORPORATED INTO THE CBA.**

The City and the Union negotiated and incorporated into the collective bargaining agreement the disciplinary rules and the resulting penalties for violations of these rules. Nothing is left to the arbitrator's judgment except determining whether the rules are violated.

This case is similar to that of *Chemineer, Inc. v. Local Lodge 225, International Association of Machinists and Aerospace Workers, AFL-CIO* (1983), 573 F.Supp.1 which should be followed:

...as Plaintiff points out, § 19.01(B) of the agreement herein specifically reserves for the company the "right to establish and require employees to observe Company Rules [and] to suspend, demote, discipline and discharge employees for just cause in line with this Agreement." Section 6.03, Step 4(E) of the agreement also states that the arbitrator "shall not have any authority to change, enlarge, amend, modify or otherwise alter, in any respect, any part of this Agreement ...." In light of these provisions, the arbitrator had no authority, once he made a finding of "just cause" for the discharge, to further review the company's imposition of a penalty. *Grand Rapids Die Casting Corp., supra*, 684 F.2d at 416 n. 1; *Firemen & Oilers Local No. 935-B v. Nestle Co., Inc.*, 630 F.2d 474, 476 (6th Cir.1980); *UAW Local 342 v. T.R.W., Inc.*, 402 F.2d 727, 731 (6th Cir.1968), *cert. denied*, 395 U.S. 910, 89 S.Ct. 1742, 23 L.Ed.2d 223 (1969). His inquiry began and ended with the just cause determination. Once he answered that inquiry in favor of Chemineer, the agreement gave him no authority to review and modify the company's disciplinary decision.

See also, *Sears, Roebuck & Co. v. Auto., Pet. & Allied Ind. Union*, (E.D. Missouri 1983), 570 F.Supp. 650 (once arbitrator concluded that conduct violating a "last chance" agreement entered in accordance with contractual authority existed, the arbitrator had no authority to modify penalty of termination).

Similarly instructive is *Board of Control of Ferris State College v. Michigan AFSCME, Council 25, Local 1609* (1984), 138 Mich. App. 170, 361 N.W.2d 342, utilizing federal case law as persuasive authority. In that matter, the Management Rights clause expressly reserved with

the College the right to develop work rules. Pursuant to that right, the College developed work rules detailing Major and Minor violations, and granting the College discretion to determine the penalty. The arbitrator found Major violation, finding just cause to discharge, but mitigated the penalty to an unpaid suspension. The court found that under the collective bargaining agreement the parties intended the employer to have discretion to discharge the employee, and thus, the arbitrator lacked authority to modify the employee's discharge.

In this case, Findlay did not solely adopt a rule and penalties pursuant to a Management Rights clause, but additionally and expressly incorporated them into Article 10 of the CBA.

Further, this is not an instance in which the City unilaterally adopted a rule contrary to the CBA. In *Southwest Ohio Regional Transit Auth. v. Amalgamated Transit Union, Local 62* (2001), 91 Ohio St.3d 108, (“*SORTA*”) this Court reiterated the point that a CBA is limited to the provisions bargained for and that an arbitrator may not apply extraneous rules to the agreement, where those rules were not bargained for and are contrary to the plain terms of the agreement itself. Similarly, in *Internatl. Assn. of Firefighters, Local 67 v. City of Columbus* (2002), 95 Ohio St.3d 101, this Court held that the arbitrator extraneously applied a unilaterally adopted rule contrary to the terms of the CBA that contravened the CBA's injury-leave provision in its definition of “disability”.

However, in *SORTA*, this Court clarified that: “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 at 111. The parties in this action fully utilized the collective bargaining process in adopting and agreeing to be bound to the Department Rules and Regulations, which include predetermined penalties. The rules are not unilaterally adopted, but rather, subject to the Labor-Management Committee and the grievance procedure. The Department Rules and Regulations are not contrary to the CBA. The Union waived any objection thereto by failing to

follow the grievance procedure provided in Article 10 should there have been any contention that the Disciplinary Matrix, or any of the Rules and Regulations that incorporates the Matrix, contravened the CBA. Rather, the parties bargained for and agreed to be bound to known predetermined remedies for violations of known and agreed-upon work rules.

Here, differently than in *SORTA*, the City and the union negotiated and incorporated into the collective bargaining agreement the disciplinary rules and the resulting penalties for violations of these rules, which penalties (i.e. the Matrix) were included in the Department Rules and Regulations as of March 1, 2012. The OPBA did not grieve the Matrix as it was entitled to do under the 2011-2012 CBA. Article 10, incorporating the Department Rules and Regulations including the Matrix, remained unchanged through negotiations for the 2013-2015 CBA. *SD Warren Co. United Paperworkers' Internatl. Union* (1<sup>st</sup> Cir. 1988), 845 F. 2d 3, certiorari denied (1988), 488 U.S. 992 ("*Warren 1*"), and its companion case *S.D. Warren Co. v. United Paperworkers' Internatl. Union* (1<sup>st</sup> Cir., 1988), 846 F. 2d 827, certiorari denied (1988), 488 U.S. 992 ("*Warren 2*"), cited as authority by *Ohio Office of Collective Bargaining v. Ohio Civil Service Employees Assn., Local 11, AFSCME* (1991), 59 Ohio St. 3d 177 (holding arbitrator was without authority to modify the penalty imposed under the clause governing termination for abuse). In *SD Warren Co.*, the parties negotiated rules and appended them to the contract containing a management's rights clause. As stated in *SD Warren Co.*:

Here, differently than in *Misco*, the company and the union negotiated and incorporated into the collective bargaining agreement the disciplinary rules and the resulting penalties for violations of these rules. Nothing is left to the arbitrator's judgment except determining whether the rules are violated. An uncomplicated reading of the contract reveals that management has the *sole* right to discharge employees for cause, the definition of which includes possession of marijuana on Mill property. 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. The parties negotiated and agreed to the remedy for violations of Rule 7(a). Here the

arbitrator found a violation of that rule by reason of the employee's possession of marijuana on mill property. The rule plainly states that such a violation is "cause for discharge." The management rights clause provides that the company "reserves the sole right to ... discharge employees for proper cause...." The arbitrator, himself, agreed "that arbitrators generally consider synonymous the language `proper cause,' `just cause,' or `cause.'" App. to Brief for Appellee at 111. Therefore, the contract plainly states that the company has the sole right to discharge employees for the violation which admittedly occurred. In the face of the contract's unambiguous language to this effect, it cannot be said that the arbitrator even "arguably constru[ed] or appl[ied] the contract." The award altered the previously agreed penalty for this conduct. By substituting the arbitrator's own "brand of industrial justice" over that established in the contract, the arbitrator engaged in a proscribed modification of the agreement.

As stated in *Misco*, 108 S.Ct. at 371, if the parties do not pre-negotiate remedies, the arbitrator can fashion them as part of his decisional discretion. Were we to sustain that authority in this case, notwithstanding the pre-negotiation that took place, it would be the equivalent of our saying that the parties engaged in a meaningless act by negotiating the disciplinary rules and incorporating them into the collective bargaining agreement. We would be saying that the arbitrator retained the right to fashion remedies even when this *contractual* authority was not given by the parties. That is not the law. *Id.*

*SD Warren Co.* at p.8.

An arbitrator's authority is limited to the contractual authority granted. If Arbitrator Mancini would have, in fact, based his award on "some body of thought, or feeling, or policy, or law that is outside the contract (*and not incorporated in it by reference*)," the arbitral award could not stand. *Harry Hoffman Printing, Inc. v. Graphic Comm. Int'l Union, Local 261*, (2d Cir. 1991), 950 F.2d 95, 98 (internal quotation marks and citations omitted). However, the Rules and Regulations in this matter were expressly incorporated by reference and the Arbitrator was bound to follow the predetermined penalties, including the Chief's discretion to choose among penalties, once the Arbitrator found a Class C violation.

In this matter, the City did not unilaterally adopt rules, but rather, the parties jointly created rules and penalties as testified to by Chief Horne; the parties expressly incorporated the Rules and Regulations with the Matrix into the contract and agreed within the four corners of

the CBA to be bound by the same; the parties provided referral of changes by either party to the Labor-Management Committee; and, allowed the Union to grieve any Rules and Regulations through the grievance procedure contained in the CBA. Nothing in the CBA evinces any intention on the part of the parties to endow an arbitrator with expansive discretion. The Rules and Regulations, with predetermined penalties, were incorporated into the CBA and the arbitrator was without authority to fashion a remedy contrary the authority granted him by the CBA.

**THE PARTIES ARE BOUND BY THE INTERPETATION OF THE CBA PROVIDED BY ARBITRATOR KLEIN IN FINAL AND BINDING ARBITRATION WHICH IS PRECLUSIVE UPON THE PARTIES UNLESS AND UNTIL THE LANGUAGE IS CHANGED IN NEGOTIATIONS.**

In this matter both Arbitrator Klein and Arbitrator Mancini held that the Discipline Matrix applied, the difference being that Mancini exceeded his authority in deviating from it. In the Klein arbitration also involving the David Hill, Klein expressly held that the City could not assess discipline contrary to the Discipline Matrix under the CBA and reduced Hill's discipline. The parties submitted that grievance to arbitration and are bound by its final and binding interpretation of the contract language at issue between the parties. *Schaefer v. Allstate Ins. Co.* (1992), 63 Ohio St.3d 708 ("An award rendered in arbitration proceeding is final and binding since the parties have freely entered into such an agreement). Arbitral precedent must be given effect. Ignoring prior arbitrator awards interpreting the same contract language vitiates the final and binding nature of arbitration between parties destroys the very concept of arbitration and frustrates the purpose of arbitration as well as every public policy reason favoring the arbitration system of dispute resolution.

“The function of arbitration is to destroy disputes.” As defined by this Court:

"An arbitration is a *final* determination of the respective claims or rights of the parties in controversy on the basis of proofs. Other forms of settlement may dispose of the disputes without these rights being determined or proofs being submitted, *or a final adjudication being made*. Arbitration is not this kind of a proceeding.

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"Arbitration \* \* \* actually destroys the cells that cause the dispute by a final determination of whatever claims these cells of controversy give rise to. 713\*713 It goes deep into the causes, sifts the facts and, unhampered by legal technicalities, sees that justice is administered. This use of arbitration has established the principle that only the administration of justice *finally* and *fully* destroys a dispute.

"The fact that arbitration is *final*, expeditious, private and inexpensive puts it in a class by itself, for while other processes may possess some of these characteristics, they rarely possess all of them—especially *finality*. *For it is only in arbitration that arbitration law accords the high privilege of giving the decision of an arbitrator the same legal effect as a judgment of the court.*

"The purpose of arbitration is, therefore, to determine a difference or dispute amicably, privately and *finally and, in so doing, to exclude a court of law from such determination.* \* \* \*" (Emphasis added.) Kellor, *Arbitration in Action* (1941), at 3-4.

Other treatises are equally instructive. Professor Martin Domke, in his treatise on commercial arbitration, states that arbitration "*\* \* \** is based on a voluntary agreement of the parties, made before the arbitration process is instituted, to submit a dispute for the *binding* decision of the arbitrator." (Emphasis added.) Domke, *The Law and Practice of Commercial Arbitration* (1968) 3, Section 1.02. Similarly, it has been said that one of the defining characteristics of the arbitration system of dispute resolution is that it results in a *final* and *binding* disposition of a controversy or dispute. Oehmke, *Commercial Arbitration* (1987) 15, Section 2:1.

*Schaefer v. Allstate Ins. Co.* (1992), 63 Ohio St.3d 708, 712-713.

Permitting parties to forum shop arbitrators and re-litigate the determinations in prior final and binding awards to interpret identical contract language sets up an “escape hatch” for any party disappointed with an arbitration award and to the only means of review of an arbitration decision – the limited judicial review provided in O.R.C. 2711.

Both arbitrators held that the Disciplinary Matrix was applicable pursuant to the CBA. Arbitrator Mancini exceeded his authority in then deviating from it in the discipline before him, meting out his own brand of industrial justice. The Union did not contend that Arbitrator Klein exceeded his authority in applying the Disciplinary Matrix to reduce discipline. Having not been vacated through O.R.C. 2711, Arbitrator Klein's determination on the language is final and binding upon the parties and the City, as it was required to do, followed that resolution of the dispute.

Arbitrator Klein determined the contractual obligations as to imposition of the Disciplinary Matrix specifically finding that the City could not "simply pick and choose when it will apply the Discipline Matrix to a particular infraction warranting discipline". (Appellee's Appx at Pg. 19). Had the City failed to follow Klein's final and binding determination and simply chose to "pick and choose" the application of the Discipline Matrix, as Mancini did, certainly it would have been in violation of the CBA as interpreted by Arbitrator Klein. The City would have contravened the law stated by this Court that:

Courts should not allow public employers to disregard the terms of their collective bargaining agreements whenever they find it convenient to do so. On the contrary, the courts will require public employers to honor their contractual obligations to their employees just as the courts require employees to honor their contractual obligations to their employers.

*Mahoning County Board of Mental Retardation and Developmental Disabilities v. Mahoning County TMR Education Association*, supra, 22 Ohio St.3d at 84.

The Union in these proceedings seeks to avoid the final and binding Klein decision, as Mancini's deviation from the Disciplinary Matrix outside of his authority worked on this occasion to reduce discipline. The Union, like the City, cannot "pick and choose" when it will abide by a binding arbitration decision or its own contractual obligations, nor should a party be

permitted to forum shop in violation of the finality of a dispute pursuant to an agreed arbitration clause. By failing to give binding affect to Klein's arbitral decision, which draws its essence from the CBA, the City has been subjected to multiple proceedings in multiple forums.

"By permitting a trial de novo in some instances, [an arbitration] provision unnecessarily subjects the parties to multiple proceedings in a variety of forums, increases costs, extends the time consumed in ultimately resolving a dispute, and eviscerates any advantage of unburdening crowded court dockets."

*Taylor Bldg. Corp. of Am. V. Benfield*, 2006-Ohio-4428, ¶47, 168 Ohio App.3d 517 (12<sup>th</sup> Dist.), quoting *Schaefer v. Allstate Ins. Co.* supra, 63 Ohio St.3d at 716.

This Court has also previously adopted the following arbitral axiom:

"A submission [to arbitration] is a contract between two or more parties, whereby they agree to refer the subject in dispute to others and to be bound by their award, and the submission itself implies an agreement to abide the result, even if no such agreement were expressed."

*Ohio Council 8, AFSCME v. Ohio Dept. of Mental Health* (1984), 9 Ohio St. 3d 139, 142. While the agreement to abide by the result of arbitration is not "in the four corners" of the contract, it is required.

Ohio courts have continually recognized that Ohio has a strong public policy that favors arbitration of disputes. *Hogan v. Hogan*, 12th Dist. No. CA2007-12-137, 2008-Ohio-6571, ¶ 14. Once a matter is arbitrated, "the only way to give effect to the purposes of the arbitration system of conflict resolution is to give lasting effect to the decisions rendered by an arbitrator whenever that is possible." *City of Hillsboro v. Fraternal Order of Police, Ohio Labor Council, Inc.* (1990), 52 Ohio St.3d 174, 176 . Much like the Union's agreement to abide by the City's Rules and Regulations that are expressly subject to the grievance procedure and incorporated as an express mandate in the contract, it must abide by Arbitrator Klein's interpretation that the Disciplinary Matrix, while not wholly re-written in the CBA, is controlling.

In this case, Arbitrator Mancini in fact followed arbitral precedent to the extent he found the Disciplinary Matrix applicable. Because Arbitrator Klein's interpretation was not challenged, it is final and binding between the parties and cannot be overturned in these proceedings challenging a subsequent arbitrator's adherence to arbitral precedent as to the applicability of the Disciplinary Matrix.

### **CONCLUSION**

Adopting the Appellants' proposition of law would rewrite the CBA and allow them to avoid the predetermined penalties created by the Rules and Regulations expressly incorporated into the CBA by reference, and vitiate the express delegation of rule-making authority agreed to at Article 10 of the CBA. Furthermore, Arbitrator Klein's decision must be give preclusive effect to provide the parties the finality they bargained for in agreeing to binding arbitration of the same language between the same parties involving the same grievant. If the OPBA does not like the work rules and its predetermined penalties, it has three remedies under the CBA: (1) propose a new rule under Article 10 that would be referred to the Labor-Management Committee; (2) grieve the existing rule and/or penalty; (3) follow the procedure set forth in the Ohio Public Employee Collective Bargaining Act and negotiate the changes to the CBA it desires.

The Court's duty is to interpret the language utilized by the parties. It cannot add to or modify existing language, which clearly and unambiguously incorporate the Rules and Regulations including its Disciplinary Matrix setting forth predetermined remedies.

For these reasons and those contained in the above Appellee's Brief on the Merits, the reasoned decision of the Eighth District Court of Appeals is correct and must be affirmed.

Respectfully submitted,

/s/ William F. Schmitz

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing document with the Ohio Supreme Court by using the Court's electronic filing system and the parties will be served electronically. The undersigned hereby certifies that a copy of the foregoing Brief on the Merits of Appellee City of Findlay, was additionally served on the following parties by regular U.S. mail this 15<sup>th</sup> day of June, 2016:

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# **APPENDIX**



Grievant: David P. Hill

**APPEARANCES**

For the City:

Donald J. Rasmussen, Esq.	City Law Director
Gregory R. Horne	Chief of Police , City of Findlay
Robert Ring	Lieutenant, Findlay Police Dept.
Sean D. Young	Captain, Findlay Police Dept.
Morgan Greeno	Patrol Officer, Findlay Police Dept.
Daniel Harmon	Sergeant, Findlay Police Dept.

For the Union:

Larry D. Farley, Esq.	Allotta Farley Widman LPA, Attorney for the Union
David P. Hill	Grievant
Robert DeBouver	Patrol Officer, Findlay Police Dept.
Jason Morey	Patrol Officer, Findlay Police Dept.

**I. STATEMENT OF THE CASE**

This dispute is properly before the arbitrator pursuant to Article 41 of the collective bargaining agreement effective January 1, 2011 through December 31, 2012, between the City of Findlay, Ohio ("City") and the Ohio Patrolmen's Benevolent Association ("Union"), representing bargaining unit employees occupying the position of Sergeant with the Findlay Police Department as more fully set forth in Article 2 of the collective bargaining agreement. (Joint Ex. 1).

On July 27, 2012, the grievant, Sergeant David P. Hill, was purportedly involved in an incident of misconduct during the midnight shift roll call. Specifically, the City alleges that the

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grievant made several comments regarding patrol officer Daniel Harmon's prior mental health issues and his recent promotion and assignment to the midnight shift.<sup>1</sup> The grievant also unholstered his firearm and placed it in his mouth during the course of the roll call. Patrol officer Harmon was subsequently informed of this incident by several of his co-workers, and he lodged a complaint with Captain Sean Young on July 31, 2012. On August 1, 2012, Captain Young notified Lieutenant Robert Ring of patrol officer Harmon's complaint involving Sergeant Hill. Thereafter, Lieutenant Ring commenced an internal investigation of the incident. (Joint Ex. 3).

The summary of Lieutenant Ring's internal investigation of the incident provides as follows:

On Friday, July 27, 2012, Sgt. David Hill conducted the midnight shift roll call. During the proceedings of that roll call, Sgt. Hill made several remarks concerning the promotion of Ofcr. Dan Harmon to the position of sergeant. These remarks referenced Harmon's mental health issues from 2005 where Harmon was treated for depression. These remarks, while not necessarily made to discredit Harmon, do in fact lead towards that. There were eight officers in the roll call and Harmon is now one of their immediate supervisors, as of 8/6/12. There are 11 total patrol officers on the shift, and Sgt. Hill made the remarks in front of 8 of them. While some of the comments most likely came from some of the officers in the room, Sgt. Hill did not take any steps to put an end to them. Sgt. Hill's comments and actions showed a lack of respect for Harmon and were demeaning towards him. At no times should a supervisor spread their negative feelings about another supervisor, or subordinate, to a subordinate. Time will tell if the remarks play into the shifts' [sic] overall ability to accept Ofcr. Harmon as Sgt. Harmon. Sgt. Hill's actions violate the following Rules and Regulations of the Findlay Police Department:

- 
1. The record establishes that Daniel Harmon was scheduled to be promoted from a police officer to a sergeant on August 6, 2012. (Joint Ex. 3, at 2).

Chapter 2 Authority and Supervision

6. Respect

A member shall grant to those of superior rank the respect due their rank, and members of supervisory rank shall grant to their subordinates the respect due them as members of the Findlay Police Department.

Chapter 3 Standards of Conduct

12. Conduct Toward Fellow Employees

a. Members shall conduct themselves in a manner that will foster cooperation among all members of this agency, showing respect, courtesy, and professionalism in their dealings with one another.

b. Members shall not use language or engage in acts that demean, harass, or intimidate another person. (Members should refer to this agency's policy on "Harassment and Discrimination in the Workplace" for additional information on this subject)

Sgt. Hill further escalates the incident, as well as violates department guidelines, by removing his Glock handgun from his holster for no substantial reason. He then placed it in his mouth. His action demonstrates a lack of discipline on his part and should have never been done, especially in front of subordinates. While this action may have been done as an attempt at humor, it ultimately reflects poorly on Harmon, because a reasonable person would infer that because of Harmon, Sgt. Hill would rather commit suicide than [sic] work with him. Sgt. Hill's actions could cause the shift as a whole to lack confidence in Harmon. The removal of the handgun from the holster violates the use of force policy below since there was no reason within the policy to draw it:

V. Procedure

G. Handling and Storage of Weapons (CALEA 1.3.9.f)

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3. Except for general maintenance, training, or in conformity with the use of deadly force stated in this policy, no officer shall draw or exhibit his duty weapon.

I feel the overall incident, taking into account the remarks and actions by Sgt. Hill, can be summed up as conduct unbecoming an officer:

A. GENERAL CONDUCT

1. Obedience to Laws, Regulations, and Orders

- a. Officers shall not violate any law or any agency policy, rule, or procedure.

2. Conduct Unbecoming an Officer

Officers shall not engage in any conduct or activities on- or off-duty that reflect discredit on the officers, tend to bring this agency into disrepute, or impair its efficient and effective operation.

After reviewing Sgt. Hill's personnel file, I found no prior forms of discipline. Conduct unbecoming is a class C offense in the discipline matrix. This being a first time offense, the Step 1 discipline is at a level 4, a 3 to 10 day suspension and/or loss of leave. I would recommend a 3 day suspension, with Sgt. Hill serving one day and holding the other 2 days in abeyance that he has no repeat violations.

(Joint Ex. 3, at 7-8).

On August 28, 2012, Chief of Police Gregory R. Horne issued the following Proposed

Notice of Disciplinary Action:

You are hereby notified that the Chief of Police (Employer) proposes to take the following disciplinary action against you:

Grievant: David P. Hill

On Friday, July 27, 2012 you conducted midnight roll call just after 11:00 p.m. During the proceedings of roll call, you made several remarks concerning the pending promotion of Officer Dan Harmon to the position of Sergeant. The remarks referenced Officer Harmon's mental health issues from 2005 when he was treated for depression.

Reportedly, you stated you had more bad news for the shift. You stated you must have pissed someone off because Dan Harmon is coming to midnight shift. You reportedly stated that you had put Harmon in Orchard Hall once, now he will put you in there. You then removed your Glock .45 department issued handgun and placed it in your mouth. There were eight officers present in the roll call, many of them young officers recently off their probation period. Officer/Sergeant Harmon is now one of that shifts direct supervisors.

Your actions and comments show a lack of respect for Officer/Sergeant Harmon and were demeaning towards him. The statements quickly spread to other officers in the department and eventually made it to Officer/Sergeant Harmon who reported the incident to Captain Young. You conveyed the message that you would rather commit suicide than work with him.

Your actions violate the Rules and Regulations of the Findlay Police Department specifically:

\* \* \*

**Therefore, I recommend that you be suspended for (30) thirty days without pay with (15) fifteen days held in abeyance.** The suspension is to be scheduled by Lieutenant Ring at the conclusion of your appeals process as defined in the current collective bargaining agreement. In addition I will remove supervision of the Field Training Officer Program from you.

\* \* \*

(Joint Ex. 2, at 1-2)(emphasis in original).

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A grievance was subsequently filed on August 28, 2012, which provides, in part, as follows: "The disciplinary action proposed by the Chief on Aug[.] 28, 2012 (30 day suspension w/ 15 days held in abeyance, with removal from FTO program) is excessive and in violation of the disciplinary provisions of the CBA, and any other applicable provision of the CBA." (Joint Ex. 2, at 5). A disciplinary meeting was held on September 5, 2012, and Service-Safety Director Paul E. Schmelzer subsequently issued the following Notice of Disciplinary Action Decision, dated September 7, 2012:

A disciplinary meeting was held on September 5<sup>th</sup>, 2012 to discuss Chief Horne's proposed disciplinary action. At that hearing, your representation stated your arguments against the proposed discipline.

I appreciate your candor during the meeting about the relevancy of your actions to the effective leadership of the Field Training Officer program. I understand that you have been an integral part of its development. I hope that your commitment to the program remains, so that at some point your involvement is renewed.

Your leadership in the FTO program speaks to the fact that you recognize how important relaying your experience and guidance are to younger officers. A person of your stature in the department has a higher expectation placed upon them.

That higher expectation and responsibility to perform in a professional manner is why I feel I must concur with Chief Horne's recommendation for discipline. I recommend that the thirty (30) day suspension with fifteen (15) days in abeyance be carried out and scheduled as the Chief indicated in his notice.

I believe you honestly regret the situation, and I believe you will work toward a position in the FTO program in the future. I know you realize what that will take.

(Joint Ex. 2, at 4).

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The City and the Union subsequently proceeded to arbitration and a hearing was held on November 28, 2012, at which time the parties were afforded full opportunity to present documentary evidence, direct and cross-examine witnesses, and offer rebuttal testimony. At the conclusion of the hearing, each party rested its respective case on the record.

## **II. ISSUE PRESENTED**

The arbitrator determines the issue to be the following:

Whether the City had just cause to issue the grievant a thirty (30) day suspension without pay with fifteen (15) days held in abeyance, and removal of the grievant from supervision of the Field Training Officer Program as a result of his alleged misconduct during the midnight shift roll call on July 27, 2012? If not, what is the appropriate remedy?

## **III. APPLICABLE CONTRACT PROVISIONS**

Article 4 of the collective bargaining agreement entitled "Management Rights," provides, in pertinent part, as follows:

- 4.01 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; (b) to determine work assignments and to establish, revise, or eliminate work schedules, locations or functions, consonant with Department needs; (c) to transfer, promote or demote

employees, or to lay off, terminate or otherwise to relieve employees from duty for just cause; (d) to recruit, select and determine the number and qualifications of employees; (e) to establish basic and in-service training programs and requirements for upgrading the skills of employees; and (f) to take such measures as the Employer and Police Administration might determine necessary for the orderly and efficient operation of the Department of Police.

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Article 39 of the collective bargaining agreement entitled "Discipline," provides, in part, as follows:

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39.04 Discipline shall be imposed only for just cause. The specific acts for which discipline is being imposed, and the penalty proposed, shall be specified in the Notice of Discipline. The Notice served on the employee shall contain a reference to dates, times and places of events giving rise to the discipline, if possible.

\*\*\*

Article 41 of the collective bargaining agreement entitled "Arbitration Procedure," provides, in part, as follows:

\*\*\*

41.06 The fees and expenses of the arbitrator and the cost of the hearing room, if any, shall be borne by the party losing the grievance. Split awards shall result in the costs being split equally. All other expenses shall be borne by the party incurring them. Neither party shall be responsible for any of the expenses incurred by the other party; except that the parties may choose to share the costs associated with

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recording and producing a transcript of the proceedings, either electronically or by means of employing a court reporter.

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#### IV. CONTENTIONS OF THE PARTIES

##### City's Position

The City asserts that during a roll call on the evening of July 27, 2012, the grievant referenced Sergeant Harmon's admission in 2005 to Orchard Hall, a psychiatric facility of the local hospital. According to the City, the grievant stated during the roll call that "his [prior] promotion to sergeant over Harmon put him in there [Orchard Hall] and now Harmon was trying to put him in there." Additionally, the grievant unholstered his duty weapon, placed it in his mouth, and feigned shooting himself. Although the City acknowledges that other officers also made comments regarding Sergeant Harmon during the roll call, it maintains that the situation was initiated by the grievant.

It contends that the grievant violated the Findlay Police Department's Use of Force Policy as a result of unholstering his firearm during roll call. Moreover, such a violation constituted an egregious form of misconduct. Furthermore, the grievant engaged in conduct unbecoming of an officer on the date in question, and he violated various provisions contained in the City of Findlay Police Department Rules and Regulations as charged in the Proposed Notice of Disciplinary Action. The City asserts that the grievant's conduct was demeaning and he "did not show respect to Sergeant Harmon." According to the City, the grievant did not attempt to

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apologize or reach out to Sergeant Harmon until after he was called in and made aware of internal investigation regarding his actions.

The City points out that the grievant is a field training officer and occupies a supervisory position. The grievant should not have commented on Sergeant Harmon's mental health issues during roll call in the presence of subordinate officers. It notes that several of the personnel who serve under the grievant on the midnight shift are young and impressionable officers. The grievant acknowledged that "what he did was wrong and he stated that he would accept his punishment." However, the grievant has now rejected the punishment assessed by the City. The City maintains that a 30-day suspension with 15 days held in abeyance is warranted in this case as a result of the egregious misconduct engaged in by the grievant. Additionally, it notes that the grievant was recently assessed a written reprimand for misconduct involving his use of a taser. Accordingly, the City requests that the discipline be upheld by the arbitrator.

Union's Position

The Union initially argues that it is "... not here to argue that no discipline is appropriate," and it does not dispute either the fact that the grievant unholstered his firearm or the manner in which he held it. The grievant acknowledged that he unholstered his firearm and placed it in his mouth, and the Union does not dispute that such conduct by the grievant is inappropriate. However, the Union takes issue with any allegations by the City that the grievant expressed "displeasure towards Sergeant Harmon." Furthermore, the Union maintains that the incident which took place during roll call did not occur as stated by Officer Greeno.

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The Union asserts that the grievant "... was trying to be funny and that is what it was meant to be." It disputes the manner in which the City perceives the incident, and it maintains that the grievant "... was not malicious or trying to castigate someone else." Although the Union maintains that the actions by the grievant during roll call were an attempt at humor, it acknowledges that it was a "bad attempt." The Union argues that the grievant is a good officer who has a lot of responsibilities as a result of his demonstrated abilities.

The Union reiterates that a mistake was made by the grievant in this case, however, nobody was hurt as a result of his actions. According to the Union, a "gun is an extension of who they [police officers] are." Therefore, the incident should "... not be looked at as we [civilians] do from the outside." It maintains that the grievant was in complete control of his actions, and he "was not worried about the gun going off."

The Union further contends that the City "is adding charges to the incident of using a gun in an inappropriate manner." As it concerns the appropriate discipline in this case, the Union believes that it should be in line with the recommendation of Lieutenant Ring. It points out that Lieutenant Ring interviewed the witnesses to the grievant's alleged misconduct, and he "got it right." The Union asserts that the discipline assessed the grievant was improper based upon the facts of the incident. It notes that there have been other instances of officers unholstering a gun which have not resulted in discipline. According to the Union, "the [disciplinary] matrix was not used fairly here," and furthermore, it never agreed to the matrix.

## V. OPINION AND ANALYSIS

The dispute before the arbitrator in this case involves the alleged misconduct of the grievant during the midnight shift roll call on July 27, 2012. It is undisputed that the grievant placed his department issued firearm in his mouth at one point during the roll call. Although the grievant acknowledges that he unholstered his gun and placed it in his mouth, he adamantly denies making any comments involving Sergeant Harmon's mental health issues. As discussed below, the arbitrator determines that the testimony and documentary evidence presented in this case supports a finding that the grievant did, in fact, comment upon Sergeant Harmon's mental health issues during the roll call on the date in question. For the following reasons, the arbitrator concludes that the City had just cause to discipline the grievant as a result of his misconduct during the roll call on July 27, 2012.

The testimony presented at the hearing establishes that the grievant unholstered his firearm and placed it in his mouth during roll call. The grievant acknowledged that the use of his gun in such a manner was "wrong." As it concerns the proper handling and storage of firearms, the Findlay Police Department Use of Force policy provides, in part, as follows: "Except for general maintenance, training, or in conformity with the use of deadly force stated in this policy, no officer shall draw or exhibit his duty firearm." (City Exhibit 5, at 10). The grievant's action in this case clearly constitutes a violation of the aforementioned provision, notwithstanding the grievant's statement that he was only joking around and the testimony by some witnesses who indicated that they were not "shocked" by the grievant's conduct of placing his firearm in his mouth. The arbitrator agrees with the testimony of Captain Sean Young that the grievant's

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violation of the Use of Force policy in the presence of subordinate officers was serious misconduct "in and of itself." Although the Union argued at the hearing that other officers were not disciplined as a result of improperly unholstering their firearms, no evidence was presented that those incidents involved an officer placing a loaded gun in his or her mouth, much less an officer in a command position over young patrol officers.

The City maintains that the grievant made several remarks concerning Sergeant Harmon's prior mental health issues and his recent promotion to sergeant during the midnight shift roll call on July 27, 2012. Patrol officer Morgan Greeno testified that after the grievant had "gone through the roll call information," various "jokes and statements were said about Sergeant Harmon's instability." According to officer Greeno, the grievant initiated the joking about Sergeant Harmon, and further, the grievant specifically stated that he "put Harmon in Orchard Hall and now he [Harmon] would do the same to him." The record establishes that Orchard Hall is a psychiatric facility associated with a local hospital. According to Officer Greeno, it was a "known fact in the department that he [Sergeant Harmon] was previously admitted to Orchard Hall."

Contrary to Officer Greeno's testimony, the grievant denies that he made any reference to Sergeant Harmon's admission to Orchard Hall at any time during the roll call on July 27, 2012. The Union questions the accuracy of Officer Greeno's testimony, and it points out that her written statement concerning the incident indicates that the grievant "insinuated" that he put Sergeant Harmon in Orchard Hall. For the following reasons, the arbitrator concludes that there

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is no doubt that the grievant referenced Sergeant Harmon's prior mental health issues during the roll call on July 27, 2012.

The arbitrator finds that the written statement provided by Officer Greeno to Lieutenant Robert Ring; the content of her interview with Lieutenant Ring during the course of his internal investigation of the incident; and her credible testimony at the hearing discussed above, clearly establishes that the grievant discussed Sergeant Harmon's mental health issues during roll call.

Officer Greeno's written statement of the roll call incident provides as follows:

On what I recall to be July 27, 2012[,] I was in roll call for third shift. After beats were chosen and roll call information was read Sgt. D. Hill announced that Sergeant D. Harmon would be joining our shift due to recent promotion. Sgt. Hill made mention of a prior incident with Sgt. Harmon being admitted to the mental health sector of Blanchard Valley Regional Health Center. Sgt. Hill insinuated that he put Sgt. Harmon there and now Sgt. Harmon was going to put him there. He proceeded to unholster his duty weapon and place the barrel into his mouth for a brief moment. He then removed the weapon and reholstered it without incident.

(City Exhibit 7).

Lieutenant Ring's report of the incident provides, in pertinent part, as follows:

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08/06/12 . . . I met with Ofcr. Greeno in my office. . . . Greeno told me that she was in roll call and she would be truthful about what she saw, although she didn't really want to talk about it. . . . I asked Greeno what she recalled being said in reference to Dan Harmon and she told me that Sgt. Hill said that he had 'more bad news' for the shift. Greeno stated that Sgt. Hill said that he 'must have pissed someone off' because Dan Harmon was coming to midnight shift. Greeno said that Hill then stated he 'had put Harmon in Orchard Hall once, now he'll (Harmon) put me (Hill) in

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there." After making that comment, Greeno said that Sgt. Hill removed his Glock and put the barrel in his mouth. . . .

\*\*\*

(Joint Exhibit 3, at 4).

At the hearing, Lieutenant Ring confirmed that Officer Greeno verbally informed him during their meeting that the grievant made the comment that he [the grievant] put Sergeant Harmon in Orchard Hall and now Sergeant Harmon would put him there. Lieutenant Ring also testified that the grievant admitted during his investigatory interview that he spoke about Sergeant Harmon during the roll call in question, however, he could not recall any direct reference to Orchard Hall.

The arbitrator further finds that the testimony of patrol officers Robert DeBouver and Jason Morey do not support the Union's position that the grievant made no comments during roll call regarding Sergeant Harmon's prior admission to Orchard Hall. Officer DeBouver, a 17 year veteran with the Findlay Police Department, testified that he could not recall the grievant stating that he [the grievant] put Sergeant Harmon in Orchard Hall and now Sergeant Harmon would put the grievant there. However, he indicated that he "sits in the back [during roll call] and listens to one-half of what is said." Officer Morey, who has been on the force for more than 12 years, confirmed that Sergeant Harmon's "prior problems" and "things he did in the past" were discussed during roll call. However, he stated that he "could not remember specifically if [the grievant] said he put Harmon in Orchard Hall." Thus, it is clear that the testimony of officers DeBouver and Morey lends no support to a finding that the grievant did not utter any comments

about or references to Sergeant Harmon's admission to Orchard Park for the reason that neither officer could unequivocally testify that the grievant made no such comments. The arbitrator also notes that officer Morey acknowledged that "new officers pay more attention in roll call." Such an acknowledgment by officer Morey supports the arbitrator's finding that officer Greeno, who was recently hired by the Findlay Police Department on March 7, 2011, did, in fact, hear the grievant make comments during roll call concerning Sergeant Harmon's mental health issues, including a prior admission to Orchard Hall.

According to the grievant's testimony at the hearing, Sergeant Harmon checked into Orchard Hall in 2005 as a result of the grievant being promoted to sergeant over him. The grievant denied making any reference to Sergeant Harmon's previous admission to Orchard Hall during the roll call on July 27, 2012. However, the grievant admitted that he told the officers at roll call that he "had some bad news, Sergeant Harmon was coming to the midnight shift." The grievant also acknowledged that he told the officers that his promotion "was the worse" for Sergeant Harmon, and that Sergeant Harmon "wanted to kill himself when he [the grievant] was promoted." Based upon the testimony and documentary evidence of record, the arbitrator concludes that not only did the grievant make disparaging comments about Sergeant Harmon during roll call, those comments included references to Sergeant Harmon's mental health and his previous admission to Orchard Hall.

The City's Police Department Rules and Regulations provide in Chapter 2, Section 6 that "[a] member shall grant to those of superior rank the respect due their rank, and members of supervisory rank shall grant to their subordinates the respect due them as members of the Findlay

Grievant: David P. Hill

Police Department." The grievant's actions and comments described above which occurred during the roll call on July 27, 2012, clearly demonstrated his lack of respect for Sergeant Harmon and constituted conduct unbecoming an officer. The arbitrator agrees with the testimony of Lieutenant Ring that it is wholly inappropriate to joke about the mental health issues of a co-worker. The grievant's misconduct cannot be excused because he believed that he was only "joking around." The testimony of Sergeant Harmon clearly indicates that he did not interpret the statements and actions of the grievant in a joking manner.

The City's Police Department Rules and Regulations state in Chapter 3, Section 12 entitled "Conduct Toward Fellow Employees," as follows:

- a. Members shall conduct themselves in a manner that will foster cooperation among all members of this agency, showing respect, courtesy, and professionalism in their dealings with one another.
- b. Members shall not use language or engage in acts that demean, harass, or intimidate another person. (Members should refer to this agency's policy on "Harassment and Discrimination in the Workplace" for additional information on this subject.)

Based upon the evidence discussed above, the grievant clearly failed to afford Sergeant Harmon the requisite respect and courtesy that is deserving of him as a fellow officer. The arbitrator agrees with the testimony of Captain Young and Chief Horne that the grievant's actions in the presence of subordinate officers could only serve to undermine the authority of Sergeant Harmon and were of no beneficial purpose. The arbitrator notes that the grievant himself confirmed on cross-examination that the chain of command is very important, as is the respect

Grievant: David P. Hill

and trust of supervisors. The grievant's actions in this case, in addition to being unprofessional and demeaning towards Sergeant Harmon, were detrimental to the chain of command. The grievant acknowledged that he made a "poor decision that night," and he "should have curtailed what was going on in roll call." The arbitrator determines that the City has satisfied its burden of proof that the grievant violated the Police Department's rules as charged.

Although the arbitrator concludes that the City had just cause to discipline the grievant as a result of his misconduct, a 30-day suspension with 15 days held in abeyance is excessive under the circumstances. At hearing both Captain Young and Chief Horne testified that the City is not required to, nor does it always follow, the Discipline Matrix contained in Exhibit A of Section 26.1.2 of the Findlay Police Department Disciplinary/Recognition Procedures. (City Exhibit 4). The arbitrator notes that Section V(B)(2)(a) of the aforementioned directive provides 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"): (City Exhibit 4, at 3). The arbitrator determines that under the principles of just cause, the City cannot simply pick and choose when it will apply the Discipline Matrix to a particular infraction warranting discipline.<sup>2</sup>

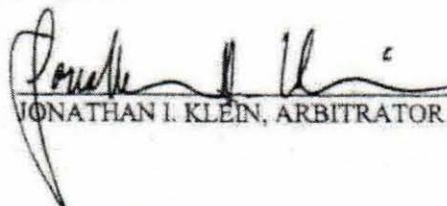
- 
2. Although the Union asserted at the hearing that it never agreed to the City's Discipline Matrix, and it pointed out that the Discipline Matrix is not contained in the collective bargaining agreement, the record in this case is not sufficiently developed as it concerns a challenge to the reasonableness of the matrix itself, as opposed to its application in this case. Article 4 of the collective bargaining agreement also appears to give the City the right to develop and promulgate a matrix subject to the usual challenges of reasonableness, notice, etc.

Grievant: David P. Hill

The record evidence establishes that the grievant's misconduct in this case is classified as a Class C Offense under the Discipline Matrix. (City Exhibit 4, at 11). Although the grievant was issued a written reprimand during the pendency of the instant case for another incident of misconduct, Lieutenant Ring indicated that the disciplinary action at issue was treated as a "step 1, and not step 2." (City Exhibit 2). The proposed notice of disciplinary action dated August 28, 2012, makes no reference to any prior violations by the grievant. A reading by the arbitrator of the Matrix Layout which follows the Discipline Matrix confirms that the grievant's violations in this case placed him at Step 1 under the Class C Offenses. Further, Step 1 under the Class C Offenses results in a Level 4 disciplinary action, and a Level 4 disciplinary action is a "3-10 day suspension and/or loss of leave." (Joint Ex. 4, at 12). Therefore, based upon an application of the City's Discipline Matrix consistent with the grievant's violations in this case, the arbitrator determines that the disciplinary action issued to the grievant exceeded the disciplinary matrix without justification, and shall be reduced as set forth in the Award, below.

**AWARD**

The grievance is sustained, in part, as follows. The City had just cause to discipline the grievant as a result of his misconduct on July 27, 2012. However, the discipline assessed the grievant was contrary to the Discipline Matrix set forth in Appendix A of Section 26.1.2 of the Findlay Police Department Disciplinary/Recognition Procedures. Therefore, the disciplinary action shall be reduced to a ten (10) day unpaid suspension and the grievant shall be appropriately compensated for any loss of pay and benefits in accordance with such a reduced suspension. The grievant's supervisory duties in connection with the Field Training Officer Program shall be restored. In accordance with Section 41.06 of the collective bargaining agreement, the arbitrator's fees and expenses shall be split equally between the parties.

  
JONATHAN I. KLEIN, ARBITRATOR

Dated: January 1, 2013

**FINDLAY POLICE DEPARTMENT**

**DISCIPLINARY/RECOGNITION PROCEDURES**

**SECTION 26.1.2**

**DIRECTIVE TYPE: Procedure**

**CHIEF GREGORY R. HORNE** \_\_\_\_\_

**RE-ISSUE DATE: March 01, 2012**

**I. POLICY**

It is the policy of the Findlay Police Department to provide the best service possible to the public through its most valuable asset, its employees. In order to ensure that its employees are providing the best service possible, the Department recognizes that it is necessary to reward good performance and, occasionally, to address poor performance among its employees. When necessary, the Department will utilize disciplinary procedures to correct deficiencies, rather than as punishment to the affected employee.

**II. PURPOSE**

To 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. In addition, this directive will also establish the framework for recognizing exceptional employee achievement and heroism.

**III. GOALS**

- A. To establish procedures and criteria for recognizing employees for exceptional performance.
- B. To establish a disciplinary system, to include procedures and criteria for using training as a function of discipline, using counseling as a form of discipline, and taking punitive actions in the interest of discipline.
- C. To specify the role of supervisors and the authority attended to each level of supervision and command, relative to disciplinary actions.
- D. To specify the appeal procedures in disciplinary actions.
- E. To establish the requirement, in the event of a termination, that a written statement citing the reason for termination, the effective date of the termination,

and the status of fringe and retirement benefits are provided to the terminated employee.

- F. To specify the procedures for maintenance of records in disciplinary actions.

#### IV. DEFINITIONS

None

#### V. DISCIPLINARY SYSTEM

- A. The disciplinary system will be comprised of the following:

1. Training (CALEA 26.1.4.a)
  - a. Training or retraining an employee. Supervisors are encouraged to recommend such a course of action if, in their opinion, training or retraining of a Department employee will produce the desired change in behavior and improve the member's productivity and effectiveness.
  - b. The supervisor will document the training needed and the employee involved. That memo will be forwarded to the employee's Division Commander.
  - c. After consultation with the supervisor involved and the employee's Division Commander, the Chief of Police may direct the Special Services Lieutenant to schedule appropriate training, as it is available.
2. Counseling (CALEA 26.1.4.b)
  - a. Counseling may be informal, conducted by a supervisor, or formal counseling with the employee being referred to a qualified counselor. Counseling may be used in either the proactive or reactive sense.
  - b. Informal counseling is usually conducted by a supervisor when an employee's behavior or conduct is not what is expected or required. Generally, such actions taken by a supervisor are documented in Interbadge for the duration of that evaluation period, and then purged.
  - c. Formal counseling may be offered to or required of a Department employee who, in the opinion of the Chief of Police, would benefit by referral to a qualified counselor.
3. Punitive Disciplinary Action (CALEA 26.1.4.c)
  - a. Procedures for actions such as a notice of verbal reprimand, written reprimand, suspension without pay, reduction in classification, or discharge are set forth in the Collective Bargaining Agreement for contractual employees or the City of Findlay Handbook for non-contractual employees.
  - b. The level of disciplinary action will be geared to the employee's disciplinary history and the severity of the offense.

- B. Employees Covered under the Collective Bargaining Agreement

1. Disciplinary Violations (CALEA 26.1.4.c)
  - a. Any employee may be disciplined for the following infractions:
    - 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.

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- b. No employee shall be disciplined except for just cause.
  - c. The employer may pursue discipline for acts committed by the employee while the employee is on duty, working under the colors of the employer, or off-duty representing himself as an employee of the Department. The employee may not be disciplined for actions on his own time that do not reflect directly on the Department or do not violate any City, State or Federal statutory provisions.
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-At the sole discretion of the Chief of Police, all or a portion of the leave balance may be served by the reduction of accrued leave in an amount equal to that portion of the suspension, based on the employee's normal work schedule. (i.e. the reduction of one work day, on a ten hour shift, would equal a ten hour reduction)
    - iv. Reduction in classification
    - v. Termination
  - b. Violations of excessive sick time use will be handled within the current guidelines found in the Collective Bargaining Agreement and Employee Handbook.
  - c. Except in situations of gross misconduct, the employer agrees to use progressive discipline.
3. Administration of Discipline (CALEA 26.1.5)
- a. Shift supervisors have the discretion and authority to issue a verbal reprimand, without prior approval of a superior.
  - b. Division Commanders have the discretion and authority to issue verbal and written reprimands, without prior approval of a superior.
  - c. The Captain of Police has the discretion and authority to issue verbal and written reprimands, without prior approval of a superior. When acting as the Chief of Police, in the Chief's absence, the Captain has the discipline authority of the Chief of Police.
  - d. The Chief of Police has the discretion and authority to issue a verbal reprimand, written reprimand or a suspension, without prior approval of a superior.
  - e. Any suspension, demotion or termination will not be implemented until the Safety Director renders a decision at a pre-deprivation hearing.
4. Appeal of Discipline (CALEA 26.1.6)
- a. Verbal and written reprimands may not be grieved. Instead, they may be appealed to the safety director.
  - b. The affected employee may file a grievance within ten working days of receipt of the notice of discipline for a suspension, demotion, or termination. The Chief then has ten working days to respond.

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- c. If the affected employee is not satisfied with the response from the Chief, he shall submit a typed cover letter, attached to the original grievance, to the Mayor and Safety Director within ten days of receiving the response from the Chief.
- d. The Mayor and Safety director will then schedule a meeting with the employee within ten days of receiving the appeal. They will then issue a joint response to the employee within ten working days of the meeting.
- e. If the affected employee is not satisfied with the response from the Mayor and Safety Director, he may take the matter to full arbitration. Within ten days, the Union and City will select a list of seven arbitrators, alternately striking a name until an arbitrator is selected. The arbitrator's decision shall be final and binding.
- f. A contractual employee is entitled to have a union representative and/or attorney with him at every step of the disciplinary process, if requested.

5. Discipline of Probationary Employees

- a. The aforementioned sections do not apply to employees during their probationary period. In those cases, the employee serves at the will of the employer and may be disciplined for just cause.
- b. Every newly hired employee will be required to successfully complete a probationary period. The probationary period for new officers shall begin on the first day for which the employee received compensation from the employer and shall continue for 2080 hours of the actual performance of their duties. Time spent on holiyac, compensatory time, sick leave or light duty time shall not count towards the accumulation of 2080 hours. Dispatchers shall serve a one-year probation. Non-contractual employees serve a six-month probation.
- c. A newly hired probationary employee may be discharged at any time during his probationary period. A probationary employee shall have no right to appeal through the grievance procedure for any disciplinary action.

C. Employees not covered under the Collective Bargaining Agreement

1. Disciplinary Violations (CALEA 26.1.4.c)

- a. Any employee may be disciplined for the following infractions:
  - 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.
- c. The employer may pursue discipline for acts committed by the employee while the employee is on duty, working under the colors of the employer, or off-duty representing himself as an employee of the Department. The employee may not be disciplined for actions on his own time that do not reflect directly on the Department or do not violate any City, State or Federal statutory provisions.

2. Forms of discipline

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Date: March 01, 2012

- 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-At the sole discretion of the Chief of Police, all or a portion of the leave balance may be served by the reduction of accrued leave in an amount equal to that portion of the suspension, based on the employee's normal work schedule. (i.e. the reduction of one work day, on a ten hour shift, would equal a ten hour reduction)
    - iv. Reduction in classification
    - v. Termination
  - b. Violations of excessive sick time use will be handled within the current guidelines found in the Collective Bargaining Agreement and Employee Handbook.
  - c. Except in situations of gross misconduct, the employer agrees to use progressive discipline.
3. Administration of Discipline (CALEA 26.1.5)
- a. Shift supervisors have the discretion and authority to issue a verbal reprimand, without prior approval of a superior.
  - b. Division Commanders have the discretion and authority to issue verbal and written reprimands, without prior approval of a superior.
  - c. The Captain of Police has the discretion and authority to issue verbal and written reprimands, without prior approval of a superior. When acting as the Chief of Police, in the Chief's absence, the Captain has the discipline authority of the Chief of Police.
  - d. The Chief of Police has the discretion and authority to issue a verbal or written reprimand or a suspension without prior approval of a superior.
4. Appeal of Discipline (CALEA 26.1.6)
- a. Non-contractual employees may not file a grievance on any matters relating to suspension, demotion, layoff, or termination. These are appealed to the Civil Service Commission.
  - b. For other matters, the employee must meet and speak with his immediate supervisor within ten working days of the cause of the complaint.
  - c. The immediate supervisor will then meet with the affected employee and give a verbal answer within ten working days of the meeting.
  - d. If the employee is not satisfied with the outcome of the meeting, he may file a grievance, in writing, to the Chief of Police within ten days of the response from the immediate supervisor. The grievance will then be aired before a committee consisting of the Chief, another employee of the Department who is selected by the grieving employee, and another employee of the Department selected by the Chief. The committee will then settle the matter by majority vote and issue a response within ten working days.

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- e. If the employee is not satisfied with the response of the committee, he may submit a grievance to the Safety Director in writing, attaching a copy of the committee's response, within ten working days of receiving that response. The Safety director will then respond to grievance in writing within ten days of receiving it.
  - f. If the employee is not satisfied with the response of the Safety Director, he may submit a written grievance, including all documentation from previous steps, to the Mayor within ten working days. The Mayor, Auditor and Law Director will then review the matter and issue a written, final response within ten working days.
- D. Role of the Supervisor in the Discipline Process (CALEA 26.1.5)
- 1. To observe the conduct and appearance of employees and detect those instances where disciplinary actions are warranted.
  - 2. To investigate allegations of employee misconduct when within the scope of their responsibility and authority.
  - 3. To recommend/impose the effective methods of discipline for the personnel under their supervision.
  - 4. To implement any disciplinary action imposed by the Chief of Police and/or the Safety Director.
- E. Supervisory Authority in the Discipline Process (CALEA 26.1.5)
- 1. Supervisors or Command Officers who personally observe employee misconduct have the authority to exercise limited disciplinary action, as indicated above. Supervisors may counsel, issue verbal reprimands and offer recommendations for other disciplinary actions, as follows:
    - a. If the misconduct is very minor, such as a minor mistake, departure from procedure, or the exercise of inappropriate judgment, the supervisor may take the immediate corrective action in the form of informal counseling. These infractions are commonly deemed as being "mistakes of the head" as opposed to "mistakes of the heart". No documentation is required beyond documentation in Interbadge.
    - b. If the misconduct is serious, or of a repeated minor nature, and the supervisor believes that a documented verbal or written warning is appropriate, necessary documentation of the incident shall be prepared, explaining the details of the situation and outlining the supervisor's decision.
    - c. If it is believed that the appropriate punishment is within the authority of the supervisor, as indicated above, notice shall be immediately served upon the employee.
    - d. If it is believed that the appropriate punishment is beyond the authority of the supervisor, as indicated above, the report shall contain the recommendation of appropriate punishment from the supervisor. The appropriate punishment will then be determined, after review of the report.
    - e. If the supervisor feels that it is necessary to relieve an employee from duty, because the conduct is extremely serious or the employee is unfit for duty, supervisors may impose an administrative leave (with pay) on

the employee for the remainder of the employee's shift. The affected employee shall be ordered to appear before the Chief at 8:00 a.m. of the next day, unless the employee would still not be safe to do so in cases involving substance use/abuse. The issuing supervisor shall be required to present a verbal and/or written report to the Chief by 8:00 a.m. of the next day.

F. Dismissal Notice

1. If an investigation of employee misconduct results in termination, the following information shall be provided to the employee:
  - a. A statement of the reason for termination; (CALEA 26.1.7.a)
  - b. The effective date of termination; (CALEA 26.1.7.b)
  - c. A statement of entitled benefits after termination. (CALEA 26.1.7.c)

G. Disciplinary Records (CALEA 26.1.8)

1. Any disciplinary action such as verbal or written reprimand, suspension, demotion or termination shall be entered into the affected employee's personnel file.
  - a. The records of any unsubstantiated, reversed or dismissed allegations of misconduct, which did not result in disciplinary action, shall not be placed in the personnel file.
  - b. Records of informal counseling shall be purged from Interbadge at the termination of the six-month evaluation period.
  - c. Records of formalized punitive action shall be maintained in the employee's personnel file for four years or until they no longer have any force or effect, whichever is longer, in accordance with the directives of the Ohio Historical Society.
  - d. Employees may review anything placed in their personnel file, in the presence of a Division Commander. Requests for the purging of any item in the employee's personnel file, which is beyond the record retention period, must be submitted to the Chief of Police.

**VI. AWARDS AND COMMENDATIONS (CALEA 26.1.2)**

A. Recommendation for Award or Commendation

1. A member of the Department or any private citizen may submit a letter of recommendation for an award or commendation to any member of the Department, and it shall be forwarded to the Awards Committee.
2. Any such letter shall contain the nominee's name and a summary of facts concerning the recommendation.
3. The Awards Committee shall review any submitted recommendations for awards and approve or disapprove the recommendation, and then forward their recommendation to the Chief of Police.
4. Eligibility for awards and commendations shall be open to all members of the Department.
5. Members of other law enforcement agencies may be recommended and awarded a Findlay Police Department Award/Commendation for acts of heroism, bravery, or other meritorious acts when committed within the City of Findlay or while in assistance to the Findlay Police Department.

6. Letters and/or certificates shall cite meritorious acts and a copy of such letters and/or certificates shall be placed in and become a permanent part of the member's personnel file.
  7. Only one award is authorized per individual for any one incident.
- B. Awards Committee
1. An Awards Committee shall be established and is to be composed of a captain, lieutenant, a sergeant, a patrol officers and a dispatcher. The Awards Committee members shall be appointed by the Chief of Police.
  2. The Awards Committee shall be responsible to review any submitted recommendations for any award. The Awards Committee shall make a written recommendation to the Chief of Police concerning awards to be made. All awards shall be decided by the Chief of Police.
  3. All other awards/commendations are made pursuant to the guidelines set forth for such award or commendation in this policy.
- C. Award recognition ribbons may be worn on the dress blouse of an eligible officer. Recognition ribbons shall be purchased by the employee but through a vendor designated by the Findlay Police Department. The recognition ribbons authorized for wear are listed in appendix "B" of this policy. Ribbons shall be enameled and measure 1/8" by 1 3/8". Ribbons shall be worn above the right breast pocket of the dress blouse and directly above the nametag and directly beside the American Flag. The American Flag shall be worn to the far left (closest to the heart) when worn beside a recognition ribbon. Unless authorized by the Chief of Police, recognition ribbons are only permitted to be worn on the duty uniform during the year the award was presented.
- D. Letters of Recognition/Commendation
1. Letter of Recognition
    - a. May come from a private citizen or a supervisor.
    - b. The original letter is given to the employee. A copy of the letter is placed in the employee's personnel file.
  2. Letter of Commendation
    - a. Issued by a member of the Command Staff, noting outstanding performance.
    - b. The original letter is given to the employee. A copy of the letter is placed in the employee's personnel file.
  3. Officer/Dispatcher of the Year
    - a. This award is administrated by the Findlay Police Employees Association and awarded to employees selected as Officer/Dispatcher of the Year. Eligible employees consist of a sworn officer of any rank or Communications Officer, respectively. A member may receive more than one nomination. All nominations will be considered
    - b. This is the only award not recommended by the Award Committee.
    - c. In order to ensure impartiality, all nominations must be supported by documentation, which should include a brief synopsis of why the nominator feels the officer is deserving of this award. The following criteria should be considered when making a nomination:

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- i. Maintains good morale, presents himself well in public, gets along with other officers or co-workers;
  - ii. Has the technical knowledge to get the job done and the drive to follow it through to completion;
  - iii. Communicates clearly and concisely, both orally and in writing;
  - iv. Demonstrates resourcefulness and enthusiasm in accomplishing Department's goals and objectives;
  - v. Strives to improve self and others;
  - vi. Presents a professional image in the public, both on and off duty, is involved with the community;
  - vii. Possesses high personal standards and dedication to duty;
  - viii. Demonstrates good leadership skills;
  - ix. Exemplifies the term "Police Professional".
  - x. Officer/Dispatcher of the year nominations will be by the Findlay Police Employees Association.
  - xi. Traits;
  - xii. Skills;
  - xiii. Examples of dedication to duty and the community.
4. Life Saving Award
    - a. May be awarded to any member of the Department whose action prevented the imminent death of any person. Should a member prolong a person's life to the extent that the victim can be released to the care of medical authorities, but that person eventually expires, the member shall still be considered for the award.
    - b. This award does not require the officer to have performed the act while on duty.
  5. Award of Valor
    - a. May be awarded to any member of the Department who, while in the line of duty, is seriously injured or wounded in combat during the apprehension or attempted apprehension of a suspect. The injury must be serious enough to warrant medical treatment and an absence from regular duty for a significant period of time.
  6. Award of Honor
    - a. May be awarded to any member who voluntarily distinguishes himself by displaying extraordinary heroism and/or bravery with minimal risk to innocent parties. The members must be aware of any imminent threat to their own personal safety. Their actions must be above and beyond the call of duty and at the risk of the individual's personal safety. The action must be one that, if not done, would not reflect negatively on the member. This action does not require the officer to have performed the act while on duty.
    - b. The Award of Honor may be awarded posthumously to the family of an eligible member who lost his life during the incident.

**SOURCES:**

- City of Findlay Employee Handbook

26.1.2: Disciplinary/Recognition Procedures  
Date: March 01, 2012

- Collective Bargaining Agreement between City of Findlay and Ohio Patrolmen's Benevolent Association
- Departmental Directive on Internal Affairs
- Recognition Standards for Law Enforcement Agencies (Fifth Edition)

**DATE:** May 29, 2008 (435)

APPENDIX "A"  
**DISCIPLINE MATRIX**

**Class A Offenses**-Generally minor violations or disregard of policy

- Sleeping on duty (3.A.14)
- Off-Duty Employment (3.A.21)
- Alcohol Violations Off-Duty (3.A.15.c,g)
- Tobacco Use (3.A.16)
- Endorsements (3.A.23.b)
- Conduct Toward the Public (3.A.13)
- Conduct Toward Fellow Employees (3.A.12.a)
- Prohibited Associations and Establishments (3.A.22)
- Appearance (3.A.6)
- Political Activity (3.A.24)
- Personal Telephones (3.A.25)
- Department Equipment and Property (3.A.17)
- Motor Vehicles (3.A.18)
- Expectations of Privacy (3.A.26)
- Fitness for Duty (3.A.3)
- Court Appearances (3.A.8)

**Class B Offenses**-More serious violations or disregard of policy

- Accountability, Responsibility, and Discipline (3.A.9.d,f)
- Obedience to Laws, Regulations, and Orders (3.A.1)
- Absences (3.A.7)
- Neglect of Duty (1.17)
- Use of Alcohol and Drugs/City Property (3.A.15.a,b)
- Use of Alcohol and Drugs on Duty (3.A.15.d,e)
- Insubordination-disrespect (3.A.11)
- Off-Duty Police Action (3.A.20)

**Class C Offenses**-Serious violations and disregard of policy

- Conduct Unbecoming an Officer (3.A.2)
- Sexual, Racial, Protected Status Harassment/Hostile Work Environment (3.A.12.b)
- Public Statements and Appearances (3.A.23.a1-4)
- False Statements/Truthfulness (3.A.10)
- Obedience to Laws, Regulations, and Orders (3.A.1)

**Class D Offenses**-Major, non-correctable offenses, including crimes and violations of public trust, for which dismissal is the usual penalty, regardless of the employee's prior disciplinary or work record.

- Insubordination-open defiance (3.A.11)
- Possession and Use of Drugs
- Rewards/Bribes/Gratuities (3.A.4)
- Abuse of Law Enforcement Powers or Position (3.A.19)
- Accountability, Responsibility, and Discipline (3.A.9.a,b,c,e)

### MATRIX LAYOUT

Class	Step 1	Step 2	Step 3
A	Level 1	Level 1 or 2	Level 2
B	Level 2	Level 3	Level 4
C	Level 4	Level 4 or 5	Level 5
D	Level 5		

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

Memorandum of Discipline	Not Considered After
Verbal reprimand	1 year
Written reprimand	2 years
Suspension, 1-4 days	3 years
Suspension, 5 days or more	5 years

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

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

APPENDIX "B"



Medal of Valor



Medal of Honor



Medal of Merit



Officer / Dispatcher of the Year



Lifesaving

EXHIBIT

J-9

### Captain's Recommendation

After reviewing this investigation, there are many facets that are troubling. First, Officer Greeno was scheduled to testify for an arbitration hearing regarding disciplinary action being sought against Sergeant Hill; which gives rise to the question of retaliation. Secondly, this is the second formal complaint considered humor by Sergeant Hill; both incidents occurred in the presence of subordinate officers and both were equally detrimental. Officer Greeno also reported that several inappropriate comments have been made for the past several months by Sgt. Hill and other members of her shift about a fictitious relationship she was having with the building custodian. Sergeant Hill denied those allegations but confirmed that he had overheard such rhetoric between other members of the department and Greeno. Although, I do feel this was an attempt at humor, it shows a consistent pattern of poor and reckless choices on Sergeant Hill's part; such instances include the tasing of a juvenile, the tasing of interns, 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. If such actions are permitted from a supervisor, an instructor and a tactical operator, it is likely such actions will be emulated by those supervised by Sergeant Hill.

This investigation also revealed a lack of discipline during Sergeant Hill's watch and is very disconcerting. It is apparent through the written statements provided by the officers that were present during that roll call on 11/13/2012 that there is no order during the shift meetings. Specifically, Officer Brian Young's statement when he wrote, "several conversations were going on at the same time" and Lt. Ring's investigative narrative where Officer Huber explained that he was doing a crossword puzzle. Although he denies some allegations, Sergeant Hill admitted that he had heard past commentary about a fictitious relationship between Morgan and a custodian but justified not intervening because she had not mentioned that she found the conduct offensive. From Sergeant Harmon's statement, it appears that he exits the room first as others remain to talk rather than reporting for duty. This supports Sergeant Harmon's prior complaint against Sergeant Hill that he struggles to earn the respect of the officers on the midnight shift, as a result of inappropriate comments made by Sergeant Hill.

Equally disturbing in the investigation, is the obvious attempt by members of Sergeant Hill's shift to minimize Sergeant Hill's comment. It is obvious that the officers involved in this incident were shocked by the comments made by Sergeant Hill. Their surprise was evident in the written statements with statements such as, "Everyone stopped talking immediately when the comment was made...." (Sgt. Dan Hannon), "I looked up when I heard this....", (Officer Jason Morey) and Officer Brian Young's written statement when he wrote, "I did chuckle and look at Sgt. Hill as if questioning whether he realized what he had said."

It is apparent with incorporating the word, "whore" with Officer Greeno's first name, "Morgan" was more than a "slip-of-the tongue", a "tongue-tie" or even a "mistake", as alleged. The actions of Sergeant Hill as a supervisor and a veteran of the Police Department have great influence on young officers. By allowing and participating in derogatory conversations about Officer Greeno, Sergeant Hill has created a terrible work environment for Officer Greeno. She has conveyed that she feels isolated from her peers and reports seeing less back up officers during her encounters on the street. She even reported receiving a telephone call from Officer Essex where he questioned if she had, "been put-up to making a complaint by the administration."

Sergeant Hill's gross misconduct during this incident is in direct violation of the following Rules, Regulations, Policies and Procedures:

**The Code of Ethics Article 6**, as written in the Oath of Office / Ethical Conduct Section 1.1 of the Findlay Police Department Policies and Procedures and in the Findlay Police Department Rules and Regulations which reads:

Employees shall at all times cooperate fully with other members of the department, with other departments and public officials in order to assure the safety and welfare of the general public. They shall not permit jealousies or personal differences to influence their ability to cooperate with other members of the department or other agencies.

Findlay Police Department Rules and Regulations Chapter (2) (6) titled, Authority and Supervision which reads:

6. Respect

A member shall grant to those of superior rank the respect due their rank, and members of supervisory rank shall grant to their subordinates the respect due them as members of the Findlay Police Department.

Findlay Police Department Rules and Regulations Chapter 3(A) (1) (a) & (2), titled GENERAL CONDUCT which reads:

1. Obedience to Laws, Regulations, and Orders

- a. Officers shall not violate any law or any agency policy, rule, or procedure.

2. Conduct Unbecoming an Officer

Officers shall not engage in any conduct or activities on- or off-duty that reflect discredit on the officers, tend to bring this agency into disrepute, or impair its efficient and effective operation.

Findlay Police Department Rules and Regulations Chapter 3 (A) (12), titled Conduct Toward Fellow Employees which reads:

12. a. Members shall conduct themselves in a manner that will foster cooperation among all members of this agency, showing respect, courtesy, and professionalism in their dealings with one another.
- b. Members shall not use language or engage in acts that demean, harass,

or intimidate another person. (Members should refer to this agency's policy on "Harassment and Discrimination in the Workplace" for additional information on this subject)

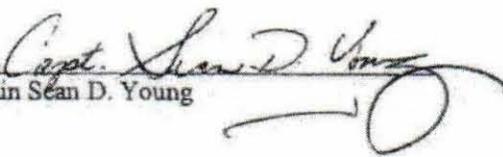
In addition to the aforementioned sections, the conduct in this incident violates the Findlay Police Department Harassment, Discrimination Policy 26.1.3 as written in section IV (A) and (B) (3), which reads:

A. **Hostile Work Environment**-May be created by supervisory personnel, coworkers or non-employees and may give rise to liability even if the harassment does not involve sexual activity or language, if the behavior is sufficiently patterned or pervasive, and is directed at an employee because of his/her sex, sexual orientation, race, ethnicity, religion, disability, or any other non-merit factor. Generally speaking, a single incident will not be sufficient to create a hostile work environment.

B. **Sexual Harassment**-Any repeated or deliberate unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature consists sexual harassment whenever:

3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive work environment. Sexual harassment is not limited to requests for sexual favors in return for job benefits. Sexual harassment may take the form of verbal abuse, leering, salacious gestures, inappropriate language, jokes of a sexual nature, or any undesired touching or patting.

The purpose of discipline is to correct poor conduct or praise good performance. It is apparent that the pending thirty day suspension, from the prior complaint (which is presently being arbitrated), had little effect on correcting Sergeant Hill's negative behavior. Clearly, Sergeant Hill creates exposes the City to liability through his reckless disregard for the afore-listed rules, regulations, policies and procedures. Based on the violations listed above, my recommendation is for termination.

  
Captain Sean D. Young

12-21-2012  
Date

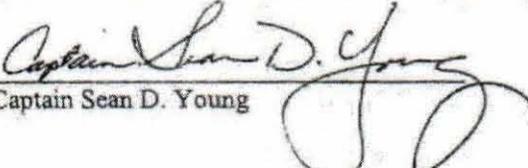
Supplement

On Tuesday 11/27/2012 at approximately 1630 hours, I met with Sergeant Mike Swope regarding the complaint filed by Officer Morgan Greeno against Sergeant David Hill.

During the interview, Sergeant Swope informed me that during a private conversation, Sergeant Hill had admitted to calling Officer Morgan Greeno, "Whoregan". Officer Hill stated that he had made the statement at a midnight shift roll call. Hill clarified to Sergeant Swope that the name "Whoregan" had been used by other officers in the past but had been a "slip of the tongue" on Hill's part. Sergeant Hill further explained to Sergeant Swope, that he meant nothing by the comment and knew immediately that he shouldn't have said it. Sergeant Swope clarified that Sergeant Hill never admitted to using the derogatory name "Whoregan", prior to the roll call.

I asked Sergeant Swope if Sergeant Hill had made an attempt to do "damage control" after calling Officer Greeno, "Whoregan". Specifically, had Sgt. Hill called any other employees by a different name? Sergeant Swope stated that that had not been mentioned by Sgt. Hill.

A written statement was obtained from Sergeant Swope.

  
\_\_\_\_\_  
Captain Sean D. Young

11/29/2012  
Date

## Captain's Supplement

A follow-up investigation of the Hill/Greeno case was ordered and initiated on 01/16/2013.

During the subsequent investigation, it appears the statements remain consistent from all of the officers interviewed. The only new information discovered during this follow-up appears to be a statement made by Officer Greeno to Officer Joe Smith. He states "he did remember that someone had told him that Greeno was [getting tired] of the comments". Smith could not say who had informed him of the information but he began "limiting his participation in the teasing".

In addition to Smith's statements, allegations had also been made that Hill had ordered members of this shift to participate in a poker game (it was unknown if gambling had occurred). Another allegation was that Sgt. Hill had shot members of his shift with the Findlay Police Department paint ball guns. Each of the respective allegations were to have occurred during one of Sgt. Hill's midnight shift.

Additional investigation was ordered regarding the new information.

On 01/22/2013, I met with Sgt. Deeter and Sgt. Harmon since both had previously supervised the midnight shift in the latter weeks of 2012. Not sure what they had heard from their shift, I asked them both if they had any knowledge surrounding the allegations. Both stated that those incidents had occurred in year past but to their knowledge, not recently. I asked each to elaborate. Both explained that they had been patrol officers when they had been ordered by Sgt. Hill to participate in a poker game. Specifically, they were summoned to the station from patrol to play the game. They reported that no gambling took place and several other members of their shift were involved in the game. Based on the elapsed time, they could not recall who else had been on the shift.

Both Sgt. Deeter and Sgt. Harmon also recalled the paint ball gun fight on Sgt. Hill's shift involving on duty officers and during duty hours. Sgt. Hill was a participant and used the training guns that had been stored in the old jail cells on the North end of the building. Sgt. Deeter believed that I had been the Lieutenant of Patrol at the time of the incident which would have been prior to my transfer to Detectives in January 2009. He recalled that he had attempted to lock himself in my office to avoid getting shot. Sgt. Deeter stood on the filing cabinet in my office (the Patrol Lieutenant's Office) in hopes of retreating into the ceiling tile. As Sgt. Deeter explained the incident, he stated that when I arrived to work the following morning, I noticed debris on my filing cabinet and commented on it. At that time, he informed me that he had been attempting to hide in the ceiling to avoid being shot. I vaguely recalled hearing his statement in passing and dismissing it as facetious due to how outlandish it sounded.

Written statements were provided by Sgt. Harmon and Sgt. Deeter.

I also interviewed Officer Joe Smith and he had not worked for Sgt. Hill during the time in question and had not participated in a poker game or a paint ball fight.

In review of the shift schedules, it appears both incidents did occur but the information was very dated.

On the morning of 01/23/2013, I met with Chief Home to apprise him of the findings in the follow-up information. It was agreed the follow-up proved a history of bad judgment and reckless conduct on Sgt. Hill's part but was outside the time-frame to pursue as current discipline. Both prior occurrences along with the tasing of a juvenile as a subordinate officer videoed, sticking a loaded gun in his mouth in front of subordinates during a roll call and now the calling of a female officer "whoregan" furthered our position that Sgt. Hill should be terminated.

  
Captain Sean D. Young

1-23-2013  
Date



Chief's Summary

I have read the investigation completed by Lt. Ring as well as the summaries and recommendations of both Lt. Ring and Captain Young. Based upon the information I agree that Sergeant Hill's conduct violates the Rules, Regulations, Policies and Procedures of the Findlay Police Department as cited in the summaries.

Sergeant Hill is a senior Sergeant with the department, is on the tactical team as a team leader, has been in charge of the Field Training Officer program, as well as being the taser instructor for the department. Sergeant Hill has personally trained many officers and has supervised several of our new officers. Comments like this left unaddressed by the administration would send a message that this is acceptable conduct as long as it is said in jest or made to look as if it were a slip of the tongue.

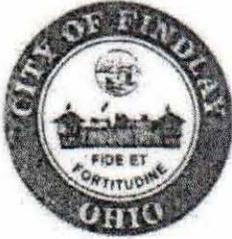
I agree with Lt. Ring's belief that this is not the first time Sergeant Hill had referred to Officer Greeno by this name. Officer Greeno even states in her written statement that the comment was made without thought and with ease which leads me to believe that it had been used before many times. Making a statement in front of the shift of her peers further degrades her. It is also very troubling that he would allow the other officers to refer to her in this manner.

I believe that Officer Greeno has not spoken up about what she perceives as biased treatment by Sergeant Hill for a combination of factors. She is a new female officer that is trying to fit in within his shift. He is a Sergeant that is senior and respected by many officers who are loyal to him which would intimidate a new officer. He is also her direct supervisor who evaluates her and such evaluations and his recommendations can either help her receive future positions and promotions. Also, his opinion of her carries weight with officers she will have to work with in the future.

Further compounding this comment is the fact that Officer Greeno was set to be a witness against him in an arbitration hearing. This does appear that he was speaking from the heart and I believe the statement was what he thinks of her and how he would continue to think of her as a result. This appears to be retaliatory in nature. I also noted the discipline that is pending. This shows very poor judgment as well as a lack of personal discipline.

As a result I recommend that his employment with the Findlay Police Department should be terminated.

A handwritten signature in cursive script, appearing to read "Peggy R. Horne".



# City of Findlay

Lydia Mihalik, Mayor

POLICE DEPARTMENT  
Gregory R. Horne, Chief of Police  
318 Dorney Plaza, Room 207 • Findlay, OH 45840  
Phone: 419-424-7194 • Fax: 419-424-7296  
www.findlayohio.com



## NOTICE OF DISCIPLINARY ACTION

TO: Sgt. David P. Hill  
FROM: Chief Gregory R. Horne  
DATE: January 8, 2013  
SUBJECT: Proposed Disciplinary Action

You are hereby notified that the Chief of Police (Employer) proposes to take the following disciplinary action against you:

On November 13, 2012 just after 2300 hrs. you were attending roll call being run by Sergeant Harmon. Also in the roll call were Officers Morgan Greeno, Brian Young, Chris Huber, Jason Morey, Rob DeBouver, Darin Lawrence, Joe Smith and Andrew Welch. After the general shift information was passed along the conversation switched to the upcoming FOP Christmas Party and who was on the organizing committee. While giving the officers names that were on the committee you stated that "Whore-gan" was on the committee which was referring to Officer Greeno, a female officer. You realized what you had said as did the entire shift. The roll call then ended. At no time did you offer any apology to Officer Greeno. Further compounding the comment was the fact Officer Greeno was set to testify in an arbitration hearing against you reference to conduct of yours at a prior roll call.

The comment offended Officer Greeno and she filed an official complaint with Lieutenant Ring. He then conducted an investigation and after speaking to all the officers that were present on the shift it was determined that everyone had heard the comment. All knew that the comment was derogatory and they were surprised you had made it. He also discovered that you had spoken to Sergeant Mike Swope after the incident and you related to him what you had said, and commented that it was a common phrase used by the officers on your shift when referring to Officer Greeno, and that you did not apologize for the comment.

Officer Greeno had also related to Lieutenant Ring that she felt she was being singled out by you and related comments made by you concerning her having a child, or being pregnant, with the building maintenance night cleaning man, which she stated had been going on for some time. Other officers on the shift reportedly made similar comments and she felt you failed to address them even despite her attempt to let officers know that the comments were not being taken as a joke. Officer Greeno also felt that because you did not like her that you had been paying extra attention to her work related activities and looking for something to criticize her about. Specifically making too many traffic stops as compared to other officers on the shift.

You were interviewed by Lieutenant Ring and admitted to making the statement as alleged in the roll call but stated that it was accidental and you claimed not to have referred to Officer Greeno as "Whore-gan" before. You did state that other officers on your shift had called her that name so often that it just slipped out. You stated you did not apologize to Officer Greeno or bring the matter up due to the pending arbitration and it being misinterpreted. You denied the other comments having been made by you, despite Officer Greeno putting the alleged comments in writing.

Based upon the information in this investigation I feel that your conduct violates the following Rules and Regulations of the Findlay Police Department and/or Policies and Procedures:

Code of Ethics Article 6 which states "Employees shall at all times cooperate fully with other members of the department, with other departments and public officials in order to assure the safety and welfare of the general public. They shall not permit jealousies or personal differences to influence their ability to cooperate with other members of the department or other agencies."

Rules and Regulations Chapter 2, section (6) titled Authority and Supervision which reads "A member shall grant to those of superior rank the respect due their rank, and members of supervisory rank shall grant to their subordinates the respect due them as members of the Findlay Police Department."

Rules and Regulations Chapter 3, sections 3(A) (1) (a) and (2) General Conduct which state

1. Obedience to Laws, Regulations and Orders

(a) Officers shall not violate any law or agency policy, rule or procedure.

2. Conduct Unbecoming an Officer

Officers shall not engage in any conduct or activities on or off duty that reflect discredit on the officers, tend to bring this agency into disrepute, or impair its efficient and effective operation.

Rules and Regulations Chapter 3 Section A (12) (a) (b) Conduct towards Fellow Employees which states

12.(a) Members shall conduct themselves in a manner that will foster cooperation among all members of this agency, showing respect, courtesy and professionalism in their dealings with one another.

(b) Members shall not use language or engage in acts that demean, harass or intimidate another person.

Findlay Police Department Harassment, Discrimination Policy 26.1.3 section IV (B) (3)  
which states:

Sexual Harassment- Any repeated or deliberate unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature consists sexual harassment whenever:

3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile or offensive work environment. Sexual harassment is not limited to requests for sexual favors in return for job benefits. Sexual harassment may take the form of verbal abuse, leering, salacious gestures, and inappropriate language, jokes of a sexual nature or any undesired touching or patting.

Officer Greeno has spoken up about what she perceives as biased treatment by you for a combination of reasons. She is a new female officer that is trying to fit in within your shift. You are a senior Sergeant that is respected by many officers who are loyal to you which would further intimidate a new officer. You also are her direct supervisor who evaluates her and such evaluations and recommendations can either help her receive future positions and promotions. Also, your opinion of her carries weight with the officers she must work with and if you do not approve of her they will not approve of her.

Further compounding this issue is that Officer Greeno was set to be a witness against you in an arbitration hearing. This appears retaliatory in nature. This shows very poor judgment as well as a lack of personal discipline.

The purpose of discipline is to correct improper conduct so that the conduct is not repeated. Reviewing your personnel file you have received a written reprimand for being involved in the tasing of a young juvenile then its subsequent posting on Face book in violation of the department's social media policy.

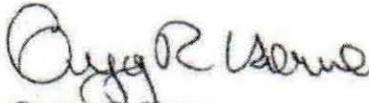
You are to receive a 10 day suspension without pay for an incident where you stuck a loaded firearm in your mouth in front of the same roll call group of officers to show displeasure with the promotion of now Sergeant Harmon.

You are a senior sergeant, are on the tactical team as a team leader, have been in charge of the field training officer program, and have been allowed to select the training officers of your choice as well as are a department trainer for the use of Tasers.

Conduct like this, if left unaddressed by this administration would send a message that this is acceptable conduct from supervisors as long as it is made out to be horseplay or a slip of the tongue. Unfortunately the prior discipline does not seem to have had any impact on this type of behavior.

Violation of the Code of Ethics is a class B offense, level 2 written reprimand; violation of the department's rules and regulations Conduct Towards Fellow Employees is a class A offense level 1 verbal reprimand; violation of the departments rules and regulations Obedience to Laws, Regulations and Orders 3(A)(1)(a) is a class B offense level 2 with one prior violation of the same section level 3 1-2 day suspension; violation of the department's rules and regulations Conduct Unbecoming an Officer 3(A)(2) is a class C offense with a prior violation is a level 4 or 5; and the most serious violation is of the department's sexual harassment policy 26.1.3 section IV(B)(3) would be a department rules and regulations violation section 3(A)(12)(b) which is a level 4 3-10 day suspension with the recent arbitrators ruling this would be a level 5 termination.

Based upon the precedent set by the your most recent arbitration it is incumbent upon me to adhere strictly to the disciplinary matrix. Therefore it is my recommendation, for the cited violations, you shall be terminated from employment with the Findlay Police Department as soon as possible. You have certain rights regarding the appeal of the above proposed disciplinary action. Please read the attached information regarding your rights.



Gregory R. Home  
Chief of Police

APPEAL OR ACCEPTANCE OF DISCIPLINARY ACTION

To The Employee:

Upon receiving the Notice of Discipline, this form must be returned within ten (10) working days to the Safety Director if you wish to appeal the proposed disciplinary action.

\_\_\_ I agree with and accept the proposed discipline.

\_\_\_ I do not agree and wish to appeal the proposed discipline for the following reason(s):

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

(Employee)

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

(Safety Director)

(Attach additional sheets of paper as needed)

## EMPLOYEE RIGHTS

You have been served with a Notice of Discipline, and under the labor agreement you have rights as listed below. *THOROUGHLY REVIEW YOUR RIGHTS BEFORE YOU AGREE OR DISAGREE WITH ANY PROPOSED DISCIPLINARY ACTION.*

If, after you review your rights and discuss the matter with your Union representative (attorney), you agree to the proposed discipline, you may execute this form by signing your name and return said form to the Safety Director.

If you disagree with the proposed discipline, you must state your reasons in writing, and return the form to the Safety Director within ten (10) working days after receiving the Notice of Discipline.

## RIGHTS

1. You are entitled to representation by the Union at **each** step of this procedure.
2. You have the right to appeal the proposed discipline by filing a disciplinary grievance with the Safety Director within ten (10) working days after receiving the notice of discipline.
3. If you file an appeal, the Safety Director will schedule a formal meeting within ten (10) working days after receiving the appeal form, to discuss the matter at hand.
4. The Safety Director will report a decision within ten (10) working days following your appeal.
5. You will have ten (10) calendar days after receipt of the Safety Director's decision in which to appeal the decision pursuant to the Grievance Procedure.
6. The losing party will pay the cost of the Arbitrator.



## Office of the Mayor

Lydia L. Mihalik

318 Dorney Plaza, Room 310

Findlay, OH 45840

Telephone: 419-424-7137 • Fax: 419-424-7245

www.findlayohio.com

Paul E. Schmelzer, P.E., P.S.  
Service-Safety Director

### NOTICE OF DISCIPLINARY ACTION DECISION

TO: Officer Dave Hill  
FROM: Service-Safety Director, Paul Schmelzer  
DATE: January 25, 2013  
SUBJECT: Disciplinary Action Decision

Officer Hill,

A disciplinary meeting was held on January 14th, 2013 to discuss Chief Horne's proposed disciplinary action. At that hearing, your representative presented your arguments against the proposed discipline.

Having listened to your appeal, I took away from it two points. First was your contention that there was not enough investigation done to determine whether this was an isolated incident. Second, you stated that the information supplied by Lt. Ring and Sgt. Swope misrepresented your actual statements and further, that the other allegations of role-call misconduct made by Officer Greeno were falsehoods.

In the interest of fairness, I thought it prudent to follow-up on your concerns. The investigation was expanded by re-interviewing the role-call attendees to determine the perceived nature of the "whoregan" statement and to also gain more insight into the allegations that joking of a sexual nature was present.

Both Lt. Ring and Sgt Swope continue to stand by their original written statements. In Sgt. Swope's statement you indicated that you have heard other officers use the term "whoregan" in the past. In Lt. Ring's statement, he not only states that you have heard the term before, but that you indicated you heard it earlier this year. You now contend that both of these statements are incorrect, questioning both officers' reports that are, incidentally, consistent with each other.

Officer Greeno indicated in her statement that you have participated in inappropriate banter. The additional questioning of officers in roll-call did reinforce your contention that you had never made the "whoregan" statement prior. Most stated they were shocked or surprised when you said it. In addition, most of the testimony from your subordinates indicated that they had not witnessed you participate in any of the lewd conversations involving Officer Greeno being pregnant or her sexual nature.

What did become abundantly clear, during the questioning of your subordinates, is that you were in a leadership role and present when completely inappropriate conversations that repeatedly targeted the same individual on the same topics were perpetuated over a period of more than six months.

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In the role of sergeant, you set the permitted tone and are to set the bar for what is considered professional behavior. By your own admission you allowed this type of behavior to take place. It appears to have become prevalent enough for Officer Greeno to complain about it after you became a part of it.

One may ask why Officer Greeno never indicated that she had a problem with the "lesbian" or "pregnancy" discussion. After all, through testimony, she appears to have participated in the "jokes" many times. This is a fair question. Her own statements indicate that she tolerated, or was "ok with some of them" as long as it came from her peers. However, statements from more than one officer that wrote a letter of support for you give the indication that the conversations had gone beyond funny and that they questioned the activity or tried to avoid it. It even appears that other officers may be concerned that there will be repercussions for their participation.

I am obviously not an officer, and would never pretend to know all the intricacies or relationship bonds that must be forged between officers to succeed in your work environment, but I am surprised by some of the things I have heard as a result of the follow-up investigation.

It is unfortunate that your recent cavalier attitude toward professionalism, coupled with other recent disciplinary issues involving you and subordinates, has demonstrated a pattern of poor judgment that is overshadowing the past ability you have shown to be a good officer and leader.

I have reviewed the Chief's recommended discipline and have spoken to Legal Counsel regarding the applicability and importance of the discipline matrix. When I take into account the ramifications of not following a rational method for applying discipline, I am afraid I have little choice but to agree with the recommendation for termination.

Sincerely,

Paul E. Schmelzer, P.E., P.S.  
Service-Safety Director

Cc: Chief Horne  
Don Rasmussen