***City of Portland*, 134 LA 389 ( Vivenzio, 2014)., Full Text**

**134 LA 389**

**City of Portland**

**Decision of Arbitrator**

June 6, 2014

**In re CITY OF PORTLAND [Ore.] and PORTLAND POLICE COMMANDING OFFICERS**

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**ASSOCIATION**

**Arbitrator(s)**

Arbitrator: Anthony D. Vivenzio

**Headnotes**

**DISCIPLINE**

**[[1]](http://laborandemploymentlaw.bna.com/lerc/2444/doc_display.adp?fedfid=61651255&vname=lelacases&jd=a0g1e6d4j9&split=0" \l "a0g1e6d4j9_1ref" \t "_self)Use of force — Unprofessional conduct**[**▸100.15**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=61651255&fname=laco_100_15&vname=lelacases)[**▸100.552517**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=61651255&fname=laco_100_552517&vname=lelacases)[**▸100.552505**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=61651255&fname=laco_100_552505&vname=lelacases)[**▸100.552535**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=61651255&fname=laco_100_552535&vname=lelacases)

Police captain violated work rules while off-duty, where he showed gun to other motorist who was allegedly cutting him off in traffic; action violated rules on physical force, unsatisfactory performance, and professional conduct.

**[[2]](http://laborandemploymentlaw.bna.com/lerc/2444/doc_display.adp?fedfid=61651255&vname=lelacases&jd=a0g1e6d4j9&split=0" \l "a0g1e6d4j9_2ref" \t "_self)Unwelcome touching**[**▸100.552510**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=61651255&fname=laco_100_552510&vname=lelacases)

Police captain violated work rules on professional conduct, unsatisfactory performance, and human resources rules, where he touched female employee above her knee.

**[[3]](http://laborandemploymentlaw.bna.com/lerc/2444/doc_display.adp?fedfid=61651255&vname=lelacases&jd=a0g1e6d4j9&split=0" \l "a0g1e6d4j9_3ref" \t "_self)Unprofessional conduct**[**▸100.552510**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=61651255&fname=laco_100_552510&vname=lelacases)

Police captain violated work rules on professional conduct, where he got into argument with union representative and ordered her to leave office.

**DEMOTIONS**

**[[4]](http://laborandemploymentlaw.bna.com/lerc/2444/doc_display.adp?fedfid=61651255&vname=lelacases&jd=a0g1e6d4j9&split=0" \l "a0g1e6d4j9_4ref" \t "_self)‘Indeterminate sentence'**[**▸100.5509**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=61651255&fname=laco_100_5509&vname=lelacases)[**▸100.5507**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=61651255&fname=laco_100_5507&vname=lelacases)

Demotion of police captain, who committed number of offenses, is reduced to 60-day suspension, where imposition of what amounts to “indeterminate sentence” is without just cause, grievant had 23-year history without previous discipline, and with commendations and awards for service to community, grievant had no history of inappropriate touching, examples of unprofessional conduct are better subject of counseling and progressive discipline than demotion, and grievant is currently in counseling to address some emotional challenges.

**Attorneys**

For the employer—Mark Amberg, office of city attorney.

For the union—Hank Kaplan (Bennett Hartman Morris & Kaplan), attorney.

**Opinion Text**

**Opinion By:**

VIVENZIO, Arbitrator.

**Procedural History**

The City of Portland is hereinafter referred to as “the Employer”. The Portland Police Commanding Officers Association (PPCOA) is hereinafter referred to as “the Union.” Collectively, they are hereinafter referred to as “the Parties.” W\_\_ is the Grievant.

The Employer and the Union are Parties to a collective bargaining agreement effective July 1, 2010 to June 30, 2013, hereinafter referred to as the “Agreement.” This case arises out of the demotion of former Captain W\_\_ to the rank of lieutenant, as directed by the Employer's letter of discipline dated December 13, 2012. (*Ex. E-29*). The Union filed its grievance on January 18, 2013. Following unsuccessful attempts to resolve this matter through the grievance procedures set forth in Article 31 of the Agreement, the Union then invoked arbitration under Article 31, Step IV.

**Stipulated Issue Before the Arbitrator**

At the hearing, the Parties presented their formulations of the issue to be resolved in the arbitration substantially as follows:

Did the Employer have just cause to demote Captain W\_\_’s to the rank of Lieutenant? If not, what is the appropriate remedy?

**Background**

***Structure of the Portland Police Bureau***

The Police Bureau is a large, complex law enforcement organization with more than 900 sworn officers and more than 200 non-sworn “civilian” personnel. The senior command structure of the Police Bureau is relatively small. It is made up of the Police Chief, three Assistant Chiefs, each of whom is in charge of one branch of the Bureau—Operations, Services and Investigations, five commanders—three of whom are in charge of the Bureau's geographic precincts—North, East and Central, one of whom is in charge of the Detectives Division and one who is in charge of the Transit Division, and 13 Captains. The rank of

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Captain in the Portland Police Bureau is the highest civil service rank below Police Chief. The only ranks higher than Captain are Commander and Assistant Chief. These ranks are premium pay assignments but the base civil service position for each of these ranks is Captain. Each Captain is assigned to head a Division with the exception of the three Captains assigned to the precincts and a Captain who is responsible for overseeing the Bureau's compliance with a settlement agreement that was entered into with the U.S. Department of Justice (DOJ) following an investigation by the DOJ into the Bureau's use of force—especially use of force involving individuals with actual or perceived mental illness. Captain is a command level rank, part of the Chiefs’ intimate command structure and the Captains in charge of the RU's (Reporting Units) are essentially completely in charge of and responsible for everything that happens within their reporting unit. As Captain of the Strategic Services Division, the Records Division and the Traffic Division, then-Captain W\_\_ was the commanding officer in charge of those reporting units. As command leaders in the organization, Captains are expected to administer and enforce Bureau and City policies and adhere to City and Bureau policy. The Police Chief and the Assistant Chiefs place an extremely high degree of reliance on the police Captains to run their Divisions, to participate in command level decisions, and to implement, administer, and follow Bureau Directives and policies.

***Summary of Alleged Violations***

A summary of the alleged violations by the Grievant of City of Portland and Police Bureau Policies as noted in the Employer's letter directing demotion of the Grievant, in order, is as follows:

• Misconduct during a “road rage” event on Interstate 90 (I-90) near Coeur d'Alene, Idaho, while the Grievant was on vacation with his family. The Grievant allegedly displayed his badge and gun to the other motorist involved, who called 911. He failed to call 911 himself to advise law enforcement of the situation. The Grievant was pulled over by the Washington State Patrol as a “high risk traffic stop.” His discourteous behavior toward the troopers who stopped him indicated a failure to understand or appreciate the seriousness of the situation resulting from introducing his firearm into a road rage incident. His conduct in this matter discredited the Portland Police Bureau and placed it in a poor light.

• Two incidents involve inappropriate touching of two non-sworn female employees, L\_\_ and B\_\_,

• The Grievant's conduct during a Weingarten meeting attended by American Federation of State, County and Municipal Employees (AFSCME) Shop Steward G\_\_. The Grievant allegedly lost control of his temper, yelled at Ms. G\_\_, and ordered her to leave his office under the threat of finding her to be in “trespass.”

The work rules thereby violated are:

Directive 310.00 - Conduct, Professional

Directive 310.40 - Courtesy

Directive 315.30 - Unsatisfactory Performance

Directive 1010.20 - Physical Force

HRAR 2.02 - Prohibition against Workplace Harassment, Discrimination and Retaliation

***The Employer's Disciplinary Process***

In considering the Employer's adjudication of facts, and the discipline imposed on the Grievant, it is helpful to understand the system utilized by the PPB in making those determinations, the supervisory, investigatory, advisory, and review entities having input into the investigation and final disciplinary decision, their policies and procedures. The Portland Police Bureau has a fairly complex investigation and discipline process that involves the Bureau, the commissioner-in-charge of the Bureau (the city's mayor), and an Independent Police Review Division (“IPR”) that is not connected to the Police Bureau or the mayor's office, but is under the authority of and reports directly to an independently elected City Auditor. The Police Bureau's discipline process also involves citizen input at the Police Review Board (PRB) where a citizen sits as one of its voting members.

When a complaint of alleged misconduct is lodged against a bureau officer, whether the complaint is initiated by a citizen (a so-called “citizen” or “C” complaint), or by someone within the bureau (a so-called “bureau” or “B” complaint), the complaint, generally, is investigated by the Bureau's Internal Affairs Division (“IAD”) (By City Code, the Independent Police Review Division also has the authority to investigate complaints—either in conjunction with Internal Affairs or independently.

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The matters at issue in W\_\_’s situation went through a “standard” Internal Affairs investigation and were not independently investigated by IPR.). Once the investigation is completed, the file is sent to the RU (Reporting Unit) manager for recommended findings which are then circulated to the Branch Chief, the IPR Director and the Professional Standards Captain for review, comment and a determination of whether to concur with or controvert the RU manager's recommended findings or to refer the case back for further investigation. Depending on the nature of the allegations or proposed discipline and whether the RU manager's recommended findings are controverted, the case is then reviewed by the Police Review Board (“PRB”) which serves as an advisory body to the police chief.

The PRB consists of a number of voting and advisory members (*Ex. E-2*). The members who vote on the findings of whether the officer violated policy and who vote on the recommended discipline for any sustained findings are a community member, a Bureau peer member of the involved officer, the IPR Director (or designee), the Branch Chief who oversees the involved member's RU and the involved members RU manager. The PRB makes recommendations to the Chief on the alleged policy violations and, for any sustained allegations of misconduct, a recommended level of discipline. The recommendation that goes to the Chief contains the number of members voting a certain way on each alleged violation and the number of members voting a certain way for recommended discipline on each sustained violation but the PRB recommendation does not contain the names of which members voted which way and does not contain an overall recommended vote of the PRB (*Ex. E-13* and *Ex. E-25*).

Once the PRB's recommendation goes to the Chief, the Chief and the commissioner in charge (in this case, the Mayor) issue a proposed discipline letter which contains the Chief's /Mayor's proposed adjudication on the alleged policy violations and their proposed discipline. While the Chief/Mayor review and consider the PRB's recommendations, they are not obligated to follow the recommendations. In this case, the original level of discipline recommended by a majority of the Police Review Board (“PRB”) and, ultimately, by Chief Reese and by the Mayor, was termination.

When the Chief's/Mayor's proposed discipline is issued, the involved officer is given the opportunity for a “due process” or “mitigation” hearing which gives the officer the opportunity to respond orally or in writing to the charges and to present any information the officer wants the Chief and Mayor to consider before making a final decision. After taking into account any information the officer (or the Union) provides, the Chief and Mayor issue a final discipline decision. Following this hearing, The Mayor and Chief Reese decided to demote the Grievant to the rank of lieutenant rather than terminate his employment.

**Pertinent Collective Bargaining Agreement and Work Rules Provisions**

***LABOR AGREEMENT
EFFECTIVE JULY 1, 2010 THROUGH JUNE 30, 2013***

***ARTICLE 30
DISCIPLINARY ACTION***

Disciplinary action or measures shall include only the following: written reprimand; suspension; or in lieu thereof, with the commanding officer's concurrence, loss of vacation or non-FLSA compensatory time; demotion or discharge. Disciplinary action shall be for just cause and subject to the grievance procedure of this Agreement. This section shall not apply to counseling and instruction. Verbal reprimands will not be used as the basis for subsequent disciplinary action unless the commanding officer is notified at the time of reprimand, and if notified, the matter will be subject to the grievance procedure.

If the City has reason to reprimand or discipline a commanding officer, it shall be done in a manner that is least likely to embarrass the commanding officer before other employees or the public.

A commanding officer who is suspended, demoted, or discharged may choose between two avenues of appeal: (1) the commanding officer may exercise appeal rights under the Bureau of Human Resources Administrative Rules of the City of Portland, or (2) the Union may, in lieu of those provisions established pursuant to the City Charter, be allowed to take up the matter at Step II of the Grievance Procedure.

***ARTICLE 31
GRIEVANCE PROCEDURE***

To promote better City-Association relations, both parties pledge their immediate cooperation

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to settle any grievance or complaint that might arise out of the application of this Contract, at the lowest level possible and the following procedure shall be the sole procedure to be utilized for that purpose. Any settlement of a grievance under this Article, which would alter or amend the terms of this agreement or any side bar or memorandum of understanding, shall not be binding on either party unless the settlement, or memorandum of agreement or side bar agreement, is approved in writing by the president of the Association and the Director of the Bureau of Human Resources.

The time limits prescribed in these provisions may be extended by a written mutual agreement between the City and Association. Days as used in this Article shall refer to work days, exclusive of Saturday, Sunday and designated holidays.

*Step I.* The Association or any commanding officer claiming a breach of any specific provision of this Contract may refer the matter, in writing, with or without the Association, to the Chief of Police. The grievant, or Association representative, shall state the nature of the grievance, the section of the Contract allegedly violated and the remedy requested. This grievance shall be presented within twenty (20) days from the date thereof. The Chief shall have twenty (20) days in which to reply. The response shall be in writing and made to the grievant and the Association.

*Step II.* If, after twenty (20) days from the date of the submission of the grievance to the Chief, or from the date of the reply, the grievance still remains unadjusted, the Association may present the grievance to the Commissioner-in-Charge. A copy of the grievance shall be sent simultaneously to the Bureau of Human Resources. Within one week of receipt of the grievance, the Commissioner-in-Charge shall either retain jurisdiction of the grievance at this level or will refer jurisdiction of the grievance to the Bureau of Human Resources for resolution.

*Step III.* The Commissioner-in-Charge or the Bureau of Personnel shall have twenty (20) days in which to reply. If the grievance has been delegated to the Bureau of Human Resources, a copy of the reply shall be sent simultaneously to the Commissioner-in-Charge. If the Commissioner-in-Charge or the Bureau of Human Resources does not respond within twenty (20) days, or from the date of the response, the Association will have fourteen (14) days to serve notice, in writing, to the Bureau of Human Resources, with a copy of the notice sent simultaneously to the Commissioner-in-Charge, of its request for mediation or its intent to arbitrate.

*Step IV.* If the Association and City agree to mediate a specific grievance, the Association and the City shall mutually request mediation through the services of the State of Conciliation Service.

*Step V.* If the parties are not in agreement after the completion of mediation, the Association will have fourteen (14) days to serve notice, in writing, to the Bureau of Human Resources, with a copy of the notice sent simultaneously to the Commissioner-in-Charge, of its intent to arbitrate.

*Step VI.* After the Bureau of Human Resources has been notified that the Association intends to arbitrate, the parties shall select an arbitrator by such methods as they may jointly elect. If they are unable to agree on such method, then the parties shall jointly request the Employment Relations Board to provide a list of the names of seven (7) arbitrators, the arbitrator to be selected by the method of alternative striking of names, with the Association striking the first name objectionable to it and the City then striking the first name objectionable to it. The final name on the list shall be the arbitrator.

The arbitrator's decision shall be final and binding on both parties, but the arbitrator shall have no power to alter in any way the terms of this agreement. The decision of the arbitrator shall be within the scope and terms of this agreement and the arbitrator shall be requested to issue the decision in writing, indicating findings of fact and conclusion, to both parties within thirty (30) days after the conclusion of the proceedings, including filing of briefs, if any. The decision may also provide retroactivity prior to the date the grievance was first filed with the Chief and shall state the effective date.

When the City has mathematically erred in computing or paying a commanding officer's pay or other benefits, such pay or benefits shall be awarded the commanding officer at the time the error is discovered by the City or otherwise brought to the City's attention.

Each party shall be responsible for paying the costs of presenting its own case in arbitration, including the payment of witness fees, if any. Expenses for the arbitrator's services and the proceeding shall be borne equally by the parties. If either party requests a court reporter, the requesting party shall pay the fee. In the event both parties request a transcript, the fee shall be borne equally by the parties.

***PORTLAND POLICE BUREAU MANUAL OF POLICY AND PROCEDURE***

*1010.20 PHYSICAL FORCE*

*POLICY (1010.20)*

The Portland Police Bureau recognizes that duty may require members to use force. The Bureau requires that members be capable of using effective force when appropriate. It is the policy

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of the Bureau to accomplish its mission as effectively as possible with as little reliance on force as practical.

The Bureau places a high value on resolving confrontations, when practical, with less force than the maximum that may be allowed by law. The Bureau also places a high value on the use of de-escalation tools that minimize the need to use force.

The Bureau is dedicated to providing the training, resources and management that help members safely and effectively resolve confrontations through the application of de-escalation tools and lower levels of force.

It is the policy of the Bureau that members use only the force reasonably necessary under the totality of circumstances to perform their duties and resolve confrontations effectively and safely. The Bureau expects members to develop and display, over the course of their practice of law enforcement, the skills and abilities that allow them to regularly resolve confrontations without resorting to the higher levels of allowable force.

Such force may be used to accomplish the following official purposes:

a. Prevent or terminate the commission or attempted commission of an offense.

b. Lawfully take a person into custody, make an arrest, or prevent an escape.

c. Prevent a suicide or serious self-inflicted injury.

d. Defend the member or other person from the use of physical force.

e. Accomplish some official purpose or duty that is authorized by law or judicial decree.

When determining if a member has used only the force reasonably necessary to perform their duties and resolve confrontations effectively and safely, the Bureau will consider the totality of circumstances faced by the member, including the following:

a. The severity of the crime.

b. The impact of the person's behavior on the public.

c. The extent to which the person posed an immediate threat to the safety of officers, self or others.

d. The extent to which the person actively resisted efforts at control.

e. Whether the person attempted to avoid control by flight.

f. The time, tactics and resources available.

g. Any circumstance that affects the balance of interests between the government and the person.

The Bureau's levels of control model describes a range of effective tactical options and identifies an upper limit on the force that may potentially be used given a particular level of threat. However, authority to use force under this policy is determined by the totality of circumstances at a scene rather than any mechanical model.

*PROCEDURE (1010.20)*

*Directive Specific Definitions*

Force: Physical contact that is readily capable of causing physical injury, as well as the pointing of a firearm.

Physical injury: As defined in ORS 161.015 (7), the impairment of physical condition or substantial pain.

*Precipitation of Use of Force Prohibited (1010.20)*

Members should recognize that their approach to confrontations may influence whether force becomes necessary and the extent to which force must be used.

Members must not precipitate a use of force by placing themselves or others in jeopardy through actions that are inconsistent with the Police Bureau's defensive tactics and tactical training without a substantial justification for variation from recommended practice.

*315.30 UNSATISFACTORY PERFORMANCE*

*POLICY (315.30)*

Members shall maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions. Members shall perform their duties in a manner that will maintain the highest standards of efficiency in carrying out the functions and objectives of the Bureau. Unsatisfactory performance may be demonstrated by a lack of knowledge of the application of laws required to be enforced; an unwillingness or inability to perform assigned tasks; the failure to conform to work standards established for the rank, grade or position; the failure to take appropriate action on the occasion of a crime, disorder, or other condition deserving police attention; or absence without leave.

In addition to other indications of unsatisfactory performance, the following examples could be considered prima facie evidence of unsatisfactory performance:

performance deficiencies or a written record of infractions of rules, regulations, directives or orders of the Bureau.

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*310.40 COURTESY*

*POLICY (310.40)*

Members shall, on all occasions in the performance of their duties or after identifying themselves as a Bureau member, be respectful, courteous and considerate toward their supervisors, their subordinates, all other members and the public. No member shall use profanity in the performance of his/her duties. It may be necessary to quote another person in reports or in testimony. Members may be required to use profanity to establish control in the exceptional circumstances where its use may help avoid the deployment of physical or deadly force. These circumstances are very limited and shall be documented in an appropriate report. No member shall use epithets or terms that tend to denigrate any particular gender, race, nationality, sexual orientation, ethnic or religious group, except when necessary to quote another person in reports or in testimony.

*310.00 CONDUCT, PROFESSIONAL*

*POLICY (310.00)*

Every member will constantly strive to attain the highest professional standard of conduct. Members, whether on duty or off duty, shall be governed by the reasonable rules of good conduct and behavior, and shall not commit any act tending to bring reproach or discredit upon the Bureau or the City. Members will conduct themselves in the discharge of their duties and the relations with the public and other members in a diplomatic and professional manner.

Members shall not publicly criticize the Bureau, its policies, programs, actions or members, or perform any acts, or make any written or oral statements which would impair or diminish the orderly and effective operations, supervision, or discipline of the Bureau.

Members shall not spread rumors in regard to other members, citizens, future policies or activities, or make statements regarding public events, crimes, or catastrophes, unless they know of their own knowledge that their statements are true.

***CITY OF PORTLAND HUMAN RESOURCES ADMINISTRATIVE RULES***

*2.02 PROHIBITION AGAINST WORKPLACE HARASSMENT, DISCRIMINATION AND RETALIATION*

*Workplace Harassment Prohibited*

The City of Portland is committed to a work environment that is free of illegal bias, prejudice and harassment and where all individuals are treated with respect and dignity. Every individual has the right to work in a professional atmosphere that promotes employment opportunities and prohibits discriminatory practices.

Workplace harassment manifests itself in two primary ways:

1. In forms of harassment that violate state and federal laws; and

2. In forms of harassment that may not violate law, but which violate this City rule because they are not conducive to creating a work environment for employees that is consistent with the intent of this rule.

This rule covers both types of harassing behavior. Employees are expected to talk with their supervisor, other managers, or the City's Diversity Development/Affirmative Action Office, about harassment they experience regardless of its origin. Supervisors or managers receiving such complaints are expected to take appropriate corrective action to stop the harassment.

It is the City's policy to prohibit workplace harassment and discrimination on the basis of race, religion, gender, marital status, familial status, national origin, age, mental or physical disability (as defined by the Americans with Disabilities Act and state law), sexual orientation, gender identity, source of income, or Vietnam era veterans status, or other protected status under applicable law in any personnel action.

Harassment and discrimination is prohibited in the workplace or in any work-related setting outside the workplace. Every employee shares the responsibility for bringing to the City's attention conduct that interferes with providing a work environment free of illegal discrimination and harassment.

*Who is Covered by this Rule?*

This Rule covers all elected officials, employees and applicants for employment with the City of Portland, as well as contractors providing services to the City of Portland such as outside vendors or consultants. Contractors providing a service to the City will be notified of this rule.

*Definitions*

*Harassment*: verbal or physical conduct that is derogatory or shows hostility towards an individual because of his or her race, religion, sex, marital status, familial status, national origin, age, mental or physical disability (as defined by the Americans with Disabilities Act and state law), sexual orientation, gender identity, source of income or Vietnam era veterans status, or other protected status under applicable law and:

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1. Has the purpose or effect of creating an intimidating, hostile, abusive, or offensive work environment; or

2. Has the purpose or effect of unreasonably interfering with an individual's work performance; or

3. Otherwise adversely affects an individual's employment and employment-related opportunities.

*Sexual Harassment*: unwanted sexual advances, requests for sexual favors, and other sexually oriented verbal or physical conduct constitutes sexual harassment under this rule where:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or

2. Submission to or rejection of such conduct is used as a basis for employment decisions affecting such individual; or

3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance, or creating an intimidating, hostile, or offensive work environment.

*Discrimination:*

Unequal or different treatment of an individual in any personnel action on the basis of race, religion, sex, sexual orientation, gender identity, age, mental or physical disability (as defined by the ADA and state law), marital status, national origin or other protected class under applicable law.

*Examples of Prohibited Conduct:*

*Verbal or Physical Conduct*

1. Use of epithets, innuendos or slurs because of an individual's race, religion, sex, sexual orientation, gender identity, age, physical or mental disability (as defined by the ADA and state law), marital status, familial status, source of income or Vietnam veterans status, national origin, or other protected status under applicable law

2. Jokes, pranks or other banter, including negative stereotyping, that is derogatory or shows hostility because of race, religion, sex, sexual orientation, gender identity, age, physical or mental disability (as defined by the ADA and state law), marital status, familial status, source of income or Vietnam veterans status, national origin, or other protected status under applicable law.

3. Unwelcome physical touching or contact, such as pinching, kissing, grabbing, patting or hugging.

*What Should Employees Do?*

2. If you believe you are being subjected to conduct that violates this rule: tell the offender to “stop it!” Say it firmly, without smiling or apologizing. Nothing prevents you from filing a complaint because you did not tell the offender that his or her behavior is unwelcome or ask the offender to stop.

3. Promptly file a complaint using the procedure below if you are subject to discrimination, harassment or retaliatory conduct prohibited by this rule. If you are witness to prohibited conduct, you are encouraged to bring that information to the attention of a supervisor.

**Discussion**

At the outset, I would like to express my appreciation for the professional manner in which the parties conducted themselves in the course of the proceedings, rendering vigorous, but courteous, advocacy.

It is well-established in labor arbitration that where, as in the present case, an Employer's right to discipline an employee is limited by the requirement that any such action be for “just cause,” the Employer has the burden of proving that the discipline imposed was supported by the evidence upon which it based its action.

“Just cause” consists of a number of substantive and procedural elements, but its essence may be summarized as follows: Primary among its substantive elements is the existence of sufficient proof that the Grievant engaged in the conduct for which they were disciplined. The second area of proof concerns the issue of whether the penalty assessed by the Employer should be upheld, mitigated, or otherwise modified. Factors relevant to this issue include a requirement that an employee knows or is reasonably expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline, the existence of a reasonable relationship between an employee's misconduct and the punishment imposed, and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

The Parties differ widely upon many of the facts of this case, and their interpretation. The matter was heard over a period of three days, with hundreds of pages of exhibits entered into the record, and without the taking of a

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verbatim transcript by a court reporter. I made a digital recording of the proceedings for my own review and have studied the entire record in this matter carefully and considered each argument and authority cited in the Parties’ briefs. As no transcript was taken, I have set forth relevant witness testimony in greater than usual detail. That a matter has not been discussed in this Award does not indicate that it has not been considered. The discussions which follow will center on those factors which I found either controlling or necessary to this decision. The Employer, through its ultimate decision-maker the Chief of Police, has set forth the rationale for its disciplinary determination in its letter on December 13, 2012, *Ex. E-9*, in a format much like that of a charging document in the civilian courts, setting forth applicable work rules and its finding of facts basing its disciplinary decision. In the following portions of the Award, the allegations will be addressed in the order taken by the Employer in the discipline letter to the Grievant.

***IAD Case #2011-C-0249:***

***Violations of Directives 1010.20 - Physical Force, Directive 315.30 - Unsatisfactory Performance, and Directive 310.00 - Conduct, Professional***

***Position of the Employer***

The position of the Employer is summarized as follows:

On August 13, 2011, at approximately 11 a.m., the Grievant was returning from a vacation in Idaho with his wife and two teenage children in his 1998 Ford pickup truck. Behind him as he emerged onto Interstate 90 westbound was a silver 2010 Toyota Camry driven by C\_\_ of Coeur d'Alene, Idaho, with his wife in the front passenger seat. Both vehicles nearly collided at the end of the on-ramp when they tried to move left into the same space on the roadway. From this point, statements vary as to subsequent events. C\_\_ claims the Grievant was tailgating him in the fast lane, while the Grievant claims that C\_\_ was moving back and forth between the center and fast lanes to avoid being passed. C\_\_ reported that the Grievant first displayed his handgun with the barrel pointed up, then pointed the weapon at him through the side window of Grievant's pickup truck. The Grievant reported that he first displayed his PPB badge, then the badge and a holstered gun, in an attempt to get Mr. C\_\_ to disengage. The preceding occurred at the east end of Post Falls, Idaho. C\_\_ called 911 and reported that someone had pointed a handgun at him while traveling westbound on Interstate 90, and several Post Falls police officers were dispatched to intercept the Grievant's vehicle. The officers also notified the Idaho State Police, which had no officers in the area at the time. Idaho law enforcement returned to Post Falls after the two involved vehicles entered the state of Washington, but contacted the Washington State Patrol (WSP), which relayed the information to its troopers in the Spokane area. WSP Trooper Greg Birkeland spotted the Grievant's vehicle, waited until he was joined by two other troopers, and initiated a traffic stop of the Grievant near Sprague Avenue. The Grievant continued for approximately one mile and stopped on the exit ramp to Freya Street. The troopers had planned to execute a high-risk stop, but the Grievant immediately displayed his badge, identifying himself as a police officer. After the troopers called the Grievant back to their vehicles and interviewed him and his wife about what happened, they decided that, since the incident had occurred in Idaho, they would relay the information to the Idaho State Police for their investigation, and released the Grievant from the scene.

The Grievant reported the incident to his immediate supervisor, Assistant Chief Larry O'Dea, who referred the incidents to Internal Affairs, which contacted Mr. and Mrs. C\_\_ and initiated this administrative investigation. Substantive differences exist in the descriptions of the initial encounter and the events that followed, both sides accusing the other of offensive and aggressive actions, but what is at issue here is how the Grievant responded and reacted to the situation overall.

Trooper Birkeland asked the Grievant, “… you're in a position … to avoid this type of stuff … what was going on?” The Grievant is reported as having answered, “you know, it was just the guy pissed me off and I was, you know, just try to get him to quit, you know, jockeying back and forth with us on the freeway.” The Grievant did not mention a threat from C\_\_’s vehicle. In his internal affairs interview,

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the Grievant stated that he had a “heightened concern” because of the appearance of the car and its occupants along with their behaviors. He described C\_\_ as wearing a straight bill baseball cap, cocked sideways, associated with being a member of a gang, and Mrs. C\_\_ as appearing “anti-establishment” about 19 years old with dyed black hair. The car was a 2010 Toyota Camry with tinted windows, not the “small silver or gray low rider with blacked out windows” that the Grievant described. Mr. and Mrs. C\_\_ were not members of a gang, but a married couple.

Directive 1010.20 provides that a PPB law enforcement officer should recognize that their approach to confrontations may influence whether force becomes necessary and the extent to which force must be used. They must not precipitate a use of force by placing themselves or others in jeopardy through actions that are inconsistent with the PPB's defensive tactics and tactical training without substantial justification for variation from recommended practice. The Grievant displayed his badge and firearm while driving alongside the C\_\_ vehicle, and stated that he did this to better identify himself as an armed off-duty police officer. This is not an appropriate or approved use of a firearm. Nowhere does the PPB teach that it is appropriate to display a firearm to better identify oneself as a police officer. The Grievant failed to take appropriate steps at de-escalation and preventative actions following a near accident. The introduction of the firearm was an escalation of force that could have been met with tragic consequences. The incident was nowhere near a situation that would justify a need to prepare to shoot at a moving vehicle or from a moving vehicle on a highway. Based on the totality of circumstances in this case, there was no justification or reason necessitating the need for the display of a firearm. The Grievant had other appropriate alternatives, such as using his cell phone to call 911, offering a hand signed apology, pulling to the side of the road (if not followed), actively looking for an exit, and/or disengaging altogether.

On February 10, 2012, the day after being found “Not Guilty” in the resulting criminal trial in Idaho, the Grievant sent an e-mail to Internal Affairs stating, in part, as follows:

A few months have passed. These last few months have been the worst months of my life. I have had a lot of time to think about that date in August. My answer is no, I would not do that again. I would rather run into their car and risk injury to my family than go through this again. I haven't carried a gun or badge since November. I don't miss it.

When I am found not guilty and I return to work, I do not plan to carry a gun or badge off duty unless I'm driving a city owned car.

These statements are troubling in their lack of flexibility, self-reflection and judgment. The idea that he, if placed in the same situation, would choose to place himself and his family at risk, rather than de-escalate the situation and call 911, is disturbing. After six months following the incident, the Grievant's statements do not reflect a thoughtful and appropriate approach, and suggest he did not fully understand or take responsibility for his actions, seeming more concerned with the consequences to him personally, than with the propriety of his actions and their impact on others.

The Grievant's actions during the incident were unsatisfactory. Directive 315.30 - Unsatisfactory Performance, requires that members maintain sufficient competency to properly perform their duties and assume the responsibility of their positions. The Grievant failed to meet the PPB's expectations of someone with the Grievant's rank and tenure, let alone a commanding officer with over 20 years experience. Instead of choosing to employ available de-escalation strategies previously described, the Grievant chose to escalate the situation. In his Internal Affairs interview, he stated, “I know I am escalating here. As I'm escalating each step I'm hoping I come to a step where he goes away.” The Grievant's decision to escalate the situation based on inaccurate facts and assessment of the situation are of concern, as well.

During the incident, the Grievant failed to conduct himself in a professional manner. Director 310.00 - Conduct, Professional, requires members to constantly strive to attain the highest professional standard of conduct. Whether on or off duty, members are governed by the reasonable rules of good conduct and behavior and shall not commit any act tending to bring reproach or discredit upon the Bureau or City. Members are expected and required to conduct themselves in a diplomatic

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and professional manner. The Grievant's actions during this incident brought reproach and discredit upon the Police Bureau and its members. The WSP officers who stopped the Grievant described him as “arrogant and cocky,” showing a lack of common sense and good judgment. The incident was highly publicized and became a topic of discussion during several community events and forums, with the coverage reflecting negatively on the Grievant and the PPB.

***Position of the Union***

The position of the Union is summarized as follows:

On the morning of Saturday, August 13, 2011, W\_\_, his wife, and their two children were returning from a vacation in Coeur d’ Alene, Idaho, their 1998 Ford truck loaded with camping gear. Near the start of the trip, W\_\_ drove onto the entrance ramp to I- 90, the traffic merging into two lanes, and at the bottom of the ramp signaled his intent to cross into the left lane. Close behind them was a 2010 Toyota Camry with very dark tinted windows, driven by C\_\_ with his wife accompanying him. C\_\_ came around from behind the slower W\_\_ vehicle, crossing the solid white lines at the merge point, and tried to pass just as W\_\_ was merging into the left lane. This much is essentially undisputed.

Testimony concerning subsequent events varies widely. C\_\_ honked his horn, and W\_\_, seeing that there was a car on his left side pulled back into the right lane. He moved into the left lane when C\_\_ was well past him. C\_\_ slowed abruptly, causing W\_\_ to brake hard to avoid a collision. All agree that the W\_\_ car moved into the right lane, W\_\_ stating, to avoid a collision. The W\_\_s denied they ever pulled up next to the passenger side of the Camry. W\_\_ then pulled into the right lane and the Camry immediately crossed over into their lane in front of them and again applied the brakes. The W\_\_s then crossed back into the left lane and again the Camry pulled in front of them. Mrs. W\_\_ was terrified believing the C\_\_s would continue this behavior until a crash. W\_\_ did not pull over and stop because he feared that the C\_\_s would also and a confrontation would result. Not knowing how far it was to the next exit, and concerned about the C\_\_s dangerous behavior, W\_\_ displayed his badge in his left hand to identify himself as an off-duty police officer. He was now traveling 40 mph in 70 mph traffic. The Camry again hit his brakes, causing W\_\_ to apply his brakes, and Mrs. C\_\_ rolled down the window and, leaning her head and body out of the window, she began hollering and waving. W\_\_ then took his silver revolver in its black holster and held it up behind his badge so that the C\_\_s could see it. This de-escalated the situation. Mrs. C\_\_ re-entered the car, W\_\_ returned his gun to the side of the truck door, and the C\_\_s sped up and moved into the right lane.

The C\_\_’s story is markedly different, and contains important contradictions in the course of later interviews by investigators. The entire episode lasted not more than three minutes, covering perhaps 2 miles of highway. The C\_\_s called 911, casting themselves as victims, claiming someone in a pickup truck pointed a gun at them. Having crossed the Washington border, Washington patrol deputies pulled the W\_\_s over. They did not ask to see the gun nor issue a citation. The Employer has raised an issue regarding W\_\_’s demeanor during the Troopers’ questioning. The record in this case, including interviews of Trooper Birkeland and Trooper Shirey, shows that Trooper Birkeland's approach to W\_\_ was accusatory and lecturing. No statements were quoted, no reports were written, and no field notes were produced.

Immediately after the stop, W\_\_ called a supervisor to report the incident. He filed his report that Monday, accurately describing the female passenger in the Camry, Captain Chris Davis testifying that a description could not have been made if the passenger had never rolled down her window, given the Camry's darkly tinted windows. Captain Davis reported that he believed W\_\_’s version of the facts, and that the C\_\_’s statements bore inconsistencies. Initially, the C\_\_s told Idaho Sergeant White that they did not wish to pursue charges. The evidence suggests that the matter was dropped until intervention by the PPB, calling for a full investigation in Idaho, resulting in a later trial. Soon after the incident, W\_\_ was removed from his position as Captain of the Traffic Division and assigned to Strategic Services, placed on leave, or assigned alternate duty while the case was pending and for a period of time afterwards.

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Seven months after the incident, and after several days of trial, W\_\_ was acquitted. Here, the City adopted the Idaho prosecutor's arguments, finding that W\_\_ escalated the situation based on inaccurate facts and assessment of the situation and lack of concern for his family's safety. These assessments have no basis in fact. After the highly emotional trial and vindication, W\_\_ did send an unfortunate e-mail, the contents of which would have to be taken literally for any suggestion of a lack of concern for his family's safety. He later apologized to Chief O'Dea and others for this e-mail and recanted it. A subsequent lawsuit brought by the C\_\_s against the City of Portland and W\_\_ seeking $255,000 in damages was dismissed.

As noted, the C\_\_’s version of the event is laden with contradictions. This is emphasized because the letter of discipline relied heavily on their account of the events. The contradictions include:

• Husband and wife differing over whether C\_\_ honked his horn;

• Whether C\_\_ owned guns;

• Whether C\_\_ sped up when he saw W\_\_’s gun or whether he pulled behind the W\_\_’s car;

• Whether Mrs. C\_\_ saw a gun, whether it was holstered, and the type of gun, black semi-automatic or silver revolver;

• Whether Mrs. C\_\_ rolled down the window of her vehicle, hung out, hollered and made large gesticulations.

Considering the foregoing, the reasoning behind the Chief's letter of demotion is fatally flawed. Additionally, the letter contains assumptions regarding W\_\_’s behavior unsupported by evidence. For example, stating that W\_\_ “engaged in a rolling altercation” implies that altercation was mutual. Stating that W\_\_ “continued for approximately 1 mile” after the troopers initiated their stop implies that W\_\_ spotted them at the same time they spotted him and was attempting to resist them. The letter accepts Trooper Birkeland's statement that W\_\_ was in a position “to avoid this kind of stuff,” though the trooper did not witness the situation or conduct any investigation of the incident, and the trooper's statement that W\_\_ said the C\_\_s “pissed me off,” made two months before his interview, unsupported by field notes, and denied by W\_\_. The letter claims W\_\_ “never articulated a threat,” though he did to Trooper Shirey, and Mrs. W\_\_ told Trooper Birkeland she felt threatened. The letter cites insignificant mistakes by W\_\_: the curvature of the baseball cap, the make and style of the car, whether the C\_\_s may be gang members, and ignores the C\_\_’s contradictions: blowing the horn, not rolling down and hanging out the window, Mr. C\_\_ looking past his wife and seeing the gun through the passenger side window (unseen by Mrs. C\_\_), and other contradictions noted above. Importantly, while the letter states that the introduction of a gun represented an unjustified “escalation of force,” Captain Chris Davis testified that the Employer considers the *pointing* of a gun to constitute a use of force but does not consider the *display* of a gun to constitute use of force. As Captain Davis noted, displaying a gun does not constitute an attempt to use it.

The letter of discipline suggested other possible alternative actions Captain W\_\_ might have taken during this event: using his cell phone to call 911, offering a hand sign apology, pulling to the side of the road, actively looking for an exit, or disengaging altogether. These suggested alternatives do not appreciate the totality of facts and circumstances of the event and ignore the reality that W\_\_ was completely successful in defusing the event.

Next, the letter cites statements by the Washington patrol officers to the effect that W\_\_ was arrogant, statements based on false assumptions derived from their sole source of information, the C\_\_.

As to subsequent adverse publicity, it is important to note the role of Mary Beth Baptista, City IPR Director and civilian member of the Bureau's own Performance Review Board, in instigating much of that publicity. She sat in on W\_\_’s interview, controverted Captain Davis's finding that there was no evidence of unprofessional treatment, added charges that were ultimately not sustained, lobbied for Captain W\_\_’s termination in the PRB, and was upset that he was only demoted, and not terminated. Chief O'Dea testified that Ms. Baptista's lobbying the media was contrary to the ordinances governing the Performance Review Board.

**Discussion**

Arbitrators generally try to present Awards in as summary a fashion as possible. This

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case, however, does not lend itself to that approach. While there is some general agreement as to the facts surrounding the earliest stage of the highway encounter, there is little agreement as to subsequent events and their interpretations, leading the Arbitrator to set forth conflicting views to those events in some detail.

In sum, the Employer alleges that the Grievant, in the course of becoming involved in a highway altercation on August 13, 2011:

• Displayed his badge and gun contrary to PPB policies and training;

• Failed to use de-escalating alternatives such as waving his hand in apology, calling 911 himself;

• By his attitude and rude behavior discredited the PPB and placed it in a poor light;

• Failed to show appreciation of the seriousness of the situation;

• Was unable to accurately perceive and report events, including his own actions and reactions of others;

• Displayed disregard for, and minimized, others; and

• Exhibited inappropriate flashpoints of anger.

in violation of the Directives noted above in IAD Case #2011-C-0249.

Upon his return home, the Grievant phoned Assistant Chief O'Dea to notify him of the incident and filed a “special report”, *Ex. E-20*, stating his version of the events as follows:

I was off duty, on vacation, driving my truck northbound and then westbound on a highway in Coeur D'Alene, Idaho, with my family. As I was merging from one highway to another, I was moving to my left when I checked my mirrors and signaled for the lane change. There was a silver low rider Honda with blacked out windows behind me. As I made the lane change, the Honda apparently accelerated and attempted to pass me on the left. As we were both moving into the same space, I realized the near collision and returned to my center lane. The Honda quickly passed me laying on the horn. I could barely make out that there were at least two occupants of the car and I could see the driver had on a baseball cap, turned to the side with a straight bill.

After the Honda passed me and moved ahead, I moved into the left lane. A moment later, the Honda anchored the brakes. I was a distance behind, so I merely slowed to 50 mph in the 60 mph zone and coasted. We proceeded in the left lane at 50 mph for a short distance so I moved to the center lane. The Honda moved to the center lane abruptly and began tapping the brakes. I continued to coast and slow down in heavy traffic. I moved back to the left lane. The Honda moved into the left lane abruptly in front of me again.

My wife told me—it appears he isn't going to give up on this game until we crash. It appeared to me the occupants were young and possibly gang members. As I increased my distance from them by coasting, I held up my bureau issue badge in front of my dash in order to identify myself as an off-duty police officer so they would drive away and leave us alone. The Honda immediately applied the brakes again and the passenger rolled down their window. A white lady who appeared to be about 19, with dyed black hair leaned out the window and appeared to be hollering at us while waving her left hand.

I was traveling at about 40 mph at this time. In order to better identify myself as an off-duty police officer, I held my holstered Smith & Wesson Model 60 in my left hand behind my badge.

The Honda quickly accelerated away from us, made a couple lane changes and disappeared in heavy traffic. A few miles later, I observed the Honda in the right lane and assumed they were taking the exit as we continued westbound toward Spokane, Washington. We never saw the Honda again.

In Spokane, I was stopped by the Washington State Police. They told me they had received a report that I was pointing a gun at the other motorist. I told them what had happened and apologized for the trouble. I told them I just wanted to proceed home and I wasn't interested in anything else. They told me they were taking no action and they would write a report and send it to Idaho and asked me for a phone number for any follow-up questions.

Much of the testimony at the hearing came from witnesses, typically supervisors involved in developing reports on this matter, providing their perspectives as to what the Employer's policies and Directives require in a situation such as this, and what the Grievant might have done as appropriate alternatives to the actions he took.

Captain Chris Davis was the investigator for the internal investigation. He testified as follows:

• He had received the recording of the C\_\_’s 911 call and the WSP recording as well as talking to the three officers who stopped the Grievant;

• He had reached Mr. C\_\_, who claimed the Grievant had pointed his gun at him, and found some inconsistencies in his statements;

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• None of the three officers believed that the Grievant was trying to evade them, and believing the matter was “Idaho's deal” took no further action of the matter;

• Officer Birkeland had told him that the Grievant told him that C\_\_ had “pissed me off,” didn't seem to think the situation was a big deal, acted cocky and told him “I can sense your attitude.”

• The Grievant didn't want to be questioned in front of his family, about which Birkeland chided him, considering the dangerous spot he had just been in with them;

• The Grievant was clear that the C\_\_s looked like gang members, noting the drivers baseball cap and the woman's dark tinted hair;

• Though describing a “tactical plan,” the Grievant was not clear on what his next steps would be, leaving questions as to what was going on in his head;

• Captain Davis was troubled by this e-mail sent by the Grievant after his acquittal in the case brought against him for this matter in Idaho, *Ex. E-22*, here quoted in pertinent part:

… your last question to me was what I do that again. My answer at the time was yes. I was thinking about how I know I didn't break any laws and that I was making a defensive move in order to protect my family…. I believe my actions did convince the C\_\_s to leave us alone and take their road rage away … A few months have passed. These last few months have been the worst months of my life. I have had a lot of time to think about that date in August. My answer is no. I would not do that again. I would rather run into their car and risk injury to my family than go through this again. I haven't carried a gun or a badge since November. I don't miss it.

• The Grievant requested that this e-mail be added into the Employer's record;

• Displaying a handgun in its holster can be a “use of force;”

• The Employer asked for an investigation to proceed because one had not been instituted after the incident;

• If the C\_\_s were indeed gang members, as the Grievant believed, introduction of a firearm could have had very serious consequences; you have to have some idea of what might happen especially because C\_\_ was still in control;

• The witness wanted to have some idea what the Grievant was thinking during that time, what were reasonable assessments and actions;

• The witness would not have introduced a holstered gun in this event;

• It's not enough that the Grievant's actions worked, but more importantly, were they reasonable;

On cross-examination, Captain Davis testified:

• No reports were made by the Post Falls, Idaho, Police Department;

• With regard to Trooper Birkeland's statements concerning the Grievant's arrogant comments to him, field notes thereof were requested but not provided;

• The WSP Troopers had only dispatch information, the story provided by the C\_\_s, at the time of the traffic stop;

• The only statement supporting Captain Davis's assessment of “arrogance” was that the C\_\_s had “pissed off’ the Grievant.

• The WSP Troopers neither searched the Grievant's car for guns, nor asked to see the gun involved in the incident;

• The C\_\_s were asked to provide pictures of their vehicle, but did not do so;

• Simply showing the badge did not de-escalate the situation; showing the gun and badge did work;

• Captain Davis did not feel that the Grievant was guilty of a willful departure from the truth;

• There was no evidence the Grievant was uncooperative with the troopers;

• The WSP Troopers did not do a complete investigation, for example, they did not write down statements;

• The C\_\_’s statements contained fabrications, for example, claiming that Mrs. C\_\_ did not roll down the side window; without her rolling down the side window and leaning out of it, the Grievant could not have made his accurate description of her;

• A report must be filed when a gun is pointed at someone; no report was required here.

One of the questions the Employer's witnesses had was whether the Grievant ever tailgated the C\_\_s, thus acting as an aggressor, or whether the C\_\_s repeatedly slammed on their brakes. It was also difficult for the Employer's witnesses to determine who “initiated” this incident, casting into doubt the nature of the Grievant's role in it.

Assistant Chief Lawrence O'Dea testified as follows:

• When both parties upon entering the highway were in the left lane, and the Grievant moved to the right lane, no escalation had yet occurred;

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• Both drivers took competitive actions, followed by a “he said, she said;”

• When the Grievant moved to accelerate so as to pass the C\_\_s on the right after a near collision, this became escalation; we had a near wreck and we know the driver is mad because he honked his horn;

• It's not certain if C\_\_ moved further ahead then slowed down, or if the Grievant moved closer

• The Grievant was escalating the situation before he showed his badge. For example, moving to the right lane was escalation, moving back to the left lane and initiating passing was escalation. There was contemporaneous competitiveness.

• The Grievant's actions were escalating actions, and he admitted this.

• He should have backed away, made a hand apology, used his cell phone to call police;

• The Grievant's actions were against policy, which requires that we avoid force and de-escalate situations;

• Displaying a gun means being prepared to shoot; if the C\_\_s were gang members there could have been a very different response;

• The witness saw no justification for introducing a firearm in the situation and found it reckless;

• For the witness, if the firearm is pulled out and held like a firearm it is a “use of force,” even if it is pointing down, or pointed in the vicinity of the C\_\_s;

• The Grievant had an ethical responsibility to call 911, to alert local law enforcement and identify himself as a policeman who showed a gun, to possibly avoid the police patrolling to look for him;

• The witness was concerned about developments in the follow-up process; three months later, the Grievant was saying he would do it again and not recognizing his actions; six months later he is saying that he would rather run his car into them; if the witness doesn't see learning happening he may see similar behavior again in the future;

• The witness had concerns over the Grievant's ability to serve as a Captain in charge of a division because he didn't see where he went wrong; he was inaccurate in his description of the incident, viewing his lifestyle above the C\_\_s,’ justifying how he treated them;

• The Grievant got the witness's positive attention with his realization that “I can overreact,” “the light went on;” but then, he became defensive, saying, “The troopers belittled me,” and the events became everybody else's fault;

• The PRB findings and recommendations were unanimous on sustaining violations of all allegations with five members voting for termination and only one member voting against termination;

With regard to judging the appropriateness of the Grievant's actions in this matter, Captain J\_\_ of the Records Division offered these insights:

• Officers frequently make decisions without knowing all the facts; their actions produce more information upon which to act;

• The officer is asking himself how he can create a safe situation;

• Regarding the formulation of strategy and the perception of danger, the witness felt that if an officer's decision /action proved incorrect, the result should be a debriefing so that the officer could learn from the situation.

The Grievant, W\_\_, testified as follows:

• The day of the incident he was returning from a vacation with his wife and two children, his 14-year-old son and 16-year-old daughter in his truck;

• After C\_\_ passed him pulling forward in the left lane, horn blaring, the Grievant pulled in about three or four car lengths behind as C\_\_ pulled away; C\_\_ then slammed on his brakes and the incident progressed;

• He felt threatened by the C\_\_’s behavior, and believed he and his family were in immediate danger;

• He didn't call 911 because he was driving, was concentrated on what was going on, and was too busy to call 911; he wishes he had called 911 when the event was over;

• His wife was not in a state to call 911; he could not have identified his location if he had called; the police would not have been able to respond in time;

• It took 15 to 20 minutes for the Washington State Patrol to stop him;

• Concentrated on the threat, and unfamiliar with the road, he doesn't know if he passed an exit or not;

• He feared that if he pulled over, he might be involved in a dangerous face-to-face confrontation;

• Given the driving behavior and reactions of the C\_\_s he does not believe that a hand sign apology would have been effective;

• Trooper Birkeland called the Grievant a “dumb ass” before the Grievant stated “I see your attitude;”

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• The Grievant never told Trooper Birkeland that he was “pissed;” the trooper didn't mention it until his interview by the Employer, and not on the stand in the criminal trial in Idaho; he told the trooper that he had felt threatened;

• The Grievant was not angry, but scared for his family;

• Perhaps he could have further braked down and looked for an off-ramp and then called 911, but he did not get the C\_\_’s license plate number;

• The Grievant was never alongside the C\_\_s except when they passed him and he passed them;

• He was behind the C\_\_’s vehicle when he displayed his gun and badge, close enough for them to see, and they reacted immediately;

• After his encounter with the WSP, the Grievant called Assistant Chief O'Dea to advise him of the incident;

• He assessed the C\_\_s as possible gang members based not upon their appearance but upon their behaviors;

• The e-mail he sent after the trial, *Ex. E-22*, was stupid, an emotional response after a long trial, and he apologized a few days later; he had come to feel that his Employer had instigated the Idaho prosecution;

• The trial was more stressful than the event itself;

W\_\_’s wife, Mrs. W\_\_, corroborated her husband's description of the actions and behaviors of the C\_\_s, including the lane changing and rapid braking, and Mrs. C\_\_’s hanging out her passenger door's window. She further corroborated that the Grievant showed his pistol barrel side down in its holster, causing Mrs. C\_\_ to reenter her vehicle which then moved to the right lane allowing the Grievant to rejoin traffic. She admitted to being terrified and having cried out to her husband, “They're trying to kill us!” As they passed the C\_\_’s car she glanced inside and saw that the driver was wearing a baseball cap. About 15 minutes later they encountered the WSP Troopers. One was more aggressive. She was physically upset and was asked to get out of the truck. They were told they were free to go. At no time did her husband ever take his gun out of its holster or point the gun towards the other car. It is not a semi automatic as the C\_\_s claimed. They did not roll down their windows at any time. Mrs. C\_\_ did roll down her window, contrary to her statement. Because of the tinted glass of their vehicle, she could make out only shadows in their car's interior. Her husband never tailgated the C\_\_s. Contrary to what they said, the C\_\_s did honk their horn, which is why her husband moved into the right lane. The event lasted between two and three minutes. Mrs. W\_\_ panicked and didn't think of calling 911, she felt threatened, and she was, “not solving problems that day.” Every time her husband tried to accelerate and get away, C\_\_ cut him off. The W\_\_s never got past them.

Detective Daniel Andrews, of PPB employee for over 20 years, accompanied the Grievant to his trial in Idaho. Idaho Detective Kevin White had conducted the local investigation and told Detective Andrews that he had heard unbelievable testimony. The C\_\_s had clearly been lying and the case did not merit further attention. The case had been inactive until the Employer changed the course of the investigation. White had been told to pick it up again.

Five months after the incident, the Grievant was acquitted in the state of Idaho of the misdemeanor charge of “Exhibition of a Deadly Weapon.” The charge states that on or about the 13th day of August, 2011, the Grievant “did draw and/or exhibit a deadly weapon, to wit: a firearm in the presence of two or more persons, in a rude, angry, and threatening manner, and not in necessary self-defense.” It is generally understood that an arbitrator is not bound by an acquittal in such a case, as the forums of civil criminal law and labor arbitration differ in many respects, including the burdens of proof they apply and the values and interests they serve.

It is noted that the alleged victims/witnesses to the incident, the C\_\_s, were not present to testify at the arbitration hearing. Also, none of the witnesses to the aftermath of the incident, the three WSP Troopers, were present. What is available as evidence from which to draw conclusions are the statements of the Grievant, both to the IA investigator and at the arbitration hearing, the testimony of his wife, and the testimony of witnesses concerning the spirit and application of the policies and Directives of the PPB as they relate to the evidence they have considered, excepts from the IA report, and the probabilities and mutual corroboration those elements present for consideration.

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Directive 1010.20 is quoted above, in full. A summary of its emphases relevant to this discussion include:

… It is the policy of the Bureau to accomplish its mission as effectively as possible with as little reliance on force as practical…

… The Bureau places a high value on the use of de-escalation tools that minimize the need to use force…

… It is the policy of the Bureau that members use only the force reasonably necessary under the totality of the circumstances to perform their duties and resolve confrontations effectively and safely. The Bureau expects members to develop and display, over the course of their practice of law enforcement, the skills and abilities that allow them to regularly resolve confrontations without resorting to the higher levels of allowable force.

The Directive then goes on with refinements of policy and “Directive Specific Definitions.”

**[****[1](http://laborandemploymentlaw.bna.com/lerc/2444/doc_display.adp?fedfid=61651255&vname=lelacases&jd=a0g1e6d4j9&split=0" \l "a0g1e6d4j9_1" \t "_self) ]**There is no direct reference to the use of a handgun except the generic term “force,” and the phrase, “as well as the pointing of a gun.” However, whether or not the display of a handgun was technically a “use of force,” under the Directive or not, it was certainly seen by the C\_\_s as being a “use of force,” as evidenced by their hasty retreat. In the criminal law, and in most jurisdictions, it is held that a present *apparent* ability and intent to inflict a battery (physical injury) is sufficient to constitute assault, and the *actual* ability is not necessary. Further, behaviors such as presenting an unloaded gun can constitute an assault when the victim is put in reasonable apprehension. *Clark and Marshall, Crimes, Seventh Edition, pp. 727, 737.* Given the foregoing, I find that the Grievant's display of a handgun, however holstered and pointed, constituted “force” within the ambit of the Directive.

I am persuaded that the C\_\_s lied in a number of instances: whether C\_\_ honked his horn, and whether he owned guns, the record reflecting such; whether Mrs. C\_\_ rolled down the window of the vehicle, hung out the window, hollered, and made large gestures, the Grievant's description not being possible otherwise, given their vehicle's tinted glass. I believe that under the totality of the circumstances, the Grievant believed the C\_\_s to be potential gang members, and their vehicle to be a low rider Honda instead of a Toyota given their behavior, the Grievant's state of mind, and the similarity among Japanese cars. Finally, I certainly agree that the Grievant was in fear for the safety of his wife and family.

What I do not find credible is that there were no alternatives available to the Grievant except displaying his gun to de-escalate the situation. I agree that if the C\_\_s were indeed gang members, introducing the firearm could have had very serious consequences. They were still in control, being the lead car, they may have been on drugs, etc. I agree that when both parties, upon entering the highway, were in the left lane, and the Grievant moved into the right lane, no escalation had yet occurred. I find it probable that the Grievant moved to pass the C\_\_s on the right. Given that there had been a near wreck, with C\_\_ leaning on his horn to show his anger, that maneuver reflected escalation. The Grievant admitted in his interview that he was escalating. *Ex. E-9, pp. 431-432*. I agree that the Grievant had both a practical reason to call 911, to try to obtain help, and an ethical responsibility to alert local law enforcement, identify himself as a policeman who showed a gun, and possibly avoid the police patrolling to look for him. I agree that other tactics have been used in similar situations, including backing away, making a hand apology, and pulling over. As to this last, the Grievant testified that he feared that this might result in a dangerous face-to-face confrontation. That would only have occurred if C\_\_ had gotten out of his car and approached the Grievant standing outside his car. Assuming C\_\_ pulled over after the Grievant, he would either stay in his car, and there could be a waiting game, or he would walk towards the Grievant's car, which would allow the Grievant, still in his car, to quickly leave the scene.

I do not find credible the Grievant's assertion that he was too busy to call 911 because he was driving and was concentrated on what was going on. For over 20 years, the Grievant has been involved in a profession where his life has depended upon his ability to multitask. Given the array of commendations and awards and critical law enforcement situations he has experienced, I cannot agree that he was so disadvantaged.

As to the allegation concerning the Grievant's conduct during his encounter with the Washington State Patrol Troopers, I find Trooper Birkeland's account to be persuasive,

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his having been interviewed soon after the event, describing behavior of the Grievant that has shown a pattern repeated among the allegations in this case.

Other matters developed in the testimony concerning these charges will be discussed below for their value in reviewing the Grievant's discipline.

The charges lodged in IAD Case #2011-C-0249 Violations of Directives 1010.20 - Physical Force, Directive 315.30 - Unsatisfactory Performance, and Directive 310.00 - Conduct, Professional, are sustained.

***IAD Case #2011-B-0018:***

***Directive 310.00 - Conduct, Professional; Dir. 315.30 - Unsatisfactory Performance; and Bureau of Human Resources Administrative Rule 2.02***

***Position of the Employer***

The position of the Employer is summarized as follows:

On July 1, 2010, the Grievant authored a memo to Assistant Chief Larry O'Dea regarding records Division employee D\_\_ making inappropriate and demeaning remarks to her coworkers about the Grievant and Commander Lee. During Internal Affairs’ investigation into D\_\_'s statements, employee H\_\_ was interviewed and stated, “In one of our meetings he put his hand on somebody's leg and I thought it was inappropriate, you know. He stroked her leg, and after the meeting she was … she was weirded out by it. I mean observing it, it looked weird, as a Captain rubbing a coordinator's leg, especially … I don't know, it just seemed weird.” She was referring to the Grievant as touching employee L\_\_. IA found sufficient basis to conduct an investigation into whether the Grievant engaged in unwelcome physical contact with female employees and engaged in unprofessional conduct while serving as Captain of the Records Division.

L\_\_ was interviewed and stated the Grievant had touched her leg on two occasions: H\_\_ was present when the first incident of touching occurred. L\_\_ stated the touching occurred sometime between January and June 2010 during role-play exercises and was witnessed by another employee, R\_\_. R\_\_ remembered the Grievant touching another employee on the leg during the meeting, and thought it odd. Another employee, LS also witnessed the touching. The second incident occurred during a bargaining meeting between labor representatives (DCTU/AFSCME) and the City of Portland. L\_\_ stated that she was seated when the Grievant approached her and then put his hand on top of her leg and, “you know, rubbed it back and forth and said ‘okay I hope that's fine with you’ and then got up and left.”

L\_\_, believing the touching was unacceptable in the workplace, subsequently decided to limit her contact with the Grievant by working the afternoon shift. She also told employee TW that she was offended by the touching. TW confirmed this. As a probationary employee, she did not report the touching because she did not want to jeopardize her employment. Bureau of Human Resources investigators concluded the Grievant had violated HRAR 2.02.

The Grievant claimed he did not recall touching L\_\_, asserted that her failure to report indicated a lack of a problem, and denied ever touching a female at the police Bureau on the thigh.

TW stated that the Grievant had also touched her in the leg/knee area during an “informal type meeting,” but, as she stated that she was not offended, this has not been considered a HRAR Rule 2.02 violation.

On another occasion during a bargaining session meeting, the Grievant touched B\_\_ in a manner which she felt was inappropriate. She stated the Grievant touched her on the thigh, with his hand lingering. She said she couldn't believe the Grievant had touched her below the waist and told him never to touch her again. Commander M\_\_ witnessed the touching. The Grievant later stated that he “greeted … verbally greeted B\_\_, and rubbed her … her knee, saying good morning, how are you doin’, something to that effect …” In denying that he touched B\_\_ on the thigh, the Grievant attempted to justify his action stating,

I don't want to be unkind, but this is an extremely unattractive lady. This is an extremely physically, listen to her; she was one of the more revolting people in the room. When I greeted her to try to say hello to her it was my attempt to try to be compassionate as I can be for someone who

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is uneducated, unskilled, and I was trying to say hello.

B\_\_’s physical appearance or level of education or skill is irrelevant. The Grievant's comment is insulting and unprofessional and shows a lack of accountability or awareness as to how his actions are perceived by others. L\_\_ and Commander Lee were consistent in their statements concerning where he touched L\_\_: on the thigh. The differences in descriptions are negligible, and L\_\_ found the contact “too familiar” and thereby unwelcomed. BHR investigators concluded the Grievant had inappropriately touched L\_\_ on the leg in violation of HRAR 2.02. Touching other employees in this manner is inappropriate, unacceptable, unprofessional and in violation of Directive 310.00 - Conduct, Professional; Directive 315.30 - Unsatisfactory Performance; and, Bureau of Human Resources Administrative Rule 2.02. A supervisor is expected to model acceptable and appropriate behaviors. The Grievant failed to conform to the work standards established for the rank, grade and position of his rank as a Police Captain.

***Position of the Union***

The position of the Union is summarized as follows:

W\_\_ was promoted to the rank of Captain in 2008. In late 2009, he was asked to lead the Police Records Division, where he would be the only sworn employee among a staff of civilians. Until the Grievant assumed leadership, this Division had a record of internal problems with sick leave abuse, excessive overtime, and morale issues. Unlike his predecessor, Captain W\_\_ set expectations, took action to solve problems within the Records Division, imposed discipline when necessary, and implemented a stern, but direct and hands-on management style. Witnesses for both parties acknowledged that he was a strong leader who learned all of the employees’ names and took an interest in what they were doing. As a result, Captain W\_\_ effectively addressed sick leave abuse and unnecessary overtime. This was acknowledged by Assistant Chief O'Dea who had no concerns with his management style and described Captain W\_\_ as an effective manager, calm and decisive, who effectively addressed the internal problems of the Division during his seven months there. Captain W\_\_’s effectiveness in turning the Division around had a predictable effect upon employees who had become accustomed to and vested in the previous culture of the Division.

***L\_\_***

This matter had its beginning when Captain W\_\_ heard from a colleague, L\_\_, that one of the division employees, D\_\_ had spread nasty rumors about him and his successor. After he conveyed this information to Assistant Chief O'Dea, on June 28, 2010, an Internal Affairs investigation commenced just as he was leaving the Records Division to run the Traffic Division. D\_\_'s allegations were unsubstantiated, but another interviewee, H\_\_, made statements about Captain W\_\_’s touching L\_\_’s leg in a meeting.

Early in 2010, following a training on HRAR 2.02, Captain W\_\_ organized a couple of staff meetings for his coordinators to address questions, for example, the significance of inadvertently bumping into someone. Witnesses to the touching found nothing inappropriate, as it was done in front of a number of witnesses in the course of a scenario in which Captain W\_\_ wanted to discuss expectations for behavior. L\_\_ never objected to the role-play and did not express concern until her interview with the Internal Affairs investigator in June of 2011, approximately sixteen months later.

L\_\_ discussed a second incident that occurred during a DCTU bargaining session, with approximately 40 people present, where Captain W\_\_ allegedly approached L\_\_, put his hand on the top of her leg, rubbed it back and forth and said, “okay, I hope that's fine with you,” then got up from his chair and left. Statements conflict as to whether he rubbed or patted or tapped her leg. At the hearing, she described it as “patting” her knee. Statements given by L\_\_ do not portray anything sexual, flirtatious, or offensive about the touching. L\_\_ never brought it to anyone's attention until the D\_\_ investigation. Without establishing corroboration, PPB has made it part of the basis for finding W\_\_ committed a serious violation of HRAR 2.02.

L\_\_’s characterization of the touching in her testimony and demonstration at the hearing was ambiguous and unclear. She did not report even this second event until the IA interview, 16 months later, initially explaining

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her probationary status in her new position as the reason for her silence. The Employer further claims that L\_\_ decided to work the afternoon shift in order to limit her contact with Captain W\_\_. At the hearing, L\_\_ recanted her position when it was shown that when she was promoted she did not have the seniority to select a shift, and she had applied to work afternoons when she applied for promotion.

As a final comment on the interpersonal dynamic of the Records Division, Captain J\_\_, the Division's current head, testified that the non-sworn culture is very different from that of sworn officers, where there is much more physical contact, and this sort of touching would simply not be an issue. Uninformed about the different expectations of the non-sworn staff before accepting the Division's leadership position, Captain W\_\_ was unaware of L\_\_’s potential reactions. No further issues of this type have occurred since Captain W\_\_ has become aware of the difference in expectations and boundaries.

***TW***

At some point in time, L\_\_ told TW about the touching incidents. TW responded to L\_\_ that during a similar “informal-type meeting” Captain W\_\_ had touched her knee, but she took no offense because it was just a friendly gesture, not “intimate.” TW confirmed that some people in the records division were intimidated by Captain W\_\_ because he is perceived as a disciplinarian; he set clear expectations, had an open-door policy, and tried to solve problems in the Division.

***B\_\_***

Sometime after April 2010, during a negotiation session with DCTU, with about 40 people in the room, TW sat down next to L\_\_ and greeted her with a pat or tap to her leg. While there is no dispute that this touching was accompanied by some sort of verbal greeting, there is significant dispute concerning the location of the touch on the leg and how long it lingered. Witnesses at the meeting found L\_\_’s reaction, protesting for 30 to 60 seconds, out of proportion to the manner of the greeting.

Before the Performance Review Board, differences over the location of the touch led to a recommendation that Captain W\_\_’s case be sustained on the charge of untruthfulness. As the Chief did not accept that recommendation, there is no allegation of untruthfulness before the Arbitrator. Director Kuykendall noted:

Ultimately, this event was handled satisfactorily according to HRAR 2.02. L\_\_ told captain W\_\_ to stop. He did so and had no further contact with L\_\_. He further reported the matter immediately to the management bargaining team and then later to his supervisor, Assistant Chief O'Dea … This entire incident appears to have been put to rest satisfactorily from L\_\_'s perspective until it was unearthed during L\_\_'s interview on 6/29/11, more than a year after the incident occurred … All the episodes occurred in public settings during the course of communication, and they were described as nonsexual. None of the contacts were of such an egregious nature to cause any of the parties, either witnesses or direct participants to mention them in any way until such time as they were inadvertently made known during an interview on another matter. While this does not excuse the conduct, it is a factor that must be entered into the equation.

Director Kuykendall went on to recommend a finding of “unproven” as to the allegation of untruthfulness.

In clumsily attempting to explain the nonsexual intent of his contact with B\_\_, Captain W\_\_ described L\_\_ in unflattering terms, including “unattractive.” He was never given the chance to explain his words before the matter came before the Performance Review Board, whose members were troubled more by the comment than by the underlying behavior. Their response was noted in the letter of discipline:

Your comment is insulting and unprofessional and shows a lack of accountability or awareness as to how your actions are perceived by others.

Had Captain W\_\_ previously been made aware of a similar complaint, he would not have touched Ms. L[redacted data].

**Discussion**

***L\_\_***

L\_\_ worked with the PPB's Records Division until 2011. The Grievant became Captain in charge of the Records Division on or about January 2010. L\_\_ testified to two incidents of “touching” by the Grievant. The first occurred early in 2010, in the course of a bargaining team meeting, conducted in what L\_\_ referred to as “theater seating.” At the end of a session

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the Grievant came over and sat next to her, and asking, in reference to work, “Is that okay?” The Grievant was referring to an adjustment of working hours in the Division. He then placed his hand on her knee. The witness then clarified the location of the hand as being the top of her thigh by her knee, her legs folded. She testified that she felt this was inappropriate, as she had never been so touched by a man with whom she was not intimate. She was “not upset,” but startled and taken aback. The witness did not report the matter, stating that she was a “single mom,” newly promoted, and felt that there would be “no benefit,” to making a report. She remembered feeling “cautious” as the Grievant “didn't like dissension” with regard to his requirements and policies, and had made it clear that employees needed to follow his rules or there would be consequences.

The second touching incident occurred in the course on a training meeting conducted by the Grievant to address customer service in the Records Division. At the end of the meeting, he touched her again in the same way. If she had not been on probation, she would have asked the Grievant not to do that. She felt that the touching was not a part of the topic of the meeting, as it was a role-play about customer service at the counter. L\_\_ didn't recall being warned by the Grievant that he would touch her, and couldn't recall what he did say. That day, she went to lunch with B\_\_.

On cross-examination, the witness agreed that while the touching incidents had happened in early 2010, she had not reported or said anything to anyone until interviewed by IA investigator Barry Renna in June 2011, approximately 16 months later, and four years before the arbitration hearing. Also, she could not recall which touching event happened first. The witness described her impression of the touching as being neither sexual nor flirtatious, and lasting about two seconds about 2 inches above her knee. The touch was not a “rubbing,” but more of a “knee slapping” motion. A question arose in the course of the hearing concerning investigator Barry Renna's going off the record for four minutes during his recording of his interview with the witness. It is after he returns to recording that the touch becomes “intimate.” Another conflict with the investigator's report involves the investigator's inference that L\_\_ transferred to the afternoon shift so as to avoid the Grievant. L\_\_ testified that she did not change her shift to avoid the Grievant, and stated that, “If that's the way it was phrased, it would have been wrong.” She decided to remain on the afternoon shift which was her current assignment. L\_\_ went on to describe the Grievant's functioning in the workplace, noting that it was a “lax environment” before the Grievant became supervisor. Employees who should have been disciplined, were not. The Grievant was not unprofessional, but strict, and “ran a tighter ship” than his predecessor, which created some discord.

Assistant Chief O'Dea mirrored L\_\_’s impression of the condition of the workplace before TW\_\_ became supervisor. “There were issues,” he stated, noted that the prior supervisor was ineffective, managing with a “closed door.” It was his last assignment. The Division had a poor reputation, with low morale and abuses of overtime and sick leave. The Grievant went to the records division in late 2009 with a mandate to “clean it up.” The division had roughly 60 employees with new systems for payroll and purchasing being implemented. Witness testified that the union “fought efforts to get the records division to where it ought to be.” Finally, Chief O'Dea testified that no warnings were given to the Grievant about the working environment he would be dealing with in the Records Division.

TW did not actually see the touching involving L\_\_. She spoke with L\_\_ at a dinner gathering, where L\_\_ mentioned the touch. She told L\_\_ that the Grievant had touched her knee while at an “informal type meeting.” She did not find it intimate, was not offended, and took it as a friendly gesture. TW responded to a question by Barry Renna asking her why she had not been offended. She replied that the Grievant had not done anything wrong. The witness went on to confirm the nature of the atmosphere at the Records Division. She noted that some people in the Division were intimidated and perceived the Grievant as a disciplinarian. TW testified that the Grievant was effective, had an open door policy, had expectations, and solved problems.

K\_\_, a 32 year employee, testified that the touching event occurred around January in 2010 in a large meeting. The meeting was

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held to address questions that had arisen about a recent training involving personal space. A role-play was held discussing types of touching, which K\_\_ did not find to contain inappropriate actions. She testified that she was not aware that L\_\_ ever mentioned any objection to the activities in the role-play to anyone. The interview with Barry Renna occurred more than a year later. A lot of people were not interviewed, including MB. MB testified that the Grievant could come across as being cold, but not inappropriate, not intimate. As to any suggestion that L\_\_ took any special action to try to get away from the Grievant, she testified that L\_\_ was newly promoted to Training Coordinator and had no option where to transfer.

H\_\_ testified that the Grievant tried to “change direction” in the Division. He was vocal, and he was the first Captain to make himself available, learning the names of every employee on every shift. The witness was never disciplined by the Grievant. H\_\_, who saw the touch, admitted to being “introverted.” She testified she didn't think it was more than a touch, but to her, it was “weird.” H\_\_ recalls her interview with Barry Renna, when L\_\_ was brought up. She told the investigator she thought the touch was unintentional, and not sexual, just part of talk, and “real quick on the thigh.” She didn't think it was creepy. The witness testified that the Grievant made good changes, for example, requiring an employee to write a memo if they were tardy, continuing a practice that had been observed over the years. A number of employees did not like the changes and challenged them.

Captain J\_\_, leader of the Records Division and a 23 year employee, acknowledged in his testimony that, “Reformers take bumps.” He noted that the Grievant had some problems in some areas of his supervision, but they were “not egregious,” and added that this matter, “could have been solved easier.” The witness testified that the Director of Services was troubled by Barry Renna's interviewing technique as sometimes not being congruent with witness responses. Captain J\_\_ leads a Division that consists of mostly female unsworn members. The witness went on to testify about the differences in culture between the work environments involving sworn officers and work environments with unsworn employees. He testified that the sworn officers’ tendency to be more demonstrative, hug and have physical contact, stems from their training, which includes physical defensive tactics. “You get used to the physical contact, any sort of contact.”

W\_\_ described his environment and his mission at the Records Division. He was the only sworn employee in the Division. He had been given a number of mandates but, in sum, was told to “fix it.” He set out to engage everyone, bring morale up, fix the overtime and sick leave issues, make necessary cuts, represent management in collective bargaining, and “attempted to do it all.” Many employees were unhappy with the changes he implemented. He laid off a number of temps, cut half a million dollars from the budget, and got the Division caught up in workload. L\_\_ is an employee he promoted to Training Coordinator.

Regarding the first touching event: He held a staff meeting sometime after sexual harassment training because of confusion about the scope of the rules, including HRAR 2.02. The Grievant was seated next to L\_\_ during the discussion. He asked if it was okay to do a role-play about observing poor interest with a customer. During the role-play, he said to L\_\_, “I'm going to tap your knee, is that okay?” He gave her time to respond, and the response was affirmative. The room was full of people. As to the second event, the Grievant did not recall sitting next to her or touching her on the leg, but allowed that it could have happened.

Human resources staffer, Snow Buchanan, got into this case in August 2011, 15-19 months after the alleged events. She testified that in her opinion it is not okay to touch someone in a private area even if you receive no objection. The witness believed that the Grievant's conduct constituted a violation of HRAR 2.02. Part of the basis for her finding was that he “rubbed” L\_\_ leg at a staff meeting, later stating “I can touch employees unless they object.” L\_\_ told her that the Grievant “lingered.” The witness testified that the Grievant did not recall the L\_\_ event though he had touched her twice. In her testimony, the witness pointed to the section of HRAR 2.02 which lists “patting” among methods of prohibited touching. “To be safe, do not touch someone, even if it's just their shoulder and they don't object.” Last, she noted that managers

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in the Grievant's position had received training on this issue.

***The Regulatory Framework***

HRAR 2.02, Prohibition against Workplace Harassment, Discrimination and Retaliation, traces its pedigree back to Title VII of the Civil Rights Act of 1964, which represented a milestone in society's evolution in recognizing the rights of women in the workplace, and the challenges they face. Harassment is prohibited because the experience frequently has a negative emotional and physical effect on the victim and may diminish job performance. Hostile environment harassment occurs when an employee is subjected to a pattern of unwelcome conduct in the workplace that interferes with an individual's work performance or creates a hostile, intimidating, or offensive work environment. In *Oncale v. Sundowner Offshore Services*, [510 U.S. 17](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=61651255&fname=us_510_17&vname=lelacases) [[63 FEP Cases 225](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=61651255&fname=fepcases_63_225&vname=lelacases)] (1993), the United States Supreme Court defined the elements of harassment that make up a hostile work environment under an objective “reasonable person” standard. It noted that the act forbids only behaviors so objectively offensive as to alter the conditions of the victim's employment. “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment-an environment that a reasonable person would find hostile or abusive-is beyond title VII's purview.” *Oncale*, *supra.* The Court went on to state that the conduct must be viewed not in a vacuum, but within “a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.” The Court cited the following example:

A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field-even if the same behavior would reasonably be experienced as abusive by the coach's secretary back at the office.

It is from a football player-like environment of sworn officers, a culture where contact between officers is more physically demonstrative, that the Grievant came before being placed in charge of the Records Division, a culture of largely female unsworn employees.

In HRAR 2.02, the City of Portland takes laudable action in seeking to forcefully address workplace harassment. It notes that:

Workplace harassment manifests itself in two primary ways: 1. In forms of harassment that violates state and federal laws; and 2. In forms of harassment that may not violate law, but which violate this City rule because they are not conducive to creating a work environment for employees that is consistent with the intent of this rule.

It is clear that the City wishes to wield a broader brush than that wielded by title VII. It goes on to define harassment as:

verbal or physical conduct that is derogatory or shows hostility towards an individual because of … her gender identity … and 1. Has the purpose or effect of creating an intimidating, hostile, abusive, or offensive work environment….

and gives examples of prohibited physical conduct as:

3. Unwelcome physical touching or contact, such as pinching, kissing, grabbing, patting or hugging.

The rule says employees should:

2. If you believe you are being subjected to conduct that violates this rule: tell the offender to “stop it!” Say it firmly, without smiling or apologizing. Nothing prevents you from filing a complaint because you did not tell the offender that his or her behavior is unwelcome or ask the offender to stop.

3. Promptly file a complaint using the procedure below if you are subject to discrimination, harassment or retaliatory conduct prohibited by this rule. If you are witness to prohibited conduct, you are encouraged to bring that information to the attention of a supervisor.

In sum, the rule addresses a situation, as interpreted here, where physical touching, including a pat, will be considered a form of harassment. The person touched is advised to immediately tell the offender to “stop it!” The person touched does not lose their right to file a complaint because they did not notify the person touching them that the touch was unwelcome, or ask them to stop. The person touched is advised to promptly file a complaint, but there is no provision in the rule addressing the effect of failure to promptly file a complaint. In practical effect, the rule imposes a presumption that a touch is prohibited. Witness Buchanan was correct, that the safest course for a manager or employee is not to touch anyone, anywhere on their person. The

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person touched can remain silent for a considerable period, an ambiguous signal of acceptance, and later file a complaint against the person, who may have had innocent intent, and touches them again. Like all endeavors seeking to regulate the palette of human behavior, this is not without potentials for confusion and unintended consequences. At the same time, this rule does have the salutary effect of protecting those people who, by virtue of some personal challenge, lack the ability to address a person who touches them inappropriately. I here apply the rule, HRAR 2.02 as it is written and apply it to the facts. The credible testimony of the person touched in this matter, L\_\_, is that the Grievant touched her on two separate occasions early in 2010. While L\_\_’s testimony and the testimony of various witnesses differed as to the exact location and duration of the touch, I am persuaded by clear and convincing evidence that the incidents of touching of L\_\_ by the Grievant as referenced in the letter of discipline, *Ex. E-29*, did occur. The descriptions of her feelings given to the IA investigator, to co-workers, and at the arbitration hearing are congruent with the language of the rule: “unwelcome physical touching.” That the matter did not come to light until June 2011, approximately 16 months later is not an issue addressed by the rule, the parties, or the collective bargaining agreement. Other matters developed in the testimony concerning these charges will be discussed below for their value in reviewing the Grievant's discipline.

***B\_\_***

The incidents described above involving L\_\_ occurred some time before the incident involving B\_\_. B\_\_ did not appear to testify at the arbitration hearing. The basic facts of this matter are not in dispute; their interpretation is. The touching occurred at a meeting with the District Council of Trade Unions. SL, who was also in attendance, did not see the touching, but heard B\_\_ exclaim loudly, “Don't do that! Never touch a woman below the waist!” and, “Did you see that? Did you see what he did?” K\_\_, a Maintenance Manager who had attended the meeting, did see the touching, locating it on or just above the knee, and testified that she was surprised by B\_\_’s “histrionic response,” given the brevity of the action and B\_\_’s reaction to it. K\_\_ testified that B\_\_ “reacted violently,” “jumped up,” and had a “dramatic overreaction” to the event. The witness testified that Captain Lee was surprised that the Grievant “would make a mistake like that,” as “B\_\_ is so violently opposed to any manager that she cannot separate the role from the person.” “Any approach would generate a negative response.” B\_\_ and L\_\_, who told B\_\_, “He did that to me, too,” had lunch together that same day.

TW testified about the differences in expectations and behavior between sworn and non-sworn employees, commenting about the contact, “It's who we are,” referring to the physical contact habits of sworn employees. He acknowledged that the event with B\_\_ made him conscious of the differences and risks. The Grievant testified he tapped her on the knee while saying, “Good morning, how are you?” B\_\_ replied to him, “Did you touch me below the waist?” W\_\_ responded, “I see I have upset you. I'm sorry.” The event was about one second in duration. Approximately 40 or 50 people were in the room. He immediately retreated. When he told fellow managers about this, one replied, “B\_\_, of all people.” When W\_\_ was interviewed, he stated:

I don't want to be unkind, but this is an extremely unattractive lady. This is an extremely physically, listening to her, she was one of the more revolting people in the room. When I greeted her to try to say hello to her it was my attempt to try to be compassionate as I can be for someone who is uneducated, unskilled, and I was trying to say hello. (W\_\_ interview, 1/19/12, lines 171-175.)

W\_\_ explains this comment by stating that investigator Renna had asserted a sexual motive for the touch, and he was trying to emphasize his lack of attraction. “I took his bait.” The B\_\_ event occurred after the L\_\_ event, though L\_\_’s reportage did not occur until after the B\_\_ event. The record reflects that the Grievant exhibited no similar conduct involving female employees after this encounter with L\_\_.

In this, and in the other case, testimony differed as to the exact location of the touch, the distance of the hand from the bend in the knee, the portion of the Grievant's hand that touched, the duration of the touch, and any motion accompanying the touch, e.g., rubbing, tapping, light slapping, etc.

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**[****[2](http://laborandemploymentlaw.bna.com/lerc/2444/doc_display.adp?fedfid=61651255&vname=lelacases&jd=a0g1e6d4j9&split=0" \l "a0g1e6d4j9_2" \t "_self) ]**The credible testimony of witnesses testifying at the hearing, including the Grievant, supports the conclusion that the Grievant touched the person of B\_\_ in the course of a meeting with the union. Further, their testimony corroborates the statement L\_\_ gave to the IA investigator, *Ex. E-9., B\_\_*Interview, 8/23/11, lines 109-121. I am persuaded by clear and convincing evidence that the incident of touching B\_\_ by the Grievant as referenced in the letter of discipline, *Ex. E-29*, did occur. The descriptions of her feelings and reactions given to the IA investigator, and witnessed by co-workers, and at the arbitration hearing are congruent with the language of the rule: “unwelcome physical touching.” Other matters developed in the testimony concerning these charges will be discussed below for their value in reviewing the Grievant's discipline.

The charges lodged in IAD Case # 2011-B-0018, violations of Directive 310.00 - Conduct, Professional; Dir. 315.30 - Unsatisfactory Performance; and Bureau of Human Resources Administrative Rule 2.02, in the matters of L\_\_ and B\_\_, are sustained.

***Directive 310.00 - Conduct, Professional, and Directive 310.40 - Courtesy.***

***Position of the Employer***

The position of the Employer is summarized as follows:

On April 23, 2010, the Grievant and the Police Records Supervisor were conducting a recorded interview with Records Division employee DB and her union representative G\_\_ in the Grievant's office regarding DB's failure to follow instructions. Approximately 4 minutes and 30 seconds into the interview G\_\_ interrupted the Grievant and he abruptly told her to stop.

Ms. G\_\_ was the first person to take the interview off track. The Grievant's appropriate response would have been to bring the meeting back into focus without taking it in a confrontational direction, instead of saying, “Close your mouth and listen to me.” That announcement changed the topic from DB\_\_’s noncompliance to Ms. G\_\_’ feeling belittled and disrespected. When Ms. G\_\_ demanded that the Grievant not be disrespectful, he ordered her from his office under threat of trespass if she remained. In his interview with Internal Affairs, the Grievant described Ms. G\_\_’ response as” animalistic” and “not from a reasonable human being.” The recording of the meeting does not support the Grievant's description.

Directive 310.40 - Courtesy, requires supervisors to, on all occasions in their performance of their duties, be respectful, courteous and considerate toward fellow supervisors, subordinates, and all other members of the public. Directive 310.00 - Conduct, Professional, requires supervisors to strive to attain the highest professional standards of conduct and to conduct themselves in the discharge of their duties and in relations with others in a diplomatic and professional manner. The Grievant's reaction to Ms. G\_\_’ interruption was uncalled for and lacked diplomacy, respect, and professionalism. The Grievant reacted in an aggressive and hostile manner that ultimately led to a complete breakdown in communication, undermined the purpose of the meeting, and had a detrimental effect on his credibility as a supervisor.

***Position of the Union***

The position of the Union is summarized as follows:

The meeting at issue became a confrontational standoff after G\_\_ became aggressive in her role as a union representative. Under the guise of “asking clarifying questions” Ms. G\_\_ made an argumentative statement. When told to stop interrupting, she raised her voice. W\_\_ responded in kind, eventually threatening to arrest her for trespass if she didn't leave. It should be noted that W\_\_ immediately went to his immediate supervisor, Assistant Chief O'Dea and informed him that he had handled the situation poorly, and, taking full responsibility, played the recording and sought advice as to how he could have handled the matter better. After they later met with Police Human Resources Manager Sean Murray and City Human Resources Manager Gerald Gaddis to listen to the recording, W\_\_ was given verbal counseling and the matter was considered closed.

Mr. Murray wrote to Ms. G\_\_’ supervisor, Ken Allen of AFSCME, and stated that her “Steward G\_\_ interrupted several times and directed the interview onto a different subject that was not being discussed.” Mr. Murray confirmed that, “Supervisors have the ability

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to ask all their questions and receive answers from the employee without interruption by the employee or union representative. Union representatives present during the interview will remain silent and orderly while questions are asked of the employee…” *Ex. A-9, p. 2.*

It was not until more than a year later that the Employer decided to reopen this incident, apparently positioning it as a make-weight complaint against W\_\_.

The Employer attaches charges to W\_\_’s description of Ms. G\_\_’ response as “animalistic” and “not from a reasonable human being.” W\_\_ explained that the description was his opinion of her behavior based on her visceral reaction, including body language, her initial escalation of the disagreement, and his feeling that she wasn't going to listen to reason. The Employer found these impressions unfair, supporting an allegation of “untruthfulness.” The allegations of “untruthfulness” were not sustained, with no charges or investigation resulting. Had W\_\_ been formally disciplined for the comments, he would have had an opportunity to formally explain them.

It is not unusual for union-management interactions to be unpleasant. This scenario would not normally be grounds for discipline, but more appropriately, counseling. In fact, that is how the matter was handled when W\_\_ brought the matter to the attention of his superiors, seeking guidance about how to avoid such incidents in the future.

***Discussion***

This incident occurred on April 23, 2010, almost 4 years before the arbitration hearing. The allegation arises out of the Grievant's conduct during a meeting with an employee, DB, and her union representative, G\_\_. A verbatim transcript and audio CD were made of this event. The pertinent portion of the interview is set forth below:

DB: I thought that those were the instructions for … I did not think I had been told any different instructions other than that. What was gonna happen now is that I would start at first site. I don't think anything, that anything about other instructions were given.

W\_\_: Okay. It was clear to me that the PIP was offered and you refused. It was clear to me that that is no longer being discussed. And then it was clear to me that I heard S say I want you to leave your numbers for me in your basket at the end of the day.

G\_\_: It was also clear to me that she said that she would be providing a written documentation for the oral reprimand, which she said she would copy me on.

Jelinski: It's right there.

W\_\_: Stop.

G\_\_: Don't tell me to stop.

W\_\_: That is not what …

G\_\_: Do not tell me to stop. I have a right to ask questions.

W\_\_: No, you're interrupting.

G\_\_: Yes, I do.

W\_\_: Close your mouth and listen to me, don't interrupt me.

G\_\_: Do not be disrespectful. Do not be disrespectful.

W\_\_: You will be asked to leave this office if you continue interrupt me.

G\_\_: I will not …

W\_\_: You will not interrupt me again.

G\_\_: W\_\_

W\_\_: If you interrupt me one more time to out of the office.

G\_\_: I'm telling you you need to be respectful.

W\_\_: Leave my office now.

G\_\_: I am not leaving your office.

W\_\_: Leave my office now or you will be trespassing.

G\_\_: I was not done talking.

W\_\_: Do you understand that's a lawful order?

G\_\_: W\_\_

W\_\_: I was talking about a subject. You are diverting the subject. We're not talking about written documentation. Leave the office now.

G\_\_: I am not leaving the office.

W\_\_: Are you refusing …

G\_\_: If I leave the office she is coming with me.

W\_\_: Are you refusing to leave the office?

G\_\_: Yes, I am.

W\_\_: This meeting is ended right now.

G\_\_: Thank you.

W\_\_: Get out.

G\_\_: She's coming with me.

W\_\_: She'll stay.

G\_\_: No, she will not. I am not leaving her without union representation.

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W\_\_: She will stay, you will leave. That is my right as a manager.

G\_\_: It is not your right as a manager.

W\_\_: Get out.

G\_\_: I'm not leaving, W\_\_.

W\_\_: You'll both be kicked out then and we'll be discussing this more with personnel.

G\_\_: That will be fine.

W\_\_: Get out of my office.

G\_\_ is an 18 year employee of the PPB assigned now to the Support Training Division. She is a shop steward and has held the position of treasurer with the local office of AFSCME since 2012. Ms. G\_\_ testified that the meeting concerned the PIP, Performance Improvement Plan, management proposed for AFSCME member DB. There had been no notice given to her of non-performance, so she had no opportunity to improve her performance before being presented with the PIP, thus progressive discipline was not observed. This was the third meeting with W\_\_. The member had apparently not followed directions given to her at the second meeting. There had been no written expectations. Ms. G\_\_ said she thought she might be arrested during the encounter. She said she had been trained to maintain an equal footing with management in meetings like this. Yelling was happening, and Ms. G\_\_ felt, “He was trying to disrespect me.” On cross-examination, she admitted that she had been the first person to raise their voice when she had been told to “Stop.”

W\_\_ testified that he has conducted meetings like this “100 times” and believed the role of a union representative in such a meeting is as a “potted plant” until they are allowed to ask questions. When it was over, he testified, he told himself “You just blew this …” and immediately contacted Assistant Chief O'Dea and let him listen to the recording. When interviewed by Barry Renna, the Grievant made the following statement:

… Frankly, if I have to describe the hollering and screaming, it was very animalistic. It was not from a reasonable human being. It was very animalistic. *Ex. E-9*

The Grievant explains his statement as resulting from “not having had a collegial conversation.” He believed that his part of the fault lay in the fact that he “took the bait; I hollered a lot more.” The record shows that the Employer and DCTU communicated about appropriate behaviors for the conduct of such meetings in the future. W\_\_ testified that he felt that the matter was over at that point, and that it was unfair of the Employer to be bringing the matter up so much later on.

Assistant Chief O'Dea testified that after he heard the recording, he realized that the facts were not as the Grievant had described. W\_\_ had gone quickly from “0-60” and had become confrontational, controlling, and defensive. At the core of a policeman's responsibilities is the ability to accurately perceive, assess, and relate facts as they are, and the Grievant did not do so. He added, “We're supposed to defuse situations.”

The role of a union advocate present in a meeting with a union member and a supervisor that may result in discipline of the member is described in the case of *NLRB v. Weingarten* (citation omitted) and is summarized, in pertinent part, as follows:

• To speak and be proactive during the interview, as long as doing so does not interfere with or disrupt the meeting;

• To provide additional information to the Employer at the end of questioning.

Having reviewed the CD recording, it is apparent that this is a textbook example of a *Weingarten* meeting gone wrong. Both parties blame each other for the direction the meeting took, the union asserting that Ms. G\_\_, rather than questioning, began offering information during the Grievant's questioning of the employee, interrupting the process, and was the first person to raise their voice. The Employer notes that the Grievant's behavior quickly escalated from frustration to aggression.

**[****[3](http://laborandemploymentlaw.bna.com/lerc/2444/doc_display.adp?fedfid=61651255&vname=lelacases&jd=a0g1e6d4j9&split=0" \l "a0g1e6d4j9_3" \t "_self) ]**The CD recording supports the fact that Ms. G\_\_ did interrupt with a statement, rather than ask a question. Further, she was the first person to raise their voice. From that point on, the Grievant exhibits rapidly growing frustration, ordering Ms. G\_\_ to leave his office upon threat of charging her with the crime of trespass. The topic had been the performance of an employee, a matter of interest to both management and the union. It quickly became a mutual affray. In everyday life, one usually observes parties to a heated dispute sustain mutual loss as a result of going off topic and giving rein to emotions. In the case of a Weingarten meeting, management bears the risk

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that an arbitrator will later invalidate a meeting that was managed in this way, and any discipline that was later imposed. These meetings do have the potential to become heated, but, as in martial arts, maintaining composure is key. Having heard the audio CD and received the testimony of Ms. G\_\_, the Grievant, and Assistant Chief O'Dea, I am persuaded that the Grievant did exhibit the behavior with which he is charged. The Directives possess somewhat similar elements, for example Directive 310.00 references “reasonable rules of good conduct and behavior … Conduct themselves … in a diplomatic and professional manner.” Directive 310.40 references “be respectful, courteous and considerate….” The remainder of the text of these Directives goes on to address different matters. Other matters developed in the testimony concerning these charges will be discussed below for their value in reviewing the Grievant's discipline.

The charges lodged in IAD Case #2011-B-0018, violations of Directive 310.00 - Conduct, Professional, and Directive 310.40 - Courtesy, in the matter of G\_\_, are sustained.

**Conclusion**

Arbitrators have considered various factors in assessing discipline in addition to those discussed earlier in this Award; the existence of a reasonable relationship between an employee's misconduct and the punishment imposed, and a requirement that discipline be administered even-handedly. Arbitrators have come to consider whether discipline may be mitigated in light of actions on the part of an Employer which have contributed to the event leading to discipline, factors which cast light upon the employee's state of mind or intention accompanying his misconduct, the potential for the employee's rehabilitation, and other mitigating circumstances surrounding an offense, such as unusual job tensions, personality problems and malice or provocation on the part of others involved in the matter. *Duncan v. Veterans Administration*, 5 MSPB 313 (1981). None of these considerations have been found to be impositions of an arbitrator's personal brand of industrial justice, but merely the result of the development of the concept of just cause.

**[****[4](http://laborandemploymentlaw.bna.com/lerc/2444/doc_display.adp?fedfid=61651255&vname=lelacases&jd=a0g1e6d4j9&split=0" \l "a0g1e6d4j9_4" \t "_self) ]**I find that the record establishes by clear and convincing evidence that the Grievant committed the acts and exhibited the behaviors and conduct with which he was charged. I further find that these acts and conduct merited discipline, even serious discipline. However, I find that the imposition of what amounts to an “indeterminate sentence” of demotion, there being no term set, was without just cause. In making that determination, I have considered the following factors, influencing considerations of greater or lesser discipline:

A factor I find very compelling is that the Grievant is a veteran of more than 23 years on the force, possessing a record, not only unmarked by prior discipline, but meriting commendations and awards for service to the community, on and off duty, occupying 103 pages of documentation. *Ex A-1.*

The Employer assigned the Grievant to a Records Division that had operated in a dysfunctional fashion over the years, a situation the Employer was aware of and had tolerated. Testimony indicated that the Grievant was never “warned,” and that “Reformers take bumps.” The record indicates that the immersion of the Grievant, mandated to “fix it,” coming from the culture of sworn officers, into the culture of largely unsworn employees, mostly female, who had been acculturated to the dysfunctional operation of the Division, contributed to the quality of the interactions that occurred in this matter. There is testimony of record that a witness felt “intimidated,” attributing such intimidation to her apprehension of the consequences she might suffer if she had failed to perform the requirements of her job. That is a reaction that every employee appropriately feels.

The incidents in question all take place within a roughly 20 month period following the Grievant's two-decades-long career free of discipline, and following soon after the Grievant's assignment to the Records Division. The Arbitrator queries whether the fact of a sudden “blip” in the Grievant's performance raised concerns with the Employer of a possible need for support and assistance.

The Grievant had no history of inappropriate touching in his prior decades with the Employer. Further, there was never a repetition of such behavior after the B\_\_ event in 2010.

The Grievant's comments regarding Ms. G\_\_ and L\_\_ were ill-considered and displayed frustration, anger, and poor judgment. There are several instances of such outbursts

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of defensiveness in the record, and I have taken them into account. I do not take the Grievant's email to his superiors after his acquittal in the Idaho case, *Ex. E-22*, literally, but as hyperbole, with judgment overwhelmed by emotion. While these are examples of unprofessional conduct, I believe they are better the subject of counseling and progressive discipline than of demotion.

I find Trooper Birkeland's assessment of the Grievant's attitude credible and consistent with the attitude of defensiveness cloaked by cockiness displayed by the Grievant during this period. This conduct was unprofessional, and is best addressed with progressive discipline.

With regard to the Idaho incident, I am persuaded that fear and concern for his wife, children, and himself, were the determining factors in the Grievant's ability to assess and respond to the situation appropriately.

The Grievant has sought the counsel of his superiors immediately after some of the events in question, events such as the G\_\_ interview and the Idaho incident. The record reflects that, and the Grievant so testified, that he is currently in counseling to address some of the emotional challenges accounting for the behavior discussed above. I will not direct, but recommend, that the Grievant continue in such counseling as recommended by his counselor.

I have reviewed the testimony and documentation regarding the discipline of other PPB officers i.e. comparables, in more or less analogous situations, and I am persuaded that they do not provide a basis for me to direct other than the discipline I have directed.

Lastly, I, like many arbitrators, am interested in discipline that, while holding an employee accountable, promotes their future functioning in the workplace. Here, the Grievant has already experienced the personal embarrassment of working among his fellows for a significant period of time while openly downgraded to a lower rank. Further, several of the events at issue took place approximately 4 years ago, prompting a frustrated staffer to state that the (investigatory) file was “growing mold.” The most recent event took place more than 30 months ago.

A number of arbitrators have held that demotion for an indeterminate term is not discipline, but merely punishment, and have reversed such actions. *Elkouri and Elkouri, Seventh Edition.* Discipline, a concept to which just cause is allied, and to which the PPB subscribes, seeks the betterment and development of an employee which the employer hired, and promoted upon his satisfaction of rigorous standards, and in whom it has made significant investment. Cases for mere punishment do exist, but only in those cases where such a damaged relationship exists between employer and employee that its imposition is worth the damage to both the employer and employee. This is not that case. The record reflects that, following the Idaho incident, Grievant was retained by the Employer in positions requiring significant judgment and responsibility and performed successfully.

I find that the Grievant is capable of performing the duties expected of an officer of the rank of Captain, and that the PPB's legitimate interest in being able to rely upon the Grievant to conform to its standards as a command officer will be served by imposing a sixty (60) calendar day suspension.

Based upon the foregoing, I will enter an award setting aside the demotion of W\_\_ and direct that a sixty (60) calendar day suspension be imposed.

**ARBITRATOR'S AWARD**

Having heard and having the opportunity to observe the demeanor of the witnesses during their testimony or read and carefully reviewed the evidence and arguments in this case, in light of the above discussions, the grievance is granted in part and denied in part:

1. The Employer had just cause to discipline the Grievant, W\_\_ on December 13, 2012, consistent with Article 30 of the collective bargaining agreement between the parties and associated work rules.

2. The Employer did not have just cause to demote the Grievant.

3. The Employer had just cause to suspend the Grievant, W\_\_ for a period of sixty (60) calender days without pay.

4. The Grievant shall be reinstated to the rank of Captain and made whole for any back pay, other than as set forth in item 3 above, and any benefits, rights, or privileges retroactive to December 18, 2012.

5. I will not order interest on any back pay due to the Grievant as the grievance was sustained in part and denied in part.

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6. The Arbitrator shall retain jurisdiction of this matter until 4:30 p.m., August 6, 2014, solely to resolve disputes regarding the remedy directed herein, if any. If the Arbitrator is advised by telephone or other means of any dispute regarding the remedy directed on or before 4:30 p.m. on August 6, 2014, the Arbitrator's jurisdiction shall be extended for so long as is necessary to resolve disputes regarding the remedy. If the Arbitrator is not advised of the existence of a dispute regarding the remedy directed herein by that time and date, the Arbitrator's jurisdiction over this grievance shall then cease.

7. Pursuant to Article 31, Step 6, the parties shall bear equal responsibility for the Arbitrator's fees and expenses.

- End of Case -