

**LABOR ARBITRATION
AMERICAN ARBITRATION ASSOCIATION**

IN THE MATTER OF	)	
ARBITRATION BETWEEN	)	
	)	
	)	
CITY OF CINCINNATI	)	
DIVISION OF POLICE	)	
	)	
	)	
-AND-	)	
	)	DECISION IN
	)	
FRATERNAL ORDER OF POLICE,	)	EMPLOYMENT TERMINATION
QUEEN CITY LODGE NO. 69	)	OFFICER ROSE VALENTINO

<u>AAA CASE NO.:</u>	01-22-0004-0876
<u>GRIEVANCE:</u>	The Grievance protests the Employment Termination of Police Officer Rose Valentino as lacking Just Cause.
<u>AWARD:</u>	The Grievance is Denied.
<u>HEARING(S):</u>	February 16 and February 20, 2023; Cincinnati, Ohio
<u>ARBITRATORS:</u>	Margaret Nancy Johnson David W. Stanton Daniel G. Zeiser

APPEARANCES

**FOR THE CITY OF CINCINNATI
DIVISION OF POLICE**

Julie F. Bissinger, Assistant City Solicitor
Colonel Teresa A. Theetge, Police Chief
Aaron Jones, Captain, Training Section

**FOR THE FOP
QUEEN CITY LODGE 69**

Kimberly A. Rutowski, Attorney
Jeffery D. Gray, Attorney
Daniel Hils, FOP President

Commander, Police Liaison
Jarrod Cotton, Sergeant,
Internal Investigation Section
Jason Lindle, Police Officer, District 3
Joe Mallory, Cincinnati NAACP President

Rose Valentino
Police Officer, Grievant
Darris Sneed
Investigative Unit District 3
Michael Ammann
Police Officer District 3
Dustin Peet, Police Officer
Central Business Section
David Knox,
Police Officer District 3
Andrew Mitchell, Lieutenant,
District 5 Commander

ADMINISTRATION

By email correspondence dated October 14, 2022 from the Piscataway, New Jersey Office of the American Arbitration Association, the Undersigned Arbitrators - Margaret Nancy Johnson, Daniel G. Zeiser, and David W. Stanton were appointed to serve as Impartial Arbitrators pursuant to Article III, titled "Grievance Procedure," *Step Three*, which states, "Arbitration: If the Grievant is not satisfied with the decision or adjustment at mediation, a panel with three (3) Arbitrators, acceptable to both Parties, shall be appointed." In accordance therewith, the afore-referenced Arbitrators were appointed and presided over these proceedings. On February 16, 2023, Day One of the Arbitration Proceeding was conducted at Centennial Plaza, Suite 200, Room A, 805 Central Ave., Cincinnati, Ohio; and Day Two was conducted at the Fraternal Order of Police, Queen City Lodge 69, 1900 Central Parkway, Cincinnati, Ohio, where each Party was afforded a fair and adequate opportunity to present testimonial and/or documentary evidence supportive of positions advanced; and where the Grievant appeared and testified in her own behalf. The extensive Evidentiary Record of this Arbitration proceeding was subsequently closed upon the Arbitrators' receipt of each Party's Post-Hearing Brief filed in accordance with the arrangements agreed to at the conclusion of the presentation of the evidence and subsequently modified per agreement between the Parties. Accordingly, this matter is now ready for final disposition herein.

GRIEVANCE AND QUESTION TO BE RESOLVED

The following Grievance set forth in the American Arbitration Association Demand for Arbitration was filed on or about September 27, 2022, and succinctly states the nature of the Grievance as “Discharge” with the description: “On or about August 19, 2022, the City terminated Officer Rose Valentino without Just Cause,” Remedy Sought: Reinstatement and make Officer Valentino whole for lost wages overtime, details, promotions, and all other lost benefits.” Name of Grievant(s): (If applicable) Officer Rose Valentino.

The issue for disposition before the Arbitration Panel is:

Was the Termination of Police Officer Rose Valentino effectuated for Just Cause; and, if not, what is the appropriate remedy?

CITED PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

The following provisions of the applicable Collective Bargaining Agreement, Joint Exhibit-1, with effective dates May 2, 2021 through April 7, 2024, were cited and/or are deemed relevant herein as follows:

ARTICLE II MANAGEMENT RIGHTS

The FOP recognizes that, except as provided in this Labor Agreement, the City of Cincinnati retains the following Management rights as set forth in Ohio and revised Code Section 4117.08 (C) 1-9:

1. To determine matters of inherent Managerial Policy, which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology and organizational structure;
2. To direct, supervise, evaluate, or hire Employees;
3. To maintain and improve the efficiency and effectiveness of Governmental operations;
4. To determine the overall methods, process, or means or personnel by which governmental operations are to be conducted;

5. To suspend, discipline, demote, or discharge for Just Cause, or layoff, transfer, assign, schedule or retain Employees;
6. To determine the adequacy of the work force;
7. To determine the overall mission of the Employer as a unit of government;
8. To effectively manage the workforce;
9. To take actions to carry out the mission of the public employer as a governmental unit.

With respect to these Management Rights, the City of Cincinnati shall have the clear and exclusive right to make decisions in all areas and such decisions, except as otherwise provided in this Agreement, shall not be subject to the Grievance Procedure.

The City is not required to bargain on subjects reserved to the Management and direction of the City in Revised Code Section 4117.08 except as affect wages, hours, terms and conditions of employment and the continuation, modification, or deletion of this Collective Bargaining Agreement. The FOP may raise a legitimate complaint or file a Grievance based on this Collective Bargaining Agreement.

ARTICLE III GRIEVANCE PROCEDURE

All sworn members of the Cincinnati Police Department shall be entitled to the following Grievance Procedures:

SECTION 3. STEPS

STEP THREE

MEDIATION:

If the Grievant is not satisfied with the decision or adjustment at Step Two of a disciplinary grievance, then the individual or organization filing the Grievance and the City shall submit the matter for Grievance Mediation in accordance with the procedures in Appendix B hereto. Contract interpretation Grievances may, at the option of the Parties, also be submitted to Mediation in accordance with the procedures in Appendix B.

ARBITRATION:

If the Grievant is not satisfied with the decision or adjustment at mediation, a panel of three (3) Arbitrators, acceptable to both Parties, shall be appointed. The American Arbitration Association (AAA) shall be contacted by the Union, in writing, to obtain a list of fifteen (15) Arbitrators within thirty (30) calendar days after the receipt of the decision, or the adjustment of the City Manager or his representative, with a copy to the Police Chief and

appropriate Deputy or Assistant City Manager. The Parties shall move to select Arbitrators within twenty (20) calendar days of the date AAA transmits the list of Arbitrators. AAA rules shall apply to all Arbitration Procedures, including the selection of Arbitrators. The decision of the Arbitrators shall be binding. Such decision shall be anonymous, rendered by the panel without any indication of which Arbitrators ruled, or reasons for either side. The panel shall certify only that at least two (2) of the three (3) Arbitrators joined in the decision. The cost of the Arbitrator shall be borne equally by the Parties. The Union and the City shall each share the filing fees, administrative fees, or panel fees charged by the AAA. The City, however, shall pay all such administrative fees, filing fees, or panel fees in the event a terminated employee selects this Grievance and Arbitration Procedure in lieu of his or her rights to proceed under the Civil Service Laws for cases involving Employment Terminations. The expense of the expert witnesses shall be paid by the Party producing same; and, in the event there is a transcript of the proceedings, the Party ordering the transcript shall be responsible for the cost of said transcript.

The Arbitrator shall have no power to render a decision that will add to, subtract from, or alter, change, or modify the terms of this Agreement and his/her power shall be limited to interpretation or application of the express terms of this Agreement.

Additionally, City Exhibit 15, titled, “Manual of Rules and Regulations and Disciplinary Process for Cincinnati Police Department” identifies certain specifications upon which the charges were levied as follows:

THE PURPOSE OF DISCIPLINE

A Police Agency must employ an open, effective, efficient philosophy of discipline. Three (3) factors form the first of two (2) triads that Managers must balance to maintain an effective disciplinary system: Public trust, the Police Agency, and the Police Employee. All Employees must be informed, trained, and oriented in the system in order to be accountable to the Agency. Positive re-enforcement shall be employed to the greatest extent possible. The individual who wills to do the right thing, in the right way, receives the greatest reward. Self-discipline generates the positive benefits associated with being a member of a professional group, pride, esprit de corps, and high morale.

The vast majority of Employees abide by law, policy, procedure, and rule. Most Employees will follow the rules when given a clear set of expectations. The nature of Police work involves the application of discretionary judgements and set of expectations. The nature of Police work involves the application of discretionary judgements, accumulated expertise, and the use of guiding values to solve a variety of problems. Police work is not conducive to the information of a comprehensive list of permissible and prohibited acts. Managers and Supervisors must

recognize that training, education, conduct, rewards, and punishments are interrelated and not separate elements.

The public's trust is impacted, however slightly, each time a manager adjudicates a complaint investigation or finds that an Employee's conduct did not conform to law, policy, procedure, or rule. When allegation of misconduct is sustained by the Police Department, corrective or disciplinary action imposed serves three (3) purposes:

- To modify Employee's conduct
- To set expectations for other Employees
- To assure the public that the Department strives to maintain the public trust by holding Employee's accountable.

FAIRNESS AND CONSISTENCY

Fairness, consistency, and clear expectations form the second triad of an effective discipline system. Employees will understand discipline when it is imposed fairly and consistently. However, Employees may incorrectly equate fairness and consistency as synonymous; they are not. The disciplinary matrix is a guide for fairness and consistency. When using the matrix, one must take into account an Officer's violations of different rules within the same section rather than just repeated violations of the same rule. The matrix does not abrogate the Police Chief's authority and discretion to impose any appropriate discipline when he believes the Officer's misconduct exhibits a lack of fitness for duty.

Consistency within a discipline system means holding every Employee equally accountable for unacceptable behavior. Unacceptable behavior for one is unacceptable for all, regardless of rank, status, or tenure.

Fairness within a discipline system means understanding the myriad of circumstances that contributed to the misconduct. Thus, disciplinary penalties for various infractions are expressed as ranges so that mitigating factors can be given appropriate consideration.

RULES AND REGULATIONS

SECTION 1 – FAILURE OF GOOD BEHAVIOR

1.06

- A. Members of the Department shall always be civil, orderly, and courteous in dealing with the public, subordinates, superiors, and associates.

- B. Members of the Department shall avoid the use of course, violent, or profane language.
- C. Members shall not engage in unwanted or unwelcome conversations of a sexual nature with other Department members, City Employees, or members of the public.

1.23

- A. Members who use force or have knowledge of a use of force by a Department member shall immediately notify a Supervisor.
- B. Members shall not use more force in any situation than is reasonably necessary under the circumstances. Members shall use force in accordance with the law and Department Procedure.
- C. Members of the Department shall not express, verbally, or in writing, any prejudice or offensive comments concerning age, gender, sexual orientation, gender expression and identity, marital status, disability, religion, race, color, ethnicity, national origin, Appalachian regional ancestry, Veteran status, military status, genetic history, HIV status, or similar personal characteristics.

SECTION 15 – DISCIPLINARY TABLE

- A. Any corrective measure outlined in Rule 9.26, Section A
- B. Written reprimand
- C. Hearing (1-5 day suspension)
- D. Hearing (5-7 day suspension)
- E. Hearing (7-11 day suspension)
- F. Hearing (11-day suspension or more, demotion, or dismissal)
- G. Hearing (dismissal)
- H. Suspension (without pay)

All time lengths for repeated conduct are based on a thirty-six (36) month period unless otherwise stated.

SECTION ONE – FAILURE OF GOOD BEHAVIOR

106

	1 st	2 nd	3 rd	4 th
A.	A	A	B	C
B.	A	B	C	D
C.	D	E	F	

C D E G

CITY OF CINCINNATI – ADMINISTRATIVE REGULATION

REGULATION NO. 25 – DEFINITION OF DISCRIMINATORY HARRASSMENT

Examples of harassment that will violate this policy and may violate the law include:

- Oral or written communications that contain offensive, name-calling, jokes, slurs, negative stereotyping, or threats. This includes comments or jokes that are distasteful or targeted at any individuals or groups based on age, gender, sexual orientation, gender expression and identity, marital status, disability, religion, race, color, ethnicity, national origin, Appalachian regional ancestry, veteran status, military status, genetic history, or HIV status.

Finally, the City of Cincinnati, Human Resources Policies and Procedures was cited as follows:

Chapter 5: Disciplinary or Corrective Action

5.2

PREDISCIPLINARY HEARING AND REPRESENTATION:

FORM 32 – NOTICE OF CORRECTIVE ACTION:

A.

If the penalty is different from the recommendation of the Hearing Officer, the Agency must include a written explanation of why the penalty differs from the recommendation of the Hearing Officer. A copy of this explanation should be sent to the Hearing Officer. The Department Director or Agency Head approves the Form in the appropriate box.

FACTUAL BACKGROUND

The facts in this matter are not in serious dispute. The City is the largest municipality in southwestern Ohio. It operates its own Police Department. The Department has an authorized complement of 1,059 sworn officers and 125 civilians. It has one Police Chief, an authorized complement of four Assistant Chiefs, 15 Captains, and 146 Sergeants. The Union represents the Police Officers of the City. The bargaining unit involved here is the Non-Supervisors, i.e., the sworn members of the Police Department up to and including the rank of Specialist. (JX 1). The parties have had a collective bargaining relationship for decades.

The City maintains a number of policies that apply to all employees, as well as policies that apply to the Police Department only. (See CX 14-15). In particular, at issue here is Rule 1.23.C of the Department's Manual of Rules and Regulations. It prohibits prejudicial or offensive language involving any protected group, including racially offensive language. (CX 15, p. 9). City of Cincinnati Administrative Regulation No. 25 prohibits any oral or written communications that contain offensive language targeted at protected individuals or groups based on age, gender, race, and so forth. (CX 7, Tab A). The City also provides training on its policies. These trainings have included implicit bias, fair and impartial policing, and discrimination and sexual harassment. The Grievant received training on these from 2018-2022. (CX 1-6).

The Grievant has been employed by the Police Department since June 2008, when she graduated from the Police Academy and became a Police Officer in District 1. (UX 14). During her employment with the City, her performance evaluations have been satisfactory. For the most recent three years, she received overall ratings of Exceeds Standards. (UX 14; CX 7, Tab I). On February 28, 2019, the Grievant received an official reprimand for showing body worn camera (BWC) footage from a homicide scene to members of her family. (UX 14; CX 7, Tab J). On

December 8, 2020, she was officially reprimanded for an altercation with her sister and brother-in-law that took place in March 2020. Criminal charges were filed against all three. The Grievant pled not guilty and was convicted of disorderly conduct, a misdemeanor of the fourth degree. (UX 7; CX 7, Tab J). She received an Evaluation Supplemental Log (ESL) on December 11, 2020, for deactivating her BWC while responding to a call. (UX 16). During her employment, the Grievant also received a number of commendations, including two for exemplary conduct. (UX 12).

In late 2017, the Grievant experienced difficulties in her personal life. Her partner, the father of her children, pled guilty to driving under the influence in Arizona and was sentenced to four years in prison. The Grievant then became the sole provider for the household. She testified that she struggled and needed to be on first shift for day care reasons for her youngest child. She requested and was granted hardship so she could remain on the first shift. In February 2020, she was diagnosed with depression and prescribed medication. (UX 6). The Grievant testified that she took the medication for over a year, which helped her to feel balanced and in control of her emotions. She further testified that her partner came home in April 2021, and she thought her problems would be over, so she weaned herself off the medication by June 2021.

In 2018, Officer Donte Hill, an African American former employee of the Police Department, used the word “nigger” while interacting with African American residents of Cincinnati during a call. He received a written reprimand for violating Police Department Rules 106.B and 1.23.C, and City Administrative Regulation No. 25. This was done at the District level. (CX 22). Several months later, a white Officer, Dennis Barnette, used the same word when he was slapped by an African American female during a call. After an Internal Investigation Section (IIS) investigation and hearing, Officer Barnette was issued a 56-hour suspension for violating the same rules. (CX 23). When then Chief Elliot Isaac was informed that Hill had used the same word and

only received a written reprimand, he directed that it be investigated by the IIS. Hill then received the same 56-hour suspension. Both Hill and Barnette grieved. Arbitrator Zeiser found Hill's 56-hour suspension to be double jeopardy since he had already been reprimanded. Arbitrator Stanton found Barnette's 56-hour suspension to violate just cause because it was inconsistent with the discipline issued to Hill. He reduced the discipline to a written reprimand, consistent with Hill's discipline. (CX 22-23).

After these arbitrations, the Department revised Rules 1.06.B and 1.23.C to the language noted above. Additionally, it modified its Disciplinary Table for violations of Rules 1.06 and 1.23. The recommended discipline for a first violation of Rule 1.23.C would be a 5-7 day suspension. A second violation could result in a 7-11 day suspension, while a third violation could result in dismissal. (CX 7, Tab G). These revisions were effective in 2021.

The grievance involved here arose from an incident that occurred on April 5, 2022, at 3:05 p.m. The Grievant was assigned to District 3, a large, diverse district covering much of Cincinnati's west side. It is the busiest district in the Department, serving one-third of Cincinnati's residents, and employs the most Officers. The Grievant was on duty, in uniform, in a marked police car, using City owned equipment. At the end of her shift, she responded to the District 3 station to complete an offense report. She was alone and driving, as her partner had been off that week. The District 3 station is located on Ferguson Avenue, across a driveway from Western Hills High School. The entrance to District 3 is off the driveway that leads to a strip mall behind the station. The entry-exit to the District is oval shaped, with the entry at the east end of the oval and exit at the west end. The entry leads to a secured lot for police vehicles. The oval includes parking for visitors. The entry and exit lanes widen at the driveway, so they are approximately 25 feet wide.

As the Grievant turned onto the driveway to enter the station, she encountered several parked cars waiting for students to get out of school. One vehicle was partially blocking the exit from District 3, which is closest to Ferguson Avenue. The car extended into the exit drive perhaps five feet at most. The Grievant had been instructed the day before not to allow cars to park along the drive. One of the drivers that the Grievant had told not to park there was parked again. The Grievant engaged her lights and siren to signal the vehicles to move. This automatically turned on her body worn camera (BWC) and the onboard vehicle camera. (CX 28). The Grievant testified that a student also flipped her off, though this is not seen on the video.

The Grievant told the driver “You gotta move” without winding down her window. She continued: “Fucking ridiculous. Fucking assholes. Is she going to fucking just sit there?” The Grievant pulled into the station and up to the security gate and continued: “Fucking dumb. I fucking hate them so much. God, I hate this fucking world. Fucking hate it. Fucking niggers. I fucking hate them.” (CX 27-28). The Grievant testified that frustration had been building that day and she “could feel it building inside, that it was “like a balloon popped.” There were a “lot of things happening” in her personal life — her older child was away at college, she had pulled a muscle in her back and was dealing with the pain, and she found out that week she had done poorly on the oral part of the sergeant’s exam.

The Grievant called her doctor that day and made an appointment. She saw the doctor on April 8, 2022, and July 1, 2022, for depression and anxiety. She also attended a one-hour session at the Public Employees Assistance Program on July 25, 2022. (UX 8). She was prescribed the medication she had previously taken. The Grievant testified that it makes her feel balanced inside. Normal, small things do not make her upset. She has more patience, is much calmer, and can handle life situations better.

Following a records review in response to a criminal case discovery request, the Police Records Section watched the BWC footage and heard the language used. As a result of the discovery request, the video was made public and found its way on the internet, where it was reported on by many news outlets and other media. (CX 18). It was also posted on social media. (CX 11-12). On July 26, 2022, Police Support Bureau Commander Brian Norris notified IIS. IIS Lieutenant David Sprage in turn notified Interim Police Chief Teresa Theetge and requested permission to initiate an investigation. Theetge approved the investigation. (CX 7).

During the investigation, the Grievant acknowledged her behavior and that the statements she made were inappropriate and unprofessional. She stated that she was extremely frustrated due to traffic and individuals not taking her seriously. She also recognized that she was not in control of her emotions and not mentally healthy and sought treatment. The Grievant was adamant that she does not use racial slurs and could be an effective Police Officer with treatment. She believed she had been desensitized by constant exposure to the word on the street and in music, which caused it to slip into her vernacular. The Grievant said this was not represent who she is or how she feels about African Americans. She characterized the outburst as an isolated incident and was open to counseling. A violation of Rule 1.23.C was sustained and approved by Interim Chief Theetge. (CX 7, Tab C).

A Pre-disciplinary hearing was held with Captain Douglas M. Wiesman as the Hearing Officer. (CX 10). Captain Wiesman recommended the Grievant receive a 56-hour suspension without pay, have a fitness for duty evaluation, be placed on an intervention plan, and additional training. Interim Chief Theetge disapproved the recommendations and recommended dismissal. (CX 16). Theetge found several aggravating factors, including that the Grievant became “infuriated” by an African American female not moving her car and a sixteen-year-old boy flipping

her off, her frustration level increased during her approximately 3.5-mile drive back to the District 3 station, and the Grievant claiming she was desensitized to racially offensive language by music and hearing talk on the street.

Theetge noted that law enforcement can be extremely stressful, but Cincinnati Police Officers are expected to handle all encounters with professionalism and they should not cause a trained Police Officer to become infuriated. Police Officers are often exposed to some of the most egregious statements and conduct, whether directed at an Officer or someone else and the Grievant demonstrated an inability to maintain her composure. Additionally, the Grievant had already received a number of trainings, leading her to conclude that further training would not change her behavior. Theetge took into account the community's trust in the Department. The Department had worked hard for 20 years to foster strong relations between the Department and the community. The Grievant's statements had been viewed by millions and damaged the public's trust in the Department. Finally, Theetge found that the verbalization of hatred for the African American community meant that the Grievant's ability to impartially police a large population of Cincinnati would always be questioned. It would also affect her credibility as a witness and, at the very least, significantly reduced her ability to be a productive member of the Department. The Grievant's use of the word also irreparably damaged her ability to work with members of the Department, both African American members and anyone who disapproves of hate speech. (CX 16). The City's Law Department and City Manager approved Theetge's recommendation. (CX 17).

On August 29, 2022, the Grievant was served with a Notice of Disciplinary Action, Layoff or Displacement. (CX 13). Queen City Lodge No. 69 grieved the dismissal. (JX 2). At the arbitration hearing, Lodge No. 69 introduced texts between the Grievant in which she apologized

for the use of the N-word. Others reached out to her. The comments were supportive, recognizing she made a mistake. (UX 9). Several witnesses — Officers Jason Lindle, Darris Sneed, Michael Ammann, Dustin Peet, David Knox, and Andy Mitchell — testified on the Grievant’s behalf. Knox has been her partner for three or four years, and Mitchell was her partner for eight or nine months in 2007. They each testified that the Grievant is a good Police Officer, does not use the N-word, and is not a racist. Each one would have no issues working with her if she were reinstated. Knox testified that he would be her partner again and would not be in the car with her if he had any indication the Grievant were a racist.

The parties introduced evidence of other Officers who used the N-word. Besides Officers Hill and Barnette, Officers Joehonny Reese, Willie Coman, and Dan Carter all used the word on duty while dealing with African American citizens but received no discipline. Additionally, Officer Kelly Drach was overheard using the term “sand nigger” at a caller twice in the span of about a week. She received a 56-hour suspension for violations of Rule 1.23.C and Administrative Regulation 25. (UX 2-4; CX 19-21, 29).

CONTENTIONS OF THE PARTIES

CITY CONTENTIONS

The City contends the Grievant’s actions on April 5, 2022, wherein she uttered a racially insensitive indictment against an entire race of people in violation of Cincinnati Police Department Rule 1.23.C prohibiting such utterances, as well as City Administration Regulation 25 defining discriminatory harassment, provide Just Cause to effectuate the Employment Termination of this Officer. The City contends the Grievant did indeed fail to exercise required behavior in violation of those two Sections for which the only appropriate penalty, given her training and experience, is termination. The City, upon learning of the BWC and Mobile Vehicle Recorder footage recording

the Grievant's actions resulting from a document request made pertaining to an unrelated matter, the Police Records Section advised the appropriate administrative personnel, which ultimately led to an Internal Investigation. Based on the charges levied, the Grievant was terminated from her Employment.

The City maintains this matter is clearly distinguishable from other Officers who have made the same utterance and have received lesser degrees of disciplinary action. Given the blanket indictment of an entire race of people, termination is the only appropriate course of action. The City relies upon many noted instances of disciplinary action for similar infractions, but stresses if an Employee cannot be terminated for this matter, then what does it take to effectuate and uphold termination? The City emphasizes the Grievant's justification based on her alleged mental breakdown due to the stress from work and personal issues is simply disingenuous and does not provide any satisfactory reason for her hateful diatribe against the entire African American race while in uniform in a marked Cincinnati Police cruiser while on duty. Most of that relied upon by the Grievant as possible "triggers" to her inexplicable outburst happens frequently on a day-to-day basis as stated by many of the sworn Police Officers who appeared and testified in this proceeding. It was described as "part of the job" - something expected to be ignored - especially by an experienced Police Officer who received countless training sessions regarding proper procedure and protocol with respect to dealing with members of the public. Additionally, her rationalization for her use of the racial slur indicating it was desensitized because she "hears it all the time" in her job and in popular music culture, is also disingenuous and cannot simply slip into one's vernacular, but represents an expression of deep inborn bias as demonstrated.

Despite Captain Douglas Wiseman's recommendation for the Grievant to be suspended from duty without pay for 56 hours, such was appropriately overturned by Police Chief Theetge.

The City of Cincinnati Human Resource Policies and Procedures, Chapter 5 titled “Disciplinary or Corrective Action” affords the Chief discretion to issue a penalty different from the recommendation of the Hearing Officer. Police Chief Theetge testified, “...after watching the video, the manner in which Ms. Valentino used the racial slur, it was the disdain in her voice for an entire demographic of our society. I find that appalling and egregious.” It is clear Officer Valentino became infuriated based on an African American woman not moving her vehicle as previously instructed and a sixteen (16) year old African American youth raising his middle finger at her, which led to a heightened level of frustration during a 3.5 mile drive from Constantine Avenue to District 3 wherein she experienced raining conditions and traffic congestion. The Police Chief indicated, with respect to Law Enforcement, the community’s trust is the foundation of what gives the Department the authority to do its daily duties. Moreover, if the Grievant were to return to Police service her name would appear in the “Brady Disclosures” and/or on the “Brady List” for expressing such prejudice wherein defense attorneys are entitled to any information that might impeach a Police Officer.

The type of notoriety this matter garnered can only be characterized as intense given the number of media outlets addressing it. The City insists that, given the overwhelming evidence of record and the egregious indictment against an entire race, this Police Officer simply cannot discharge her duties in a fair and equitable manner based on her obvious and clear disdain for those individuals. The City contends dismissal was the only appropriate penalty supported by Just Cause based on her egregious actions on April 5, 2022 in violation of Section 1.23.C of the Manual of Rules and Regulations and Disciplinary Process for the Cincinnati Police Department and City of Cincinnati Administration Regulation No. 25, applicable to all Employees, and renders the imposition of termination proper and for Just Cause as contractually required.

For these reasons, the City requests the Grievance be Denied.

FOP CONTENTIONS

The FOP contends the City failed to establish the Grievant's termination was supported by Just Cause. Additionally, the FOP argues the burden of proof in this matter should be a heightened level based on the alleged stigmatizing behavior engaged in by this Police Officer. The Grievant's termination and the national media attention surrounding this matter has painted a detrimental picture of the Grievant not only professionally, but in her personal life, thereby requiring a heightened level of burden of proof. Additionally, the FOP contends the Employer has failed to meet its burden of proof based on the time-honored arbitral precedent requiring the seven tests of Just Cause.

The FOP acknowledges the use of the racial slur at issue herein is prevalent on the streets of this or any other city. In support thereof, it cites numerous instances where City of Cincinnati Police Officers have engaged in similar misconduct for which lesser degrees of disciplinary action were issued. At the time of this incident, the penalty the City set for violating Rule 1.23C was a suspension of 5-7 days. Such has simply been the case and there is no reason to deviate from that as seen by the recommendation made by Douglas Wiseman, the Hearing Officer for this Grievant. This Grievant should receive the same penalty as other Officers who have engaged in similar misconduct. Additionally, the FOP references several other instances where the City clearly has not applied its rules, orders, and/or penalties in an evenhanded manner without discrimination to all Employees. In many of these instances, especially in this matter, the degree of discipline administered by the City was excessive and not reasonably related to the seriousness of the offense based on this Officer as well as others' service records.

The Grievant has received consistent performance evaluations that exceeded expectations. The only discipline she had in her file was minor in nature regarding an off-duty incident involving her sister. Officer Valentino testified she only pled guilty to this misdemeanor to avoid long court delays that were occurring during the early days of the pandemic. As testified to by many of her colleagues, the Grievant exhibited no pattern or practice of prejudice, nor has the City demonstrated the Grievant could not effectively perform her duties as a Police Officer due to her inevitable inclusion on the Brady List. In fact, it cites several other Cincinnati Police Officers who currently find themselves on the Brady List and continue to perform without issue. Based on the examples offered by the City, there was no similar conduct for comparison. Numerous Officers have been found to have utilized the same racial slur and have not been terminated as was the Grievant. Any attempt by the City to portray Officer Valentino's conduct as more egregious than the others referenced should be rejected. Many of the instances referenced and discussed during the two (2) day Arbitration Hearing also received considerable media for uttering a racial slur. It is clear the City has placed offending Officers on notice that the penalty for such misconduct is to a 5-7 day suspension in accordance with prior instances of this conduct, as well as reliance on the disciplinary guide and/or the matrix prescribing such as a penalty. Moreover, Hearing Office Douglas Wiesman, who has conducted hundreds of such matters, recommended to the Police Chief that the Grievant receive a 7-day or 56-hour unpaid suspension for this incident.

The Union emphasizes Officer Valentino was in the midst of a mental health breakdown, alone in her cruiser and has demonstrated no pattern or practice of prejudice in her personal record. Any attempt by the City to describe the incident as racially motivated should not be given any credence.

The Union does not condone the use of the racial slur at issue herein in any form or at any time. However, with this matter, the penalty imposed is excessive based on the manner in which other Police Officers, who have uttered the same racial slur, received far less disciplinary action. Even though members of the public and the City Council have urged the City and the Police Department to adopt a zero-tolerance policy for the use of that word, the Cincinnati Police Department has chosen not to adopt a zero-tolerance policy. The Police Department can, and has, changed its rules and can, and has, revised penalties attendant therewith. Such was the case after the Donte Hill and Dennis Barnett matters involving the utterance of the same racial slur. The Police Department has made it clear to Police Officers that the first occurrence of using that word or any other racially derogatory term would result in a 5-7 day suspension in accordance with the Disciplinary Matrix. It is fundamentally unfair to impose discipline retrospectively.

In this matter, the City opted to terminate the Grievant while the Hearing Officer recommended a 5-7 day suspension. Her termination relies heavily on public opinion, which should not be considered under a Just Cause analysis. The Grievant was placed on desk duty after the BWC and Mobile Vehicle Recorder footage was discovered and remained on desk duty for several weeks until such was leaked to the media. Once that occurred, the City moved rapidly to terminate her employment. It is clear based on this evidentiary record that the Employer has failed to establish Just Cause to effectuate the Employment termination of fourteen (14) year Police Officer Rose Valentino in violation of the Collective Bargaining Agreement.

For these reasons, the Union requests the Grievance be Sustained.

ANALYSIS

Neither the Union nor the Grievant have defended the occurrence giving rise to the termination now under review. Indeed, the Grievant has expressed her remorse for the words used,

maintaining that the hatred asserted was an aberration and does not reflect who she is as a person or a Police Officer. In dispute is the severity of the discipline imposed and the propriety of the discharge under the specific situation and circumstances in this matter. The contractual principle of just cause mandates that discipline be proportionate to the offense and issued consistently.

Facts elicited at the hearing have been discussed by the arbitration panel to discern whether the conduct warrants termination of a fourteen (14) year veteran of the City Police Department. The Grievant herein has garnered excellent evaluations for her services to the City and earned the respect of many of her peers. She has received commendations and been given preferred assignments, including Field Training Officer. Concerns addressed by the panel include the disciplinary Matrix, the manner in which the City has disciplined Police Officers found to have used racial slurs in the past, and the mental and emotional state of the Grievant at the time.

Administrative and Departmental Rules/The Matrix

An initial consideration is the impact of the Matrix promulgated by the City on the penalty assessed in this instance. As previously noted, following two arbitration awards in 2019, the City revised its Rules and Regulations, updating Rule 1.23.C to correspond to Administrative Regulation 25. Additionally, the City modified the Disciplinary Table in the Manual of Rules and Regulations for the Police Department. Recommended discipline for an initial use of prohibited language changed from a written reprimand to a five-to-seven-day suspension.

In the December 5, 2019 Staff Notes issued by the Police Department, Officers were advised of the modifications. (UX 18). The Union now argues that the City has "set" the penalty for violating Rule 1.23.C and that it has "put all officers on notice that using the n-word, or any other expression of prejudice would result in a five-to-seven-day suspension for the first offense." (Union Post-Hearing Brief, p. 18).

Both the Police Department Manual of Rules and Regulations and the City Administrative Code prohibit use of racial slurs by employees. Applicable to all City employees, Administrative Regulation No. 25 sets forth the City policy on Non-Discrimination. (CX 7, Tab H). It provides that conduct or oral communications containing offensive slurs or negative stereotyping by City employees will not be tolerated and that "appropriate action will be taken" by the City for violations of the regulation. Disciplinary or Corrective Action for City employees is set forth in Human Resources Policies and Procedures requiring that discipline be "fairly, impartially and consistently carried out." (CX 14). Dismissal from City service may be issued for major misconduct.

Pertaining to the Police Officers, Departmental Rule and Regulation 1.23.C reads:

Members of the Department shall not express, verbally or in writing, any prejudice or offensive comments concerning age, gender, sexual orientation, gender expression and identity, marital status, disability, religion, race, color, ethnicity, national origin, Appalachian regional ancestry, veteran status, genetic history, HIV status, or similar personal characteristics.

Section Thirteen of the Manual of Rules and Regulations for the Police Department provides that "any member may be dismissed from the Department when proven guilty" of charges including "Failure of Good Behavior." Thus, the Disciplinary Table outlines possible penalties to be imposed for infractions of Departmental Rules and Regulations, but it does not limit the City in assessing an appropriate discipline.

Assigned to conduct a Pre-Disciplinary Hearing for the Grievant, in his analysis submitted to then Interim Police Chief Theetge on August 15, 2022, Captain Douglas Wiesman acknowledged the statements made by the Grievant to be "hateful," an "explosion" of "vitriolic insensitive language" and, having been "viewed by millions of people," to be "damaging to the public's trust in Police." (CX 16). While sustaining the findings, Captain Wiesman relied on the

matrix to recommend a seven (7) day suspension along with "an intervention plan," fitness for duty evaluation, and additional training.

In her August 19, 2022, memorandum to the Interim City Manager, Interim Chief Theetge rejected the recommendations and sought removal. (CX 16). Citing aggravating factors, Theetge specifically noted her right to deviate from the Matrix and recommendations of a Hearing Officer. Authority to do so is found in Chapter 5, Disciplinary or Corrective Action, in the Human Resources Policies and Procedures Manual. To deviate, the Chief is required to provide a written explanation for a penalty different from that recommended by a Hearing Officer and to so advise the Officer. In this instance, Theetge complied with the procedural requirement, explaining her reasoning for termination of the Grievant. She prepared a Form 32, dated August 29, 2022, that was processed through Human Resources, the Law Department, and finally the City Manager, who made the final disciplinary determination. (CX 14). Additionally, the Chief referenced the Manual of Rules and Regulations and Disciplinary Process for the Cincinnati Police Department, which specifically indicates the Matrix is a "guide." The Manual provides that the Matrix does not "abrogate the Police Chief's authority and discretion to impose any appropriate discipline when [s]he believes the officer's misconduct exhibits a lack of fitness for duty." (CX 15. p. 3).

As in her Form 32, at the arbitration hearing, Chief Theetge explained her reasoning for dismissal rather than the recommended suspension. Her conclusions derived from listening to the tape of the Grievant's Body Worn Camera (BWC) and the Mobile Video Recording (MVR). Theetge stated the "disdain in the voice [of the Grievant] for an entire demographic of our society" was appalling and egregious. (Tr. 165). She considered "the reputation" of the Department and the significant efforts of the Department in building trust in the community. One of the reasons for discipline as stated in Manual of Rules and Regulations for Police Officers is "public trust."

Theetge questioned how she could use the Grievant as a sworn Police Officer in the very community for which she had expressed hatred and disdain. Theetge determined she could not.

The Chief testified that "context matters" and, when assessing discipline, it is necessary "to look at the total package." (Tr. 230). Indeed, just cause is not a mechanical exercise but requires an examination of the facts and circumstances in each individual case. Consistency in discipline does not require uniformity. In fact, the Union has taken this very position. Testifying in another arbitration proceeding involving language, Union President Dan Hils stated, "every case stands on its own and is unique." (CX 26, p. 226). Since factual situations will vary, just cause warrants review of aggravating as well as mitigating circumstances.

The Panel finds, then, the Matrix neither "sets" nor requires a five-to-seven-day suspension for an employee who uses a racial slur. Disciplinary Tables are useful in advising employees of potential penalties for proscribed behavior. Yet, specific behaviors giving rise to discipline differ, and discipline will vary according to the severity of the misconduct. The City retains discretion to determine discipline commensurate with an offense, including consideration of aggravating factors. Egregious wrongdoing may warrant a correspondingly more extreme penalty than indicated in the Matrix. Promulgated rules provide guidance for employees, but rarely do they restrict employers from the reasonable exercise of discretion in imposing discipline. In this case, the Matrix does not preclude the Chief from recommending termination or prohibit the City from discharging an employee for a flagrant violation of Rule 1.23.C.

The Union argued that, based on disciplines imposed on other employees, the Grievant was "unaware that a violation of Rule 1.23.C would result in a termination." (Union Post-Hearing Brief, p. 19). The Grievant, though, was not terminated for use of a racial slur only. She was discharged for using a slur while voicing hatred in a profanity-laden tirade against an entire

community she had a duty and responsibility to protect. Such behavior does not require a written prohibition or warning of potential discharge. An employee having an obligation to serve the public should have known that the language used by the Grievant could give rise to termination. Indeed, her subsequent behavior confirms the Grievant knew her conduct to be reprehensible. She testified "I'm humiliated. I - when I watch that video of myself, I mean, I can't even - I'm mortified at who that was in that car that day." (Tr. II, p. 29). Remorse is an element in assessing discipline, but it does not nullify the severity of misconduct or eradicate its impact on the public.

Analysis of the Disparate Treatment Argument

The FOP argued that, because other Police Officers who had used racial slurs incurred disciplinary suspensions or reprimands, the discharge of the Grievant constitutes disparate treatment. (Union Post-Hearing Brief, p. 19). Consistency in the imposition of discipline is a factor in just cause and disparate treatment may justify modification of a penalty. Disparate treatment connotes a distinction in treatment, especially an unfair distinction. The FOP must show that the Grievant was treated differently than similarly situated employees and that the conduct resulting in discipline was alike in all material respects. Factors used to show similar situations include the nature of the offense, the degree of fault, length of service, prior discipline, and other mitigating and aggravating factors. Put another way, differences in discipline that are the result of differences in conduct do not support a disparate treatment argument. A problem with the Union argument, again, is that the Grievant was not discharged simply for making a disparaging comment using the N-word. Rather, she was terminated for using the N-word while vehemently stating her hatred for all black people, i.e., an entire community of City residents, using repeated profanities.

In her testimony, Chief Theetge explained how she had differentiated the cases where Officers received lesser penalties. As a result of grievances culminating in arbitrations, two

Officers, Donte Hill and Dennis Barnette, had suspensions reduced to written reprimands. (CX 22-23). In the case of Hill, his written reprimand was later increased to a suspension, which Arbitrator Zeiser reduced based on double jeopardy. Barnette's suspension was reduced by Arbitrator Stanton because his comment was similar to Hill's, whose discipline preceded Barnette's. In both cases, use of the word was "kind of off-the-cuff" and not a vituperative denunciation of an entire race, as in the matter now pending. (Tr. 177).

Kelly Drach, on two occasions in response to fraudulent telemarketer calls, referred to the caller as a "sand-n." (UX 3). After apologizing to a colleague for the first instance, Drach used the term a second time. A complaint was filed and Drach received a disciplinary suspension. Whereas the Grievant expressed disdain and hatred for an entire population, Drach was not "targeting a demographic." (Tr. 178). Both Drach and the Grievant were motivated by frustration; but the words used by the Grievant and heard by millions of people were a vilification of a significant population served by the Department and not directed to or about one individual. As stated by the Police Chief, "not only did [the Grievant] use the racial slur in doing that, but she was talking about how much she hates them, hates them." (Tr. 179).

Other instances of lesser penalties for use of a racial slur are similarly readily distinguishable. Having been called the N-word by an intoxicated patron where he was working a nightclub detail, Officer Joehonny Reese used the slur in reply to the patron, trying to de-escalate the situation. His use was not to belittle the patron or to denigrate an entire race. (CX 29). The Union President acknowledged in testimony pertaining to Reese that it was a situation where "he was the victim of racial slurs," and Reese was only repeating the term. (Tr. II, 109).

Similarly, Officer Willie Coman repeated a slur used by an unstable woman toward him. (Tr. II, 110). Dispatched to a location where racially offensive comments were being directed

towards a family, he reportedly used the N-word in response to the situation. Coman did not direct the slur to a particular individual or an entire race. Another Officer, Dan Carter, also used the slur responding to an intoxicated individual who had called him the N-word. In both instances, the use of the slur was not to disparage or to express disdain for anyone, but in response to the word having been used by someone else and directed towards the Officers. As stated by the Chief, those situations are "completely different than Valentino's incident where it was unprovoked, and it was a display of hatred." (Tr. 232). In recommending termination in this case, the Chief considered other situations in which racial slurs had been used. She reasonably concluded that the situation and the specific words used by the Grievant differed and warranted discharge. (CX 29).

The FOP also introduced evidence about a Black Officer who allegedly used profanity when speaking about her White colleagues. (UX 5). Although a complaint was filed with the Ohio Civil Rights Commission, testimony established that there was insufficient evidence to sustain departmental charges in that instance. (Tr. 236). In contrast, there is no question about the language used by the Grievant in the pending matter.

Additionally, the FOP argued that, unlike the instances cited above, the Grievant was alone in her car, speaking to herself, and not addressing anyone in particular. She had no intent for anyone to hear what she said. (Tr. II 106). Yet, as a consequence of her BWC and MVR having been activated, her words were heard in news reports nationwide and received national coverage. (CX 18). Though not intended to be heard, as with a "hot mic," the words were broadcast across a wide audience. Language has consequences for the speaker, even if meant to be private.

As part of its disparate treatment argument, the FOP responded to the City's contention that the Grievant's inclusion on the Brady List reduced her credibility to testify as a Police Officer in criminal proceedings. (CX 9). The FOP elicited evidence that many police Officers on the Brady

List continue to serve in the Police Department. Without scrutiny of those Officers, the Arbitration panel determines that the pending matter concerns the impact of the conduct of the Grievant on the population and not on her ability to serve as a witness in judicial cases.

Just cause requires similar discipline for similarly situated employees engaging in comparable misconduct. The arbitration panel finds that no other employee has used the N-word coupled with hate or while denouncing the whole Black race with repeated expletives. Such behavior is distinguishable from any misconduct included in the record of this arbitration proceeding.

Media Coverage/Public Interest

As with the Grievant, the situations in which lesser penalties had been imposed resulted in substantial media attention and public scrutiny. (UX 17). The Union argued that disciplinary penalties should not be determined on the basis of "public opinion" or news coverage and that exposure to a wide audience is not a component of just cause. (Union Post-Hearing Brief, p.17). To an extent this is true but, when misconduct adversely affects the ability of a Police Officer to perform his/her duties, public perceptions and public interest *are* relevant. Behavior — even off-duty conduct — that taints the reputation of a Police Department is just cause for disciplinary action.

As a matter of policy, the City Police Department, like Police Departments nationwide, is striving to foster and maintain the trust of its citizens. In her memorandum to the Interim City Manager, Chief Theetge explained, "...there are a myriad of things I must take into consideration when determining the appropriate level of discipline for an officer's misconduct," one of which is "...the community's trust." (CX 16). She continued, "In law enforcement, the community's trust is the foundation of what gives us the authority to perform our daily duties." She concluded that the

racial slur and vitriolic language heard on the BWC and MVR irreparably damaged the ability of the Grievant to work with the African American population within the City, as well as with Officers in the Department. Her determination in this regard is appropriate. (CX 16).

Although the Union introduced testimony from Black and White Officers regarding their willingness to continue to work with the Grievant as well as documentary evidence of support from peers, the concern of the Police Chief regarding the adverse impact of the conduct of the Grievant is borne out by witnesses.¹ (UX 9). Sergeant Jarrod Cotton, for example, testified that he did not know "what other possible conclusion the Chief could come to." (Tr. 111). He explained the impossibility of dispatching the Grievant to a home knowing that its occupants have seen and heard her "saying she hates you." (Tr. 111). The City does not have the luxury of being selective in dispatching Officers on runs. Nor do Officers choose with whom they go on runs. (CX 10, p. 38). In attendance at the Pre-Disciplinary Hearing, Sergeant Cotton queried, "Will she still be able to be effective in the community?" (CX 10, p.36).

The City also elicited the testimony of Joe Mallory, President of the Cincinnati NAACP. Describing his response to the tape, he stated "It kind of hit me to my core, like the way she made the statement.... It kind of shocked my conscience." (Tr. 194). He related, too, the extensive feedback he had received from the community expressing dismay regarding the language used by the Grievant and the vehemence of her anger. As did the Police Chief, Mallory described the building of trust between the community and the police and that "This trust was torn, the fabric of trust was torn in the community." (Tr. 199). Indeed, at the Pre-Disciplinary Hearing, Captain Wiesman made the same comment, stating the video "just took a piece of the fabric away from the

¹ Much of the testimony elicited by the Union from Officers confirmed the Grievant had not made racist comments in the past. The Grievant, however, was not discharged for being a racist. Her termination was the consequence of an outburst occurring on April 5, 2022, in which the hatred she expressed for an entire race was subsequently heard by multitudes of people. No precursor of racism on the part of the Grievant is needed to justify the disciplinary decision of the City.

trust that we have with the public.” (CX 10, p. 29). He described the "devastating" impact it had on him personally and all the other Officers who had watched it.

Working throughout the City with partners, Police Officers must have confidence that their teammates will respond to situations appropriately and not incur the enmity of the persons they are employed to protect and serve. The willingness of an individual Officer to work with the Grievant does not address the concerns of the Chief for the safety of her uniformed men and women serving a diverse population. Nor does it take into account the possible reaction of residents when confronted by a Police Officer who has been heard to malign a race with a slur and profanities.

Prior to completion of due process protocols, the City actually experienced repercussions from the incident. While she was on desk duty, a citizen "had concerns over interacting with the Grievant because of what she had done.” (Tr. 149). In another instance, a media post threatened protests. In yet another, after the Grievant responded to a telephone call, the individual posted disbelief that the Grievant was still working for the Police Department. (CX 11-12). These incidents are illustrative of the adverse impact of the language used by the Grievant on residents of the City who turn to the Police Department for services.

The Panel finds the behavior was egregious and warrants the discharge issued by the City. A lesser penalty would send a disturbing message not only to the community, but also to the dedicated men and women of the Police Department who work on behalf of the public.

Emotional/Mental State of the Grievant

The Union described the episode giving rise to the termination as a "meltdown" of the Grievant attributable to "frustrations" in her "personal and professional life, coupled with the blatant disrespect shown to her by members of the public.” (Union Post-Hearing Brief, p. 6).

Having carefully considered those frustrations as contributing to the conduct at issue, the arbitration panel finds the evidence of the mental status of the Grievant neither condones the behavior nor justifies reducing the penalty. Policing is stressful and those engaged in the work of a Police Officer must have the stamina to confront on a daily basis the stressors of the job. In her testimony, the Police Chief addressed that issue, stating, "We are simply in the wrong line of work if we can't deal with those things." (Tr. 167-168).

After having viewed the tape from the body worn camera, Union President Dan Hills testified that he believed the Grievant was "in crisis" with the "*possibility* of this case involving mental health." (Tr. 115 [emphasis added]). In her testimony, the Grievant described a prior diagnosis of depression and her resumption after the April 5, 2022, incident of prescribed medication to keep her "balanced." (Tr. II, 31; UX 6). The Union introduced into the record general information on depression and the mental challenges confronting Officers, but those do not specifically relate to the Grievant or to the April 5, 2022, incident. (UX 21-22).

Pertaining to the Grievant, the Union submitted memos, admitted with a limited purpose over the objection by the City, from a mental health professional as well as her personal care physician. (UX 8 and 10). Should evidence of the mental health of the Grievant have been intended as a defense to her behavior on April 5, 2022, then the burden of proof on this issue shifts to the Union. In the opinion of the arbitration panel, the documentation submitted by the Union is not adequate to establish that the conduct of the Grievant may be attributed to and excused by reason of her mental state. While rules of evidence are not strictly applicable in arbitration proceedings, the probative weight of hearsay evidence is a factor considered by arbitrators.²

² See the section on Expert Witnesses, in *How Arbitration Works*, Elkouri and Elkouri, Sixth Edition, p. 393, stating: "Before permitting expert testimony, a foundation showing such expertise, subject to cross-examination, must be provided."

In the unsigned August 7, 2022 "To Whom it May Concern" memorandum, for example, the primary care physician purportedly stated the Grievant was seen "for chronic, intermittent but progressively worsening depression with anxiety." (UX 8). Without the ability of the City to question the physician about her conclusions and its relation to the April 5, 2022 conduct of the Grievant, the relevance of the document is substantially diminished. The August 2, 2022 memorandum from a psychologist concluded that the Grievant's "anger-related behavior on April 5, 2022, is *very likely* attributable to PTSD." (UX 10). Again, the Union endeavored to submit a professional opinion without the ability of the City to cross-examine the psychologist regarding the basis for her determination. Without the testimony of the psychologist and cross-examination by the City, the persuasive value of the document authored by the psychologist is significantly reduced. Opinion evidence requires the availability of the professional for examination.

In a situation such as the one pending, the "To Whom It May Concern" memos are insufficient to convince the panel that the behavior of the Grievant was the consequence of a mental breakdown. Without testimony confirming and persuasively attributing the episode to a mental collapse, the defense advanced by the Union is not sustained by the evidence. The arbitration record lacks medical testimony or proof linking the April 5, 2022 occurrence to a mental episode on the part of the Grievant.

Furthermore, her calm and resigned comment after she realized she had been recorded — "and there it is" — undermines the suggestion of a mental episode. (CX 27). The Grievant completed her shift without interruption. Although she did make an appointment with her personal care provider, the Grievant did not contact anyone within the Department or avail herself of the Public Employee Assistance Program until July 25, 2022. (UX 8). Acknowledging stressors in her personal life, the Grievant failed to avail herself of the resources available to her through the Police

Department, including its Wellness Program designed to ensure employees have the tools and support they need. (CX 10, p. 14; UX 1).

During her Disciplinary Hearing on August 4, 2022, Captain Wiesman asked the Grievant, "How do you get from an outburst of anger/mental episode to using that word?" He continued, "That is so overtly offensive to roll that word in....Where does that come from?" (CX 10, p. 18). The Grievant replied, "I hear the word a lot. And so, it is present there. It's not a word that I dug out of nowhere. It's a word that's present because I hear it almost every day." She testified to being desensitized to the word both by its use on the streets and in music. Yet, as pointed out by Captain Wiesman, other Officers hear the word, too, but have not used it like the Grievant. Moreover, the explanation offered by the Grievant portends a potential repetition.

At her Pre-Disciplinary Hearing, the Grievant testified two incidents "popped the balloon." The one was a car parked so as to extend into the District 3 driveway and the other was a "child gave [her] the finger." (CX 10, p. 15). In her Form 32 explanation, the Chief stated, "Police officers are often exposed to some of the most egregious statements and action by individuals," but "an officer is expected to maintain their composure while providing police services." (CX 16). In another arbitration proceeding pertaining to the use of a slur, the Union President acknowledged "there is no excuse for [using] it." (CX 26, p.221).

Although Captain Wiesman recommended retraining, the evidence established the Grievant has received extensive and repeated training on applicable issues: Empathy through American History; Implicit/Explicit Biases; Diversity, Inclusion, and Equity. (CX 1-6). As recently as three months prior to the incident under review, the Grievant had been retrained on issues of Fair and Impartial Policing. (CX 5). More training will not repair the damaged standing of the Grievant held by the City's African American population. Nor will it modify behavior.

The effort of the Grievant to seek professional assistance in handling her personal stresses is to be commended. Nonetheless, her ability to perform as a Police Officer in a major metropolitan city having a diverse population has been compromised by her behavior on April 5, 2022. The City has reasonably exercised its administrative discretion in determining to separate the Grievant from its Police Department.

Additional Considerations

The arbitration panel is mindful of the years of service rendered by the Grievant to the City. Her record includes commendations and excellent evaluations. (UX 12 and 14). Testimony elicited on behalf of the Grievant described a capable Police Officer. In many instances, a lengthy and unmarred tenure may serve to mitigate a penalty for employee misconduct. It is not the prerogative, however, of the arbitration panel to substitute its judgment in this case for that of the City. The incident for which the Grievant has been terminated involves community relations and the City can best assess the ramifications of the misconduct upon its ability to serve the public. In the Manual of Rules and Regulations, employees are on notice that a purpose of discipline is "to assure the public that the Department strives to maintain the public trust by holding employees accountable." (CX 15, p. 2).

Moreover, prior discipline is an element in evaluating just cause. The employment history of the Grievant includes disciplinary action imposed approximately sixteen (16) months prior to the incident under review. (UX7). As the consequence of a misdemeanor conviction arising from a disorderly conduct charge, the City issued the Grievant a December 8, 2020 reprimand for failure of good behavior. Part of her sentencing in the criminal case included a referral to Community First Behavioral Health Solutions, attendance at five classes, and an order to complete anger management assessment. Although the Grievant completed the requirements of her sentence, she

has once again a short time later exhibited a lack of control resulting in another "failure of good behavior." ³ In the Manual, employees are on notice that "when using the matrix, one must take into account an officer's violations of different rules within the same section rather than just repeated violations of the same rule." (CX 15, p.3).

As stated by the Grievant in her Interview during the Internal Investigation, policing "is a hard job and it was -- I was really getting to a point where I was really affected by it." (CX 25. p. 7). When asked at the arbitration hearing why she did not address depression with the City earlier, the Grievant replied that one does not freely share such information. Yet, the Wellness Program promulgated by the City states it is "a 24/7 *confidential* connection for employees facing personal or professional stress which is often unique to Law Enforcement." (UX 1). Our society has come a long way from a time when mental illness was considered a stigma. Any concerns regarding perceptions about mental illness and the Grievant's failure to take advantage of available resources to address mental health do not excuse the egregious conduct of April 5, 2022. Nor do they restore the ability of the Grievant to perform as a Police Officer in a racially diverse municipality.

Under the circumstances of this case, the Grievant is better served by concentrating on her well-being without the stress of working in law enforcement. The intent here, as in all just cause cases, is not to penalize the Grievant. Rather than a punishment, this decision should be considered an opportunity for her to engage in and seek treatment. By its award upholding the discharge, the arbitration panel enables the Grievant to focus on and remedy the underlying causes for aberrant behavior. Absent the demands of the job of a Police Officer, the Grievant is better positioned to secure her emotional and mental well-being.

AWARD

³ At the time of the disorderly conduct charge, the Grievant was taking the same medication she testified now provides 'balance.'

By decision of the Arbitration Panel, the grievance is hereby Denied.

Dated and made effective June 30, 2023, in the City of Cincinnati, Hamilton County,
Ohio, by the Arbitration Panel duly appointed by the American Arbitration Association.

Margaret Nancy Johnson

Margaret Nancy Johnson

David W. Stanton

David W. Stanton

Daniel G. Zeiser

Daniel G. Zeiser