



APPEARANCES:

FOR THE CITY OF CLEVELAND :

1. William M Menzalora, Esq.....Chief Assistant Director of Law
2. Monroe Goins,.....Lieutenant, Internal Affairs Unit
3. James Chura,.....Commander, Bur. of Special Investigations
4. Tom Ciula,.....Video Forensics Operator
5. Martin Flask,.....Public Safety Dir. (fim) Mayor's Exe. Asst.

FOR THE FRATERNAL ORDER OF POLICE LODGE 8:

1. Robert M. Phillips, Esq..... Attorney, FOP Lodge 8
2. Brian Betley,.....Capt./President, FOP Lodge 8
3. Jerry Zarlenga,..... Sgt.Nice President, FOP Lodge 8
4. Randolph Daley,.....Sgt./Grievant
5. Patricia Coleman,.....Sgt./Grievant
6. Brian Chetnik,.....Sgt./Grievant
7. Matthew Putnam,.....Sgt./Grievant

ISSUE:

Was the City of Cleveland possessed just cause to suspend without pay Sergeants Chetnik, Coleman, Daley and Putnam for ten (10) days, thirty (30) days, fifteen (15) days and ten (10) days, respectively?

If not, what shall the remedy be for each grievance?

## BACKGROUND INFORMATION:

This matter came on for hearing on March 19, 2014 in a conference room at the law offices of Faulkner, Hoffman & Phillips, LLC, at 20445 Emerald Parkway Drive, Cleveland, OH and continued on March 20, 2014 Drive, at the Union's office at 2249 Payne Avenue, also located in the city of Cleveland.

Said City, (hereafter the "Employer", "Management" or "City"), has a mature bargaining relationship with Lodge 8 of the Fraternal Order of Police, (hereafter the "Union" or "FOP" or "Lodge 8").

The parties' collective bargaining history is made manifest by the first joint exhibit of record (JX-1), their current labor contract, hereafter the "CBA" or "Contract".

In Article XX, Section 4, said CBA notes in part that:

"In the event that a grievance goes to arbitration ,the arbitrator shall have jurisdiction only over disputes arising out of grievances as to the interpretation and/or application and/or compliance with the provisions of this Contract, including all disciplinary actions and in reaching his decision, the arbitrator shall have no authority (1) to add or subtract from or modify in any way the provisions of this Contract; (2) to pass upon issues governed by law; or (3) to make an award in conflict with law. ..."

In addition, the parties' CBA defines the scope of this bargaining unit as "supervisory police officers" in the classifications of Sergeant; Lieutenant ; Captain; Traffic Commissioner and Commanders (excluding Commanders in the Bureau of Human Resources or serving as an Executive Assistant to the Police Chief, as confidential management employees). (*See* JX-1).

Further, the promoted ranks, except for Commanders, shall have access to the CBA's grievance/arbitration procedure set forth in Article XX of said labor contract. That process is further agreed to be a limitation upon the City's broad management rights set forth in Article II in that Article II, Section 2, Subsection

(e) expressly states the City must "Suspend, discipline, demote or discharge for just cause...members."

The parties mutually agreed to present the four delineated Sergeants' suspension grievances before the undersigned pursuant to the labor -management grievance rules of the American Arbitration Association. Hearing was held on March 19 and 20 of 2014 at the situs' set forth, *supra*. Over the two hearing days a four hundred ninety-nine (499) page record was taken stenographically by Fincun-Mancini Court Reporters and a transcribed copy was provided to the undersigned.

The parties adduced sixteen (16) joint exhibits while the City and FOP8 presented twenty-seven (27) and twelve (12) party exhibits, respectively. Both parties stipulated that the grievances were timely filed and properly the subject of this proceeding. The four grievants attended throughout and were represented by labor counsel Robert M. Phillips, Esq. and FOP8 officers as indicated, *supra*.

The subject disciplinary suspensions arose out of two (2) investigations of a protracted police vehicle pursuit on the night November 29, 2012. This chase wended its way through four (4) of the City of Cleveland's five (5) Police Districts. The subject of this pursuit was a suspect civilian-driven 1979 blue Chevrolet Malibu, in which the male driver and front seat female passenger became deceased by virtue of patrol officer gunfire into the suspect vehicle. It had entered a middle school parking that had only one means of paved access. The terminus of this pursuit occurred when the suspect vehicle operator drove back towards the one (1) parking lot driveway without an indication of stopping or otherwise surrendering to the large contingent of Cleveland, City of East Cleveland, Ohio State Highway Patrol and either CPD's Community Services Unit or Cleveland State University (which is what "CSU" means to the undersigned) police which participated in the pursuit. The suspect vehicle struck a stopped police vehicle and was proceeding towards several (by then) on-foot patrol officers who engaged the suspect vehicle's passengers by discharging their service weapons thus bringing the 1979 Chevrolet Malibu to a halt.

Law enforcement operations in Cleveland resides in its executive branch's

Department of Public Safety. Said department is comprised of five (5) divisions one of which is the Division of Police or "CPD". There are five (5) Districts in the CPD. Districts are led by a Commander who oversees subordinate officers (captains, lieutenants, sergeants and patrol officers) and reports to a Deputy Chief.

Work assignments fall into one of three (3) platoons ("shifts"). These vary in daily duration with an "A"-platoon covering eight (8) hours and "B" and "C" platoons being ten (10) hour assignments. These later platoons typically overlap and "Support units" are scheduled on an eight (8) hour basis according to the requisites of a particular District. The chain of command extends upward from Commanders to a Deputy Chief for field operations and downward from Captains (typically two to each District) to Lieutenants to Sergeants to Patrol Officers. In a District the two (2) Captains divide their supervisory authority between patrol car operations and what are termed "support units", be they the vice squad, detective bureau, community services, or the unit serving the Cleveland State University ("CSU") campus area.

There are City-wide support units such as the "SWAT" Team, Narcotics Bureau or the Mobile Services Unit ("MSU") responsible for the on-board computer terminals in the patrol or ranking officer's vehicles.

Dispatch and radio functions are handled by another bureau, "CCS", which is the Communication Control Section. Dispatchers serve in one of two capacities: service call-takers or dispatchers who determine the necessary response to a service call by a District's personnel. Each District has a Dispatcher who does not take calls for assistance but instead prioritizes situations and assigns field personnel while utilizing up to six (6) computer monitors at once. One screen will track a police vehicle's location if that vehicle is equipped with an automatic vehicle locator ("AVL") terminal.

Continuing through the chain, supervision is provided to each platoon/shift by an assigned lieutenant. Nominally referred to as "platoon commanders", said lieutenants are "commanders" in name, not rank.

Sergeants report to lieutenants, one of which is the "OIC" (Officer-In-Charge) of each District's building during each platoon or shift. The City's

complement of patrol officers numbers about thirteen hundred (1300) sworn officers.

Districts have their own dedicated radio channel which must be monitored by officers in the field. In addition, officers might also have access to other district communications through portable or car mounted radio equipment or, by virtue of simultaneous listening to secure person-to-person broadcasts with "TAC" radios, named for their intended tactical use without going through a dispatcher.

The November 29, 2012 pursuit technically comprised three (3) non contiguous chases of the suspect vehicle. The logistical details of the pursuit efforts have been extensively examined by the investigative bodies of record and need not be set forth herein in minute detail. Approximately twenty-two (22) miles was covered by the suspect vehicle and fifty-eight (58) Cleveland police vehicles, fifty (50) of which had an AVL system fitted. The chase took around twenty-five (25) minutes through residential and non-residential areas at an average speed of sixty (60 m.p.h.) miles per hour.

The grievants herein received disciplinary suspensions as the result of the following specifications issued by the Employer and summarized as follows:

OFFICER'S NAME	RANK	DISTRICT	ASSIGNMENT
Patricia Coleman (9987)	Sgt.	Second	OIC-Vice Unit

Specification #1: On Nov. 29, 2012 assigned to car 2S80, violated the pursuit policy by failing to request permission to join pursuit from a Sector Supervisor.

Specification #2: On 11/29/12 assigned to car 2880 violated pursuit policy by being lead car in an unmarked unit with a marked unit being available.

Specification #3: On 11/29/12 assigned to car 2S80, you made errors and allowed errors to be made in the daily duty reports prepared by you and officers under you.

OFFICER'S NAME	RAN	DISTRICT	ASSIGNMENT
Coleman (cont.)	K Sgt.	Second	OIC-Vice Unit

Specification #4: On Nov. 29, 2012 assigned to car 2880, you did not access or monitor the AVL system or follow the GPO for support section supervisors.

Specification #5: On Nov. 29, 2012 assigned to car 2880, you became too involved in pursuit and sacrificed ability to effectively supervise your subordinates. Thus, info about the size & scope of pursuing officers' response was not relayed appropriately to supervisors who should have managed the pursuit response.

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<u>OFFICER'S NAME</u>	RANK	DISTRICT	ASSIGNMENT
Brian Chetnik	Sgt.	Second	Sector I Supervisor

Specification #1: On Nov. 29, 2012 assigned to car 2823 you failed to acknowledge a pursuit involving your subordinates.

Specification #2: On Nov. 29, 2012 assigned to car 2823, failed to respond and supervise subordinates under your command.

Specification #3: On Nov. 29, 2012 assigned to car 2823, you failed to check or monitor AVL system during a lengthy pursuit to learn the engagement of personnel under your direct supervision.

Specification #4: On Nov. 29, 2012 assigned to car 2823, failed to exhibit any level of supervision, guidance or support for officers under your direct supervision.

<u>OFFICER'S NAME</u>	RANK	DISTRICT	ASSIGNMENT
Matthew Putnam	Sgt.	Third	OIC-Vice Unit

Specification #1: On Nov. 29, 2012 you failed to monitor the AVL system during your tour of duty.

Specification #2: (Dismissed by Mr. Flask) On Nov. 29, 2012 you left a City patrol rifle unsecured in a police vehicle with open windows.

Specification #3: On Nov. 29, 2012 you failed to notify the Communications Control Center that you were responding to a vehicle pursuit or leaving the City with a patrol rifle.

Specification #4: (Dismissed by Mr. Flask) On Nov. 29, 2012 you did not deploy (make ready for action or charge) the patrol rifle, which you reported was your sole purpose for responding to a pursuit and outside Cleveland.

Specification #5: On Nov. 29, 2012 you allowed personnel under your supervision to engage in or parallel a vehicle pursuit after it had been terminated by a Sector Supervisor and a Support Supervisor.

<u>OFFICER'S NAME</u>	RANK	DISTRICT	ASSIGNMENT
Randolph Daley	Sergeant	Second	Community Service Unit Supvr.

Specification #1: On Nov. 29, 2012 your duty report had inaccuracies. The AVL system showed your vehicle being parked between 1950 & 2240 hours contrary to your duty report's showing a response to other locations in the Second District.

Specification #2: On Nov. 29, 2012 observed out of uniform at Second HQ. Upon learning that one of your officers initiated a pursuit you retrieved your uniform & equipment from your locker delaying your response to the incident and leaving personnel unsupervised.

Randolph Daley: (cont.)

Specification #3: On Nov. 29, 2012 you were in control of a pursuit involving suspect believed to have shot at and continued to present a threat to police. You reported that you believed that there were only three police vehicles involved in the pursuit, but did not validate nor did you make an inquiry to support your assumption, thereby failing to effectively evaluate the pursuit.

Specification #4: On Nov. 29, 2012 you failed to check or monitor the AVL system during your tour of duty.

Specification #5: On Nov. 29, 2012 you did not advise CCS to notify police not on scene to disregard, nor return units to service pending assignments.

The charge letters issued to the grievants led to the following suspensions without pay:

Sgt. Coleman: thirty (30) days;

Sgt. Chetnik: ten (10) days;

Sgt. Putnam: ten (10) days;

Sgt. Daley: fifteen (15) days

The timely filed grievances for each of the four Sergeants pray that the respective suspensions be rescinded, each grievant be made whole and that all records of this discipline be removed from divisional files.

### DISCUSSION AND ANALYSIS:

The loss of human life with a nexus to the use of deadly force and other police measures involved in this incident is readily seen as a tragedy in the minds of people of good will who espouse public safety and justice in a plenary sense.

A highly detailed forensic and legal examination as well as a great deal of public scrutiny and media attention of this incident has been brought to bear on

the grievants herein through other labor-management grievance arbitrations, civil and criminal legal proceedings and community efforts to engage in dialog and training to help avert similar occurrences.

However, since these four (4) suspension grievances do not involve the use of deadly force and related issues there shall be no further in depth recitation on either the conduct of officers who discharged their weapons, CPD policy formulation, medical forensics or tactical operations.

This is because the City has centered its main position on having just cause to suspend the grievants upon a much narrower consideration. The Employer terms the Union's claim that these grievants were denied due process "AN ELABORATE EXERCISE IN MISDIRECTION." (*See*, ER Br. Pg. 71). In detailing what it terms the Union's allegation of a lack of due process as a "...variation of a larger, unfounded umbrella argument -..." Management notes that the only due process it owes employees under this CBA are notice and an opportunity to be heard-things which it had provided these grievants.

More pointedly, the City distills its argument on behalf of the specifications leveled against each grievant herein as NOT being predicated upon any of these four grievants' failure to bring the suspect Chevy Malibu and its occupants to a halt before the fateful ending in East Cleveland. The Employer feels that the lack of "stop sticks" or non-use of the CPD's helicopter is thus rendered irrelevant for purposes of determining the instant grievances.

Instead the City bases its disciplinary determinations under review herein upon grievants "...never even *attempted* to use the above-referenced communication and tracking resources to evaluate and control the Pursuit.(sic) The communication resources were available to the grievants, but they just did not use them." (*See* ER Br. Pg. 77)

Further bolstering this position, the Employer states it is also the reason why the Union's argument that the grievants were not provided adequate training on pursuit techniques must fail is also due to their lack of communications with subordinates and not using the Automatic Vehicle Locator ("AVL") devices. The Employer terms this "a fundamental lack of knowledge..."

Thus the scope of my review of the record has been narrowed to the just cause determination. I have made an extensive review and evaluation of the audio/visual evidence and the aforementioned two investigative reports by the Ohio Bureau of Criminal Investigation ("BAI"), the internally created (by action of Chief of Police Michael McGrath) critical incident review committee ("CIR") on the overall events of November 29, 2012, the transcript of the hearing, my notes and the parties' briefs.

Before this analysis proceeds to determine the merit of these grievances it is necessary to state which standard of evidentiary proof is applicable. In a general sense the law has three components: Civil law, Equity and Criminal law. Each component has developed a standard of proof which is often described as being *apreponderance of the evidence* for civil law, *clear and convincing evidence* for proceedings in equity and *beyond a reasonable doubt* for criminal matters.

Of these, the equitable standard of a *clear and convincing* degree of the evidence is adhered to by a large majority of arbitrators of labor-management grievances in disciplinary matters as opposed to contract interpretation grievances. The undersigned follows this practice because an employer has control of the workplace, equipment and access to other employees in or out of a grievant's bargaining unit. This strategic advantage allows management to act first and puts union representatives in the position of needing to react to investigations, disciplinary charges or, in some instances, notoriety stemming from media publicity or prosecutorial action. Requiring that a stricter degree of proof be required beyond the basic civil law standard's "more probable than not" guideline levels the playing field and helps insure that workplace due process occurs. Management is also required to not only meet this higher degree of proof but also bears the burden of going forward with the evidence. This again is an offset to the employer's control of its premises and personnel and inherent ability to act first. This flows from the legal maxim of "He who alleges must prove."

Once the City has advanced its reasons that it had just cause to discipline based upon the specifications, each grievant may respond to show that the specifications were not established by clear and convincing proof. Toward that

end, FOP8 has countered Cleveland's "Elaborate Misdirection" argument by initially showing that all four (4) grievants had clear disciplinary records for the two (2) year period prior to November 29, 2012 (TR 121) as well as long and commended careers with the CPD.

I realize that rank, tenure and awards cannot obviate the occurrence of misfeasance, malfeasance or nonfeasance of such an egregious nature that severe discipline, including removal from office cannot be justified . However I do not find any of the specifications, standing alone and as to each grievant, sufficient to be a predicate for the level of suspensions imposed.

Therefore, this analysis shall proceed with an examination of the aggregate specifications meted out to each individual as warranting the respective level of imposed suspension. This necessitates weighing the defenses to the proscribed conduct an individual basis.

Regarding **Set. Patricia Coleman**, her decision to engage the suspect vehicle and her ensuing participation in the chase was what the City claims was "passive" more like being "non-existent", instead of "active".

I disagree and am not compelled to support the City's determination to suspend Sergeant Coleman for thirty (30) days. Her tour's vice squad responsibilities had been accomplished on that evening. Returning from her Second District field operations she heard radio reports of a chase on Channel 2- her home district's channel and happened upon the pursued suspect vehicle going in the other direction in the near west side of Cleveland, (actually the suspects were eastbound on Clark Ave.) which put them heading straight in the path of Miranda and Coleman.

She had her driver, Det. Miranda, execute a "U-tum" and joined in the pursuit. This happened after Sgt. Coleman had heard on Channel 2 that a shot had been fired (near the Justice Center) and that the suspect vehicle was picked up again having gone over the Detroit bridge away from downtown.

Her assessment and following actions were far from "passive" in my view. This officer ran to the trouble; not away from it. She and Det. Miranda became

the third car in the pursuit early on. Criticized for pursuing in an "unmarked" police car, her explanation to me about the black four door vehicle her driver operated convinced me that it did not pose the type of hazard to the public proscribed in by CPD policy on pursuits. The record also reflects that Det. Miranda did drive "lights and siren" (lights behind the grill and a blue portable light affixed to the roof; siren under the hood) as per the policy. I suppose in a "perfect world" white doors with a shield logo and a full size roof-mounted lightbeam, etc. would be more visible and thus preferred in a pursuit. However, the policy does not strictly forbid using the type of unmarked black sedan Sgt. Coleman was in. The policy is more concerned with prohibiting use of a civilian "undercover" type of vehicle which the public might easily mistake for a fleeing vehicle in a chase scenario. True, Coleman and Miranda were in plainclothes but due to the nature of the incident with speeds said to have averaged 60 mph, I doubt other motorists or bystanders had much of an opportunity to become visually confused by the third car's lack of "black and white" patrol car markings let alone its occupants' lack of police uniforms.

Sgt. Coleman knew personnel she was supervising were in the pursuit. She wanted to lend her supervisory presence to the pursuit and did so with her decision to thus engage. She also made it known to her Dispatch that they should advise the Third District when the pursuit was lose to entering that District.

Sgt. Coleman was truly thrust in the breach of this intense chase. She had little more information than P.O. Nan's 'popped a round off' (shot fired) info and a general concept of who was in the pursuit, its direction, its being in her Second District's Sector(s) and believed that Sgt. Daley was supervising based<sup>1</sup> on radio transmissions, yet the City determined that her performance, as well as the efforts of the other three (3) sergeants, fell short of expectations and execution. This Employer is also at fault as evidenced by what the BAI report termed a "systemic failure" of the CPD's "Command" function. I will not attempt to gauge the degree or percentage of the Employer's share of the let-down in police performance it has lodged against all four (4) grievants. But it is inescapably there; despite the argument that the systemically flawed "Command"

the BAI spoke about, notably resides in the patrol officer and sergeant ranks. I find the Union's definition of the escalating authority possessed by the respective ranks convincing. I believe this was inherent in the BAI's findings and do not choose to lay "fault" at the feet of Sgt. Coleman<sup>1</sup> or any of the other sergeants reviewed herein for either their judgment or conduct connected with this approximately twenty-five minute vehicle pursuit and apprehension.

The suspect Chevy Malibu spun out on the I-90 off-ramp onto E. 72<sup>nd</sup> Street. Mr. Russell regained control of the Chevy Malibu but in the process Sgt. Coleman's car became the lead, closest to the suspect vehicle. She did not order Miranda to drive to the immediate point of pursuit, the suspect vehicle. It happened for a while then her car fell back in favor of marked CPD vehicles.

As the sixth or seventh car at the terminus of the chase, Sgt. Coleman heard gunshots and broadcast "shots fired". (R380-81) When a lot more shots resulted she made a radio transmission warning other officers about crossfire potential. (TR 382).

Sgt. Coleman remained on the scene to help and was debriefed by superiors until obtaining a ride to Second District around 6:00 a.m. since her (and Miranda's) car became part of the crime scene's investigation and had to remain in East Cleveland..

The City emphasizes that only one direct communication took place between Sgt. Daley and Sgt. Coleman and also that Coleman assumed Daley had taken over managing the pursuit without verifying it with Daley on the radio.

However, my takeaway from this record is that Coleman's presence in the chase from her Clark Avenue sighting of the Chevy Malibu to her arrival at Heritage Middle School was known to Sgt. Daley and other officers involved.

The "errors" she is alleged to have made or caused to be made in her daily duty reports are not sufficiently established in this record and by their very nature

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<sup>1</sup> Special Assistant Flask remarked that Sgt. Coleman was the reason this hearing had to take place. (See TR-390)

could have been subsequently promptly corrected. I find this specification to be *de minimi* given the exigent circumstances and chaotic incident and its aftermath. I find it was gratuitously added to the mix of specifications and represents no probative evidence of dereliction of duty.

With regard to the failure to use the AVL system specification I cannot discern that this grievant had an intent to mute or avoid using this locating device. The entire chase involving her unmarked vice unit car consumed about twenty (20) minutes duration with her car at one point being thrust in the pursuit's lead for three (3) minutes and nine (9) seconds. This data was sought by the undersigned from Commander James Chura who had researched my question from a review of the radio logs. (See TR 497)

At another point in the chase the suspect vehicle struck a marked police car and there were radio communications about the passenger in the Chevy Malibu turning and facing rearward while pointing with an undetermined object in hand. Given the strong circumstantial info that there might be a hand weapon *in* the Chevy Malibu I cannot fault Sgt. Coleman for not monitoring the AVL system (per specification #3) or becoming "so involved in the pursuit" that she "sacrificed the ability to effectively supervise (her) subordinates". This record has a dearth of proof as to how Sgt. Coleman, having exercised her judgment to engage in the chase, winding up at or near the head of the pursuit line, somehow failed her subordinate officers.

I suppose that had the grievant performed "by the book" as her evaluators subsequently opined, info about the size and scope of the pursuit effort *might* have been communicated to the supervisors the reviewers preferred to have managed the pursuit. This is wishful thinking and no doubt part of the Monday morning quarter-backing the Union posits in its brief. (See UN Br. 23) I conclude that neither this specification (#5) nor the others are supported by clear and convincing evidence. Neither is the allegation of Sgt. Coleman being a "passive" leader. Passivity does not connote her performance made that November night in 2012 pursuant to her sworn duties.

Absent meeting it's burden of proof the Employer has not demonstrated that it possessed just cause to suspend Sgt. Coleman for thirty (30) days without

pay.

With regard to the charges against **Sgt. Brian Chetnik**, they basically mirror the charges against Sgt. Coleman as to not using the AVL system or failure to actively supervise or position himself to supervise his subordinate officers.

Similar to Coleman, Sgt. Chetnik did not have a correct understanding of the number of cars in the pursuit (58). He did not know that none of his subordinate officers were in the chase. But he also is taken to task for not knowing where three (3) of his other subordinate officers were during the pursuit .

While acknowledging that Sgt. Chetnik "stepped forward" to take the leadership role at the Second District according to Mr. Flas his decision to stay at the Second HQ cannot explain away what the Employer terms his abject failure to know where his officers are and what they are involved with.

Further claiming that Chetnik could also not absolve his non-action by asserting that Sgt. Daley had assumed control of the pursuit operation, it did not relieve Chetnik of the need to actively supervise either the initial or continued actions of his officers or check thru the AVL system as to their whereabouts .

Finally, in the last hour of his tour that night he did nothing-then went home at midnight.

I note with interest that Sgt. Chetnik did what others have been disciplined for: he took no part in the chase and remained at the Second District's HQ. I find proof on the record that there has been a history of Support Supervisors being in pursuits . However, while that might be applicable to argue for in Sgt. Daley's behalf I do not see how Sgt Chetnik violated that protocol. Chetnik was neither a Sector or Support Supervisor.

In exercising his judgment to remain at the District he was commended by

Mr. Flask ostensibly for not abdicating police supervision of needs in the community besides what the demands of the pursuit of the Chevy Malibu posed to the police function during and after the incident halted. Sgt. Chetnik had reason to understand that a Captain (Rick Zouhar), another Sergeant (Coleman) besides Sgt. Daley and other supervisory officers were involved. I find credence in the FOP8 argument that the City has charged Sgt. Chetnik primarily because a number of his direct reports engaged in the pursuit and some of those Patrol Officers discharged their weapons at the scene in East Cleveland. However, those who joined the pursuit did not request permission to do so from either a Sector Supervisor or any other supervisor. This grievant did not learn the full scope of his officers who joined the pursuit until a day or two later.(TR 427-29)

I do not share the Union's view that Sgt. Chetnik was also disciplined due to his waiver of attending his pre-disciplinary hearing. The record provides nothing besides this suspicion so I am not compelled to make such a finding.

However, I have concluded that the accusations of Sgt. Chetnik doing naught or failing to supervise in reality, only sound as if he was totally indifferent to his responsibilities in the Second District or to his badge.

Once again, I need to emphasize that the pursuit consumed less than a half hour's duration under highly exigent circumstances where critical decisions needed to be reached in rapid fashion particularly by those officers at the apex of the pursuit. However, in light of the degree of criticism Chetnik's fellow grievants herein received for their supervisory choices, what Sgt. Chetnik decided to do makes sense to me. Apparently, it did as well with Mr. Flask, a very experienced police officer and former Chief of Police in Cleveland.

While I cannot grant "extra credit" to Sgt. Chetnik in this grievance's determination because he had only been a sergeant for about a half year at the time of the incident, I do not feel this appeal needs traction from such consideration. Once that approach is undertaken the degree of "credit" becomes onerous to calculate and yields no useful precedential guidance for advocates or neutrals alike.

Suffice it to say, Brian Chetnik held the rank of sergeant then and still

does. Therefore he must be evaluated in light of what is reasonably expected in the performance of that rank, not over his length of tenure in the rank.

As I see it, the City has not demonstrated by clear and convincing evidence that Sgt. Chetnik deserves to be suspended. I find no flagrant dereliction of duty or serious disregard for the citizens he serves or the subordinates he supervises. Certainly the City advances a laundry list of ways that this grievant should have acted. But I see the same critical *post mortems* used elsewhere. Chetnik cannot be indifferent to the welfare of his assigned officers solely because he remained at his District office AND at the same time covered the District's needs and was there to oversee police field operations for the duration of his shift. Said duration was not long but neither did the grievant try to 'cop some overtime' by seeking to have his tour extended. I assumed he was being relieved at midnight and know from his testimony that he had a colleague phone him upon the latter's leaving from the pursuit's terminal scene to inform grievant on the status of his officers and the incident.

While the Employer is no doubt rankled by the number of responding units and patrolmen who "self-dispatched" themselves to the chase it cannot by shear will affix blame to the grievant for what Sgt. Chetnik's responding officers undertook on their own. Had this transpired earlier in the platoon's tour for that night and the grievant went on for, say, two (2) or three (3) hours without knowing the whereabouts of his charges or the strength of their self-deployment I'd have a different view.

As for the Union's claim that this grievant's exercising of his right to waive appearing at his pre-deprivation hearing was a factor in the City's decision to suspend him, I see no evidence that there was any personal bias or other type of *animus* toward Sgt. Chetnik for the indicated reason.

However, the job-related performance of Sgt. Chetnik has not been demonstrated to be neglectful or indifferent on November 29, 2012 by again, clear and convincing evidence. Thus, the City did not have just cause to discipline him by suspension without pay in my view.

**Sgt. Randolnh Daley** stands suspended for usurping overall managerial

responsibility for the pursuit. Of his five (5) specifications the Employer views numbers 3 and 4 the most serious. (See ER Br. Pg. 61) In essence Sgt. Daley's performance was deficient because he assumed there were only three (3) police cars pursuing but did not inquire to validate his assumption. Also, because he did not "check or monitor" the AVL system.

Of the two shortcomings alleged, the later one, non-use of the AVL system, is regarded as being mandatory while controlling a police pursuit from either the field or district headquarters is said to be discretionary. The specific criticism against this grievant is that he chose to not do a mandatory task (use AVL) and put greater emphasis upon doing a discretionary service from either the field or office.

My initial point of review on Sgt. Daley's performance is whether or not he usurped oversight or if it was permissible. For one thing, he did take action; he was not intransigent in that regard. Since the CPD deemed the pursuit *per se*, was justified, it was not a case of Daley taking control of an improper police operation.

For this grievant to have assumed control of the pursuit's monitoring I agree with the Union's premise that it was permitted at its inception due to his supervision of the P.O. (Vasile Nan) who radioed the initial info on the suspect vehicle, its speed and what was believed by not only Ofc. Nan but other police personnel to have been a gunshot. Similar to Sgt. Coleman, Sgt. Daley took action. I find nothing rash or impetuous in his conduct. Commander Chura stated why the CPD prefers to have Sector Supervisors control pursuit operations rather than Support Supervisors. It is because there will always be one of the former on each platoon while the latter position may not always be deployed. This is not a strong indicia that support supervisors are forbidden to act in control of pursuit situations.

I find that there does exist such a "custom and practice" as FOPS puts it. More importantly, there is no express policy forbidding support supervisors from overseeing vehicular pursuits. Sgt. Daley took his cue from that experience and from his supervision of Officer Nan, the initiator of the chase. While in the Second HQ Sgt. Daley was not wearing his body armor and needed to go to his

locker to don it and then joined the chase using zone car #220. Thus underway, Sgt. Daley monitored the pursuit's progress at least well enough to know how to pick up the trail eastbound on Interstate 90. He stated he went "lights & siren" as well in his marked zone car. En route to East Cleveland, he heard radio reports of shots fired. His reaction was to radio Dispatch and advise that EMS be sent to the scene.

Once there, he did check on his subordinates and in the company of then Deputy Chief (now, Chief of Police) Calvin Williams, went to work on delineating the crime scene. The Deputy Chief asked Sgt. Daley to not release any officers back into service until the respective levels of involvement could be determined. When the City's deadly force unit arrived around 0300 hrs., he returned to his duty station.

The Employer predicates its fifteen day suspension for this grievant upon as follows:

1. Since Sgt. Daley, having voluntarily assumed management of a police pursuit originating in Sector I of the Second Dist. he became responsible for determining the involvement of what turned out to be 105 patrol officers. This was in spite of various sector leaders not issuing directions to stand down to their subordinates. The City imposed a 50% greater suspension on Sgt. Daley than on Sgt. Chetnik for example, because the scope of the personnel Daley came forward to lead was greater.

I am not in accord with the Employer's thinking on this issue. I do not conclude that assuming a greater responsibility warrants a greater penalty absent a showing of misfeasance or malfeasance meeting the clear and convincing yardstick. The "out of uniform" specification is over-reaching to say the least. In addition the way this grievant chose to operate his communications equipment is not shockingly deficient or blase'.

If, regarding specification #5, the grievant was not told by then Deputy Chief Williams to keep the personnel and units on the scene, I would have appreciated hearing that from Chief Williams.

I find there was no just cause basis for suspending this grievant, Sgt.

Daley.

**Sgt. Matthew Putnam** serves in CPD's Special Services' narcotics gang unit. On the date in question he was on duty until 0600 on the following calendar day (Nov. 30, 2012). Early in his tour on November 29th his team made a drug buy and while doing the paperwork for that bust he heard parts of radio reports on his channel 3 (Third Dist.) about shots being fired and directed a colleague to monitor channel 2 (Second Dist.) in addition.

His first meaningful bearing was that a chase was occurring near Steelyard Commons (again, the Second Dist.) And about to head east on I-90 into his District. This grievant decided to get a "long gun", an AR-15 rifle for tactical purposes. Sgt. Putnam surmised that if he could set up at a vantage point to the fleeing vehicle's route on I-90 he could be useful with the rifle's reach in the event that one or both suspect left the Chevy Malibu being pursued and continued to flee on foot. He had no intention to join the pursuit armed with his rifle. He thought the situation through and directed his driver, Det. Ereg, to take him to "the area", around E. 72<sup>nd</sup> and determined by the AVL. (*See* TR 450-454)

The grievant didn't get to deploy in a spot where he and his AR-15 might have been a means to end a foot escape because his car, an unmarked black Ford Crown Victoria with lights and siren similar to the unit Sgt. Coleman rode in, became sidetracked in the CWRU campus area and there wasn't a known route to a set up point before the suspect vehicle made it to Euclid Ave. and could only be followed to the East Cleveland, OH school parking lot where the chase was ended.

Once close to the scene, the grievant saw gunfire and exited his vehicle seeking a safe vantage point. He states he called out for those on the scene to be wary of their crossfire and radioed EMS to come to the scene. In just seconds the chaotic incident was over. He checked for injuries and generally tried to be of assistance. When he left his vehicle Sgt. Putnam did not carry the rifle with him and the City claims it was left unsecured because the windows were open; part of the rationale for his ten (10) day suspension.

The specifications against this officer are superficially plausible but lacking in merit. Besides the what seems to be ubiquitous failure to use the AVL system, the matters pertaining to not saying he was leaving the City with the rifle and left said AR-15 in his mobile unit with the windows down are in my opinion, *de minimi* and not worthy of deep evaluation. Given the degree of tumult at the scene and Sgt. Putnam's take on the chase's portend<sup>2</sup>, I am not persuaded that Sgt. Putnam intentionally allowed other personnel to continue in pursuit after the Third Dist. had called them off.

There is a dearth of proof that this grievant failed his responsibilities under highly stressful conditions. He behaved in a clear-head fashion in my view and thought through the potential of suspects bailing and an ensuing foot escape effort. Although his "placement" effort did not materialize, he tried. He made an effort to be useful and did not squander City resources or put either citizens or feUow officers in harm's way. Therefore, I grant his grievance and revoke his ten (10) day suspension.

The Union has advanced compelling arbitral authority in support of its position that just cause to discipline these grievants is not found on this record. Notably, the *Cincinnati State*, 135 LA 1205, (Heekin 2012) award rings true particularly on the issue of meager pursuit driving training.

Insufficient training on inter-district pursuits when melded with the lack of direct car to car communication, leaves even the most street-experienced officers open to criticism for how they might drive, communicate or lead others.

In granting these four (4) grievances in their entirety I am mindful of the CBA's pledge to only discipline for just cause. That concept needs to be met by a record which shows that penalties are warranted by clear and convincing proof.

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<sup>2</sup> On direct Sgt. Putnam reflected on his feelings as follows: "...that evening I thought officers were shot at . I had a very, very bad feeling it was going to end bad because they {suspects} weren't stopping. There were multiple radio transmissions that they were pointing a gun. They rammed a {CPD} car. It was a bad situation." (TR 467)

This has not been done in my studied opinion. I cannot escape a fairly pervasive feeling that these disciplinary decisions were designed to play to a different audience rather than to correct and rehabilitate in the labor-management sense.

There is no discussion needed on whether progressive discipline was followed because the threshold question of whether just cause was established by a clear and convincing degree of the evidence, when answered, obviates the need to go further.

AWARD:

First, I incorporate by reference the Interim Award issued on March 31, 2015 pertaining to all four (4) grievances but specifically made necessary by a request to open the record and append additional documentary evidence after the briefing schedule had expired and just several days before the former issue deadline for these awards.

Based upon the foregoing, the parties' CBA and the record as a whole, the thirty (30) day suspension of Sgt. Patricia Coleman is revoked in full, the ten (10) day suspension of Sgt. Brian Chetnik is revoked in full, the fifteen (15) day suspension of Sgt. Randolph Daley is revoked in full and the ten (10) day suspension of Sgt. Matthew Putnam is revoked in full.

Further, all departmental records of these respective suspensions shall be permanently removed from CPD's divisional files and archives.

I shall retain jurisdiction over this case for thirty (30) days from the below issue date in order to assist the parties with the implementation of the terms of this award.

Respectfully submitted this 24<sup>th</sup> Day of May, 2015  
at Strongsville, OH

21/11 r !fkm

Dennis E. Minni, NAA  
Arbitrator-Mediator