

ARBITRATION DECISION

AMERICAN ARBITRATION ASSOCIATION

October 30, 2014

In the Matter of:

City of Cleveland)	Case No. 53 390 00289 13
)	Mark Bickerstaff, Jason Edens,
and)	Matthew Gallagher, Brian Lockwood,
)	Richard Martinez, Grievants
Fraternal Order of Police, Lodge No. 8)	

APPEARANCES

For the City:

William Menzalora, Chief Assistant Director of Law
Michael McGrath, Director of Public Safety
Martin Flask, Executive Assistant to the Mayor
Lieutenant Monroe Goins, Internal Affairs Unit
Tom Ciula, Video Forensics Operator
Commander James M. Chura, Bureau of Special Investigations
Commander Thomas Stacho, Bureau of Communications & Property Control
Commander Patrick Stevens, Third District
Deputy Chief Dornat Drummond, Division of Police

For the Union:

Robert M. Phillips, Attorney/Advocate
Captain Brian W. Betley, President, FOP Lodge No. 8
Sergeant Jerry Zarlenga, Vice President, FOP Lodge No. 8
Lieutenant Jason Edens, Grievant
Sergeant Brian Lockwood, Grievant
Sergeant Matthew Gallagher, Grievant
Sergeant Mark Bickerstaff, Grievant
Sergeant Richard Martinez, Grievant
Captain Thomas Tube, Second District, Support Captain

Arbitrator:

Nels E. Nelson

BACKGROUND

The instant case involves the City of Cleveland and Fraternal Order of Police, Lodge No. 8. The city consists of approximately 78 square miles and had a population of 396,815 in 2010. The union represents the Sergeants, Lieutenants, Captains, and Commanders who work in the Division of Police.

The city is divided into five police districts. Each district is led by a Commander and has two Captains -- one is in charge of the district's basic patrol unit and the other is responsible for the district's support units, including the vice, detective, and community service units. The Patrolmen in each district are assigned to the A, B, or C Platoon with each platoon under the command of a Lieutenant. The Patrolmen in each platoon are assigned to either basic patrol or a support unit. They are supervised by either a Sector Supervisor or a Support Supervisor, both of whom are Sergeants.

The department has a Bureau of Communications and Property Control, which includes the Communications Control Section (CCS), commonly referred to as "police radio dispatch." It consists of call-takers and dispatchers. The call-takers receive calls for emergency service and create an event in the computer-aided dispatch system. The call-takers then forward the event to a dispatcher who assigns one of five priorities to the call and dispatches a patrol car. The dispatchers monitor six computer screens, including one which shows the location of each police car equipped with an Automatic Vehicle Locator (AVL). They work in close proximity so that they can exchange information when necessary.

The department has nine radio channels. Each district has its own radio channel, which Police Officers in the district are required to monitor. The department also has tactical channels for secure, person-to-person communication. During a pursuit, Police Officers sometimes need to

monitor another district's radio channel or a tactical channel in addition to their own district's channel.

The events giving rise to the instant case began at 10:26 p.m. on November 29, 2012. At that time, Patrolman John Jordan stopped a car registered to Timothy Russell on East 18th Street between Rockwell and Superior Avenues. When Jordan approached the car, it fled west on Superior Avenue. He pursued the car but when he lost sight of the vehicle, he broke off the chase. Jordan did not broadcast his traffic stop or his pursuit.

A few minutes later, the car driven by Russell drove past the Mobile Services Unit, which is located in the Third District on St. Clair Avenue across the street from the Justice Center. Patrolman Vasile Nan, who was assigned to the Second District Community Services Unit, was at the Mobile Services Unit to have the computer in his car serviced. When he heard what he thought was a gunshot, he took cover behind his vehicle. Once the suspect vehicle passed, Patrolman Nan gave chase and broadcast that a vehicle with two occupants had "just popped a round" and was heading westbound on St. Clair Avenue. Sergeant Randolph Daley, the Second District Community Services Unit supervisor, who was Nan's immediate supervisor, began monitoring the pursuit. Shortly thereafter, Patrolmen Nan broadcast that he had lost sight of the suspect car.

At 10:35 p.m., Second District Patrolmen David Siefer and James Hummel encountered the suspect vehicle heading westbound on the Detroit-Superior Bridge. They pursued the vehicle and the pursuit was joined by other police vehicles. It continued for approximately 22 minutes, passed through four of the city's five police districts, and involved 105 Cleveland police officers and at least 62 police cars, including ones from Cleveland, Bratenahl, East Cleveland, the Cuyahoga County Sheriff's Department, the Ohio Highway Patrol, and the Regional Transit

Authority. The pursuit ended at Heritage Elementary School in East Cleveland where 13 police officers fired 137 shots at what turned out to be two unarmed individuals, killing both of them.

There were two investigations of the events of November 29, 2012. First, the Bureau of Criminal Investigation (BCI), which is part of the Ohio Attorney General's Office, was responsible for the criminal investigation. It did an extensive review of evidence and records and conducted numerous interviews. On February 5, 2013, BCI forwarded its report to Timothy J. McGinty, the Cuyahoga County Prosecutor. On the same day, Michael DeWine, the Ohio Attorney General, offered a prepared statement regarding the investigation and suggested that the events reflected a "systemic failure."

Second, Michael McGrath, the Chief of Police, appointed a Critical Incident Review Committee (CIRC). The purpose of the committee was to determine the facts on the night in question and to identify possible policy and procedural violations for the purpose of the administrative disciplinary process.¹ The committee was chaired by Commander James Chura, who was in charge of the Bureau of Special Investigations. Other members of the committee were Cassandra Bledsoe, the Administrator of the Office of Professional Standards; Commander Dornat Drummond, the Commander of the Fifth District; Sergeant Monroe Goins, an Investigator in the Internal Affairs Unit; Blaine Griffin, the Director of Community Policing; Nancy Kelly, an Assistant Law Director in the city's Law Department; Sergeant Merrifield, from the Training Section; Sergeant Robert Simon, from the Integrity Control Section; Commander Patrick Stevens, the Commander of the Third District; and Lieutenant Ronald Timm, from the Homicide Unit and the Use of Deadly Force Investigation Team.

¹ Up to the time of the arbitration hearing, the CIRC had considered possible rule violations by Police Officers who did not use deadly force. The 13 shooters had not been administratively charged at the time of the hearing.

On February 21, 2013, Goins, as a member of the Internal Affairs Unit, issued Investigative Reports for Sergeants Mark Bickerstaff, Jason Edens, and Matthew Gallagher, all of whom were Third District Sector Supervisors, and Sergeants Brian Lockwood and Richard Martinez, who were Second District Sector Supervisors. In each case, he listed alleged violations of department rules and procedures. Goins recommended that the reports be sent up through the chain of command for review.

On April 24, 2013, the city made public a video presentation relating to the events of November 29, 2012, produced by the CIRC. It included a description of the organization of the department and the relevant General Police Orders. The presentation used video from surveillance cameras located on the streets to show the pursuit as it went through the city and then into Bratenahl and East Cleveland. It incorporated maps from the AVL system showing city police vehicles, which were color-coded to indicate their district and whether the car was assigned to a patrolman or a supervisor.

In May 2013, Martin Flask, the Director of the Department of Public Safety, notified Bickerstaff, Edens, Gallagher, Lockwood, and Martinez that he would be holding pre-disciplinary hearings for them between May 14, 2013, and May 21, 2013. On June 11, 2013, Flask suspended Bickerstaff, Lockwood, and Martinez for ten days and Edens and Gallagher for three days.

On June 13, 2013, Bickerstaff, Edens, Gallagher, Lockwood, and Martinez filed grievances. They charged that there was not just cause for discipline; that the discipline was excessive, unreasonable, and not supported by the evidence; and that it was inconsistent with progressive discipline. Bickerstaff, Edens, Gallagher, Lockwood, and Martinez asked the city to

rescind their suspensions and to make them whole. They also requested that all of the records relating to their discipline be removed from Division of Police files.

When the grievances were not resolved, they were appealed to arbitration. On October 2, 2013, the American Arbitration Association notified the Arbitrator of his appointment. The parties agreed to combine the five grievances for arbitration and a hearing was held on April 8 and 9, 2014. At the hearing, they agreed to incorporate in the record the transcript, exhibits, and post-hearing briefs from the case involving Sergeant Michael Donegan, Lieutenant Paul Wilson, and Captain Ulrich Zouhar, AAA Case No. 53 390 00288 13, which was decided by the Arbitrator on June 12, 2014.

ISSUES

The issues as framed by the Arbitrator are as follows:

- 1) Was there just cause to suspend Sergeant Mark Bickerstaff for ten days? If not, what is the proper remedy?
- 2) Was there just cause to suspend Sergeant Jason Edens for three days? If not, what is the proper remedy?
- 3) Was there just cause to suspend Sergeant Matthew Gallagher for three days? If not, what is the proper remedy?
- 4) Was there just cause to suspend Sergeant Brian Lockwood for ten days? If not, what is the proper remedy?
- 5) Was there just cause to suspend Sergeant Richard Martinez for ten days? If not, what is the proper remedy?

RELEVANT CONTRACT LANGUAGE

Article II
Management Rights

* * *

Section 2. Except as limited under this Agreement, the City's management rights include, but are not limited to, the right to:

* * *

(e) Suspend, discipline, demote or discharge for just cause, lay off, transfer, assign, schedule, promote, or retain members;

* * *

CITY POSITION

Just Cause for Discipline

The city argues that there was just cause for the discipline it imposed on Bickerstaff, Edens, Gallagher, Lockwood, and Martinez.

Sergeant Richard Martinez - The city argues that Martinez violated its policies and procedures. It claims that the violations are as follows:

Specification #1: On Thursday, November 29, 2012, while assigned to car 2S34, you ... did not check on or use the AVL during your tour of duty.

Specification #2: On Thursday, November 29, 2012, while assigned to car 2S34, you ... did not supervise personnel under your command. Sat in car reading a book.

Specification #3: On Thursday, November 29, 2012, while assigned to car 2S34, you ... did not monitor radio to check status of pending assignment while aftermath of pursuit and [Use of Deadly Force] was being managed.

Specification #4: On Thursday, November 29, 2012, while assigned to car 2S34, you ... did not take any supervisory action during the pursuit. (City Post-Hearing Brief, pages 12-13)

The city argues that the charges set forth in Specifications #1, #2, and #4 are valid because Martinez failed to "actively" monitor his subordinates. It points out that the Manual of Rules states that Sergeants:

[S]hall be assigned as officers in charge of stations or units within the Division of Police or assigned as sector supervisors in the basic control section and perform such

other supervisory duties as the Chief of Police or their commanding officer may designate. They shall have immediate control of the personnel under their supervision and shall be responsible for the discipline, appearance and general good conduct. They shall assist and instruct subordinates in the performance of their duties and continually seek to improve the efficiency of their performance. They shall thoroughly familiarize themselves with all applicable federal statutes, state laws, and municipal ordinances, rules, General Police Orders, Divisional Notices and memorandums of the Division, and be responsible for their strict observance and enforcement, causing full compliance by subordinates. (City Post-Hearing Brief, page 13)

The city notes that GPO 9.1.03 requires sergeants to “act promptly to remedy situations that require correction” and to “actively direct and control the work of those they command.” It claims that in the instant case, Martinez failed to “actively direct and control any of his patrol officers” and “took no supervisory actions regarding his assigned officers.” (City Post-Hearing Brief, Page 14)

The city contends that Martinez’s testimony during his BCI interview supports its contention. It indicates that he testified:

Richard Martinez: I didn’t even have a radio but I mean I’m listening to other people’s radios. Uh, basically once the supervisor [i.e., Daley] responded and it was his car, he was dealing with it, there was no need for me to respond or get into it.

Scott Stranahan: So you checked out and didn’t pay attention.

Richard Martinez: Basically.

Scott Stranahan: That was not your responsibility at that point?

Richard Martinez: Right.

Scott Stranahan: Okay. Do you recall any, so after you disassociated yourself with it because it’s Sergeant Dailey’s [sic] responsibility, what did you do? Did you stay at [the] station or did you go out and patrol?

Richard Martinez: I don’t know how long afterwards [note: the Pursuit lasted almost 20 minutes], Captain Zouhar came into the office . . . [and] so he

said, ‘Come on then. Take me up there [to East Cleveland] . . . and [I] got in the car and took him up to the scene.

Martinez further testified as follows:

Scott Stranahan: So you weren’t assigned any specific tasks to tape off evidence with crime scene tape, or any . . . ?

Richard Martinez: It was already taped off.

Robert Phillips: As I understand your testimony today in the interview from BCI, your sole function in relations to this incident was as a driver for Captain Zouhar?

Richard Martinez: Yes sir.

Robert Phillips: At no time did you exercise any supervisory authority in relation to this incident?

Richard Martinez: No. After, when we got ready to leave, I had some people behind for cars and I had to find two or three people rides back to the district, but that was it.

Robert Phillips: But that was the extent of you Sergeancy that night?

Richard Martinez: Yes. (Laughter). (City Post-Hearing Brief, pages 14-15)

The city maintains that Martinez’s statement in his BCI interview explains why the pursuit was occurring. It observes that his statement reveals:

He did not even know one (1), let alone eight (8) of nine (9) of his assigned officers, all except P.O. Beckwith, were involved in the Pursuit. And, as stated earlier, during the pursuit, Martinez did not know [that] almost 25% of the 13 officers ... who used deadly force ... were officers assigned to him. (City Post-Hearing Brief, pages 15-16)

The city adds that “active supervision of the actions of police officers assigned to [him] reasonably would have resulted in fewer disciplinary charges being heard against [his] patrol officers.” (Ibid.)

The city argues that the fact that Daley assumed responsibility for the pursuit did not absolve Martinez of his obligation to supervise his assigned patrol officers. It points out that while Daley was responsible for the overall management of the pursuit, Sector Supervisors “retain responsibility for the initial and continuing involvement of their assigned patrol officers.” (Ibid.) The city stresses that the grievant was unable to supervise his nine patrol officers because he was unaware of their locations.

The city acknowledges that Martinez’s patrol officers violated the pursuit policy by not requesting his permission to join the pursuit. It states, however, that Martinez “needed to ‘actively’ do whatever was required to determine whether his patrol officers were actually or should have or should not have been engaged in and/or doing other necessary matters ... in connection with the Pursuit.” (City Post-Hearing Brief, page 17)

The city contends that Martinez failed to use the AVL system. It points out that the AVL general order states that “Sector Supervisors shall use the Skyview AVL system to help them monitor vehicles under their command.” (City Post-Hearing Brief, pages 17-18) The city notes that Martinez had access to AVL on multiple computers at the Second District where he remained during the entire pursuit.

The city maintains that a Sector Supervisor is supposed to know what his patrol officers are doing, where they are doing it, and actively supervise them. It complains that “allegations of a shot(s) being fired at a police officer(s), a gun being waived by a passenger from a speeding car at Second District, Sector One patrol officers Siefer and Hummel (and others)), did not warrant even an attempt by Martinez to contact his assigned officers to determine if they had self-dispatched themselves to respond to the Pursuit or if they should actually become involved in the Pursuit (e.g., directly involved in attempting to apprehend the suspects or indirectly involved by

blocking intersections or putting themselves in the area of the pursuit in case the suspects bailed out of the suspect vehicle).” (City Post-Hearing Brief, page 18)

The city argues that Martinez did “absolutely nothing” after the pursuit ended. It states that he sat in his police car for four to five hours reading a book. The city indicates that he “did not use the radio in his police car to communicate directly with [his] officers, have Radio communications with them, or track or have Radio track their locations on AVL.” (City Post-Hearing Brief, page 19).

The city accuses Martinez of playing “the blame game” by claiming that all of his inactions were its fault. It points out that he initially testified that he was not given the GPOs or that they were “just thrown in a corner somewhere.” (City Post-Hearing Brief, page 19) The city notes, however, that on cross-examination he was unable to substantiate his allegations.

The city contends that “in the end, [Martinez] apparently... saw nothing wrong with his assigned ... patrol officers adopting an ‘all hands on deck’ pack mentality.” (City Post Hearing Brief, page 20) It states that this left the Second District and the city without proper protection. The city indicates Martinez failed to supervise during the pursuit and the extended time he was at the scene in East Cleveland.

The city maintains that Martinez also violated with policies and procedures as alleged in Specification #3. It points out that he stated at his BCI hearing that he spent a few hours at the scene reading a book but at the arbitration hearing he testified that he was really reading a magazine and had only “sarcastically” said that he had been reading a book. The city indicates that “the striking change in [Martinez’s] testimony... negatively impacts the credibility of all his arbitration testimony.” (City Post-Hearing Brief, page 22) It adds that “what is even more troubling if one accepts Martinez’s arbitration testimony as credible is that Martinez effectively

claims and apparently sees no problem with his testifying sarcastically in a criminal investigation and in an administrative investigation of an event which led to the death of two individuals.”

(City Post-Hearing Brief, page 23)

The city rejects Martinez’s claim that there was no backlog of assignments and that Sergeant Farmer kept four police officers beyond the end of their shift anticipating they might be needed. It claims that Martinez could not have known this because he had no radio communications with Farmer and Farmer made no general radio transmissions after Martinez and Zouhar arrived in East Cleveland.

The city concludes that it had just cause to discipline Martinez.

Sergeant Brian Lockwood - The city argues that Lockwood violated four aspects of the policies and procedures. It claims that the violations are as follows:

Specification #1: On Thursday, November 29, 2012, while assigned to car 2S24, you ... did not supervise subordinates under your command.

Specification #2: On Thursday, November 29, 2012, while assigned to car 2S24, you ... failed to acknowledge the pursuit.

Specification #3: On Thursday, November 29, 2012, while assigned to car 2S24, you ... took no supervisory action during the pursuit.

Specification #4: On Thursday, November 29, 2012, while assigned to car 2S24, you ... did not check or use the AVL system during your tour of duty. (City Post-Hearing Brief, pages 24-25)

The city contends that the charges set forth in Specifications #1 and #3 and #4 are valid. It points out that Lockwood stated that based on radio traffic, he believed no more than three vehicles were involved in the pursuit. The city notes that “had he ... checked AVL, that would have put him in a position to counteract any problem(s) created when seven (7) of his ten (10) assigned officers ... responded to the pursuit without prior authorization.” (City Post-Hearing Brief, page 26) It claims that Lockwood’s “blindness to the size and scope of the Pursuit, and,

more importantly, the role of each of his officers played in the Pursuit while it was actually taking place, prevented him from supervising and actively directing his assigned subordinates in or out of the Pursuit.” (Ibid.)

The city dismisses Lockwood’s defense that the instant case was his first “big” chase since his August 2012 promotion to Sergeant. It states that his use of the word “big” is “an attempt to gain some sympathy or an unwarranted attempt to justify his inactions.” (City Post-Hearing Brief, page 27) The city indicates that Lockwood’s “relatively short tenure as a sergeant does not justify his actions or inactions.” (Ibid.)

The city rejects Lockwood’s attempt to escape responsibility by claiming that Daley was monitoring the pursuit. It insists that Lockwood retained responsibility for actively directing his patrol officers at all times.

The city discounts Lockwood’s suggestion that Sergeant Coleman’s involvement in the pursuit “lessened or negated” his supervisory responsibilities. It points out that Lockwood only knew that Coleman was transmitting information about the pursuit, the suspect vehicle, and the actions of the suspects. The city notes that even if Coleman had transmitted information regarding Lockwood’s subordinates, this would not have affected his job duties and responsibilities.

The city contends that the charges in Specification #2 are justified. It states that in the prior arbitration, the union argued that the pursuit began in the Third District and was a Third District pursuit. The city indicates that the union argued alternatively, that if the pursuit was a Second District pursuit, Sergeant Daley was in control of it.

The city maintains that the union’s first assertion is faulty. It observes that the pursuit started when Nan lost the suspect vehicle and Siefer and Hummel picked up the suspect vehicle

in the Second District. The city reports that the pursuit policy states that the pursuing officers are to stay on the radio channel of the district where the pursuit began. The city emphasizes that everyone who testified at the arbitration hearing acknowledged that pursuing officers used Channel 2.

The city argues that the union's second assertion has no merit. It states that while the pursuit policy states that "a Sector Supervisor" controls a pursuit, this does not include a Support Supervisor monitoring a pursuit. The city indicates that at the prior arbitration hearing, Chura explained that the reason for the policy is that there is a Sector Supervisor on duty 24 hours per day but a Support Supervisor is not always on duty.

The city rejects the union's claim that "a working practice or culture" existed that allowed Support Supervisors to control a pursuit. It states that "conspicuously absent from the Union's case is any testimony or other evidence that Chief McGrath, the top of a paramilitary organization, possessed any knowledge of or approved of such a working practice by those in the ranks below him." (City Post-Hearing Brief, page 29) The city indicates that the policy states that "in instances where the interpretation of this policy may not readily lend itself to 'bright-line' guidance, the policy shall be applied in the more restrictive manner." (Ibid.)

The city contends that at least four pre-November 29, 2012, pursuits which were initiated by a patrol officer in a support unit were monitored by a Sector Supervisor. It acknowledges that some pursuits were monitored by Support Supervisors but states:

[J]ust because in earlier 2012 some supervisory police officers in the Second District ... below McGrath may not have enforced a literal application of the pursuit policy at all times during police pursuits or just because police supervisors chose not to recommend disciplinary action against sector or support supervisors during the mandated post-pursuit review process for police pursuits did not foreclose McGrath from charging Lockwood ... and Flask, as McGrath's superior, from disciplining [him] ... for failing to follow the pursuit policy, a general police order, or for failing

to oversee the Pursuit and to take all other actions required of the sector supervisor in charge of a police pursuit. (City Post-Hearing Brief, page 30)

The city maintains that the Arbitrator cannot consider the revised pursuit policy. It points out that at the prior arbitration hearing, it objected to the admission of the policy. The city asserts that “the revised policy is a subsequent remedial measure protected by Evid. R. 407.” (City Post-Hearing Brief, page 31)

The city concludes that there is just cause to discipline Lockwood.

Sergeant Mark Bickerstaff - The city argues that Bickerstaff violated number of the policies and procedures. It claims that the violations are as follows:

Specification #1: On Thursday, November 29, 2012 while assigned to zone car 3S24, you ... had errors regarding the AVL record not corresponding to your duty report. AVL places you on E. 82nd North of Superior for approximately ½ hour. This location is in the Fifth District.

Specification #2: On Thursday, November 29, 2012 while assigned to zone car 3S24, you ... did not disregard late responding cars to the pursuit.

Specification #3: On Thursday, November 29, 2012 while assigned to zone car 3S24, you ... did not inquire with CCS regarding pending assignments.

Specification #4: On Thursday, November 29, 2012 while assigned to zone car 3S24, you ... did not take any supervisory action during the pursuit. (City Post-Hearing Brief, pages 31-32)

The city argues that Bickerstaff had three, two-man patrol cars assigned to him and that five of the officers in those cars received either a one-day or three-day suspension for engaging in the pursuit. It acknowledges, however, that none of them were involved in the shooting.

The city contends that although Third District supervisors are entitled to benefit from the fact that the pursuit was called off for Third District officers on multiple occasions, Bickerstaff still warranted discipline. It states that he “failed to actively follow up to determine if his three patrol cars heard the order to disengage and were complying with the order.” (City Post-Hearing

Brief, page 33) The city indicates that Bickerstaff “failed to provide the necessary supervisory check and balance to any inclination a patrol officer may have to become involved in a police pursuit, particularly one where allegations of shots fired at a police officer are made.” (Ibid.)

The city maintains that Bickerstaff’s testimony at the arbitration hearing cannot be characterized as “anything other than an attempt to cover-up his inactions or mislead everyone with respect to his supervision of his officers during the Pursuit.” (Ibid.) It states that when he was questioned on direct examination, he testified:

A. Okay. It would be -- let’s start at 8:43. My car, 3 Barney 21, asks -- well it reads, “Barney 21 to our road boss, are we gonna be in or are we out because they’re coming toward us.” And I responded, “We’re gonna be out.”

A. Regarding the Specification[s] 2 and 4, my cars asked, I said no and they acknowledged me.

Q. So they asked what?

A. They asked me if they can join the pursuit. I indicated no, they were not allowed to join the pursuit and they acknowledged me.

Q. And so as a consequence you are contending that Specification 2 is inaccurate, correct?

A. 2 and also 4, yes.

Q. And also?

A. 4.

Q. Also 4?

A. Yes.

Q. Because you’re considering that as your supervisory activity?

A. Absolutely. (City Post-Hearing Brief, pages 33-34)

The city indicates that on cross-examination, Bickerstaff was forced to admit to the following:

Q. Prior to getting to East Cleveland did you know any of the zone cars assigned to you on November 29, 2012 were actually involved in the pursuit?

A. No, I did not know.

Q. Because I think Bob asked you the question none of the zone cars asked for permission to get involved in the pursuit, is that correct?

A. 3 Barney 21 did ask.

Q. Okay. So which of the cars on this [FOP Ex. O, p. 41 (same as City Ex. 11, p. 5)] were assigned to you on November 29, 2012?

A. 3A24.

A. 3A25.

A. 3A26.

Q. So which of the three cars, 3 Adam 24, 3 Adam 25 or 3 Barney 26 asked for permission?

A. Neither.

A. Well what I'm actually saying is when 3 Barney 21 requested are we in or out, meaning the Third District, is the Third District in or out of the pursuit, I indicated no.

Q. Okay. But they were assigned to another sector supervisor, is that correct?

A. Yes.

The Arbitrator: No. You told me they were assigned to you. 3 Barney 21.

The Witness: Meaning - - I apologize. They were assigned to Sergeant Shepard.

The Arbitrator: But 3B21 was [assigned to] Shepard?

The Witness: Yeah, belongs to Shepard. (City Post-Hearing Brief, pages 34-35)

It claims that Bickerstaff's testimony shows that "in reality, [he] made no attempts to communicate (or track) his three assigned patrol cars." (City Post-Hearing Brief, page 36)

The city argues that Specification #3 is justified. It states that since as far as Bickerstaff knew, Third District patrol officers disengaged from the pursuit as ordered, there was no basis for him to leave his assigned sector and district. The city adds that "once Bickerstaff was out of position, he admittedly never checked with Radio regarding pending assignments." (City Post-Hearing Brief, page 36)

The city contends that while Specification #1 was unique to Bickerstaff, it "should not be viewed as cavalierly as the Union portrayed the issue." (City Post-Hearing Brief, page 37) It points out that GPO 1.2.02 requires officers to "remain in their district of assignment unless engaged in exigent law enforcement action or otherwise on other City employment-related activity pre-approved by the supervisor." It notes that despite this restriction, Bickerstaff patrolled the Fifth District without approval. The city characterizes Bickerstaff's excuse that crime "migrates" as "ridiculous."

The city maintains that there is reason to question Bickerstaff's ability to serve as a supervisory officer. It claims that "it is not a stretch to believe that Bickerstaff self-authorized himself to patrol the portion of the Fifth District where he and his family lived on November 29th

[and] that he had done so on numerous occasions prior to being caught in CIRC's post-Pursuit administrative review process." (City Post-Hearing Brief, page 38)

The city concludes that there is just cause to discipline Bickerstaff.

Sergeant Jason Edens - The city argues that Edens violated the policies and procedures. It claims that the violations are as follows:

Specification #1: On Thursday, November 29, 2012, while assigned to zone car 3S33, you ... did not disregard cars from continuing to the incident scene after finding out the pursuit was terminated.

Specification #2: On Thursday, November 29, 2012, while assigned to zone car 3S33, you ... did not take any supervisory reaction during the pursuit..

Specification #3: On Thursday, November 29, 2012, while assigned to zone car 3S33, you ... were not sure what your cars were doing while the pursuit was in progress. (City Post-Hearing Brief, page 39)

The city recognizes that Edens is on a "different footing" than the other grievants. It points out that Lieutenant Wilson ordered him to drive him to an area in the Third District where he thought the pursuit might have been headed. It also notes that Edens, like other Third District Supervisors, differs from the Second District Supervisors, because Third District patrol officers were told to disengage from the pursuit and because no Third District patrol officers were among the 13 officers who may have used deadly force.

The city contends that Edens "failed to counteract what he characterized as a police supervisor's dilemma," i.e., whether his subordinates were where they said they were. (City Post-Hearing Brief, page 40) It states that this problem results "in situations like Edens' charges P.O.s Brown and Aldrich not actually joining the Pursuit but still going to the scene in East Cleveland and Brown's subsequent statement to Edens when they met in East Cleveland 'no, no, we just came out because we heard shots were fired.'" (Ibid.) The city indicates that proactive direction by Edens would have prevented "sightseers" from going to the scene.

The city maintains that Edens acknowledged that he was not aware of any of his cars being involved in the pursuit until he got to the scene. It reports that he admitted that he did not give directions to anyone and that he did not use AVL while at the Third District headquarters. The city observes that “any nonexistent ‘keep the air clear’ defense advanced by the Union is not applicable because the Pursuit was being broadcast on Channel 2, not Channel 3.” (City Post-Hearing Brief, page 41)

The city argues that Edens’ claim that he could not act prior to knowing his police officers were in East Cleveland is “patently false.” It claims that his “statement that ‘I had no reason to believe they were involved,’ even if true, is irrelevant, and he ... needed to actively do whatever was necessary while he was at the Third District headquarters to determine the location of his subordinates and to actively direct them.” (City Post-Hearing Brief, pages 41-42) The city asserts that Edens’ failure to check with the patrol officers assigned to him to make sure they heard the broadcasts by Sergeant Shepherd, Sergeant Bickerstaff, and police radio that the Third District was not involved in the pursuit, provided it with “ample just cause” to discipline Edens.

The city concludes that there was just cause to discipline Edens.

Sergeant Matthew Gallagher - The city argues that Gallagher violated the policies and procedures. It charges him as follows:

Specification #1: On Thursday, November 29, 2012, while assigned to zone car 3S34, you ... were not aware that personnel under your command participated in the Pursuit until after arriving at the incident scene; did not make any inquiries as to any of their statuses prior to arrival.

Specification #2: On Thursday, November 29, 2012, while assigned to zone car 3S34, you ... did not access AVL.

Specification #3: On Thursday, November 29, 2012, while assigned to zone car 3S34, you ... as a Sector Supervisor took no supervisory action during the Pursuit.

Specification #4: On Thursday, November 29, 2012, while assigned to zone car 3S34, you ... did not advise radio of your involvement with the Pursuit or make notifications to disregard late responding units. (City Post-Hearing Brief, pages 42-43)

The city contends that Gallagher's policy violations are similar to the other grievants. It points out that like Bickerstaff, he had no basis to leave the city to respond to the pursuit because he believed that no Third District police officers were involved in the pursuit.

The city maintains that Gallagher was unable to defend his failure to determine whether any of his four assigned patrol officers had complied with the multiple orders not to get involved in the pursuit or to disengage. It rejects his defense that the "pursuit policy does it say after a termination order [is] given that I'm required to make sure that my officers are complying." (City Post-Hearing Brief, page 44) The city emphasizes that "to the contrary, policy mandates that all supervisors 'actively' monitor their subordinates [and] ... requires supervisors to use AVL in connection with police pursuits." (Ibid.)

The city dismisses the union's assertion that Gallagher needed to "keep that air clear". It observes that the pursuit was being monitored on Channel 2 rather than on Channel 3. The city claims that even if this defense is available to the grievants from the Second District, it is not available to Gallagher or any other Third District Supervisor.

The city rejects the union's claim that it cannot discipline Gallagher for not using the AVL system. It acknowledges that the grievant may not have been disciplined in the past for not using AVL but emphasizes that there was no evidence that it was aware of his past failures. The city complains that "neither [Gallagher] nor the Union proffered any evidence in support of his naked allegation." (City Post-Hearing Brief, page 44)

The union concludes that there is just cause to discipline Gallagher.

Level of Discipline

The city argues that there was just cause for the level of discipline it imposed on the five grievants. It acknowledges that it did not follow progressive discipline but claims that “actions and inactions which lead to more severe consequences warrant more serious discipline.” (City Post-Hearing Brief, page 45) It states:

Even though none of the five grievants (or any other supervisory officer) was charged with failing to stop the Pursuit prior to its conclusion in East Cleveland (which is why the Union’s arguments regarding the availability of stop sticks and other issues are a red herring), as the suspects possessed the power to end the Pursuit merely by stopping their car, the failure of these four grievants to possess basic, readily available facts regarding the Pursuit which, in turn, resulted in a failure to manage (either personally or by giving direction to others) the Pursuit justified the discipline imposed. More importantly, the incident ended as it did, and the grievants’ actions and inactions irrefutably led to an excessive number of police being in a position to use deadly force against two unarmed individuals regardless of whether any particular officer used and was justified in using such force or did not use deadly force. (City Post-Hearing Brief, pages 45-46)

Sergeants Brian Lockwood and Richard Martinez - The city contends that the ten-day suspensions imposed on Martinez and Lockwood are appropriate. It indicates that both are guilty of the “failure to know the location and actions of assigned subordinates and the failure to actively supervise assigned subordinates.” (City Post-Hearing Brief, page 46) The city indicates that it could also argue that “their respective disciplinary suspensions were less than what they deserve ... because Donegan’s (Second District, Sector 2, B-Platoon) actions or inaction, with one exception, were similar in nature to those of the four above identified supervisors and this Arbitrator concluded that Donegan’s conduct warranted a 30-day suspension or three times what the above referenced sergeants received.” (City Post-Hearing Brief, page 47) It asserts that the only difference between Martinez and Lockwood and Donegan is that Donegan “checked out” after encountering the pursuit on the road in the Second District.

The city maintains that the Arbitrator must reject any argument that Martinez and Lockwood should receive the same penalty as Edens and Gallagher. It points out that Second District supervisors “should administratively suffer the consequences of some of their assigned patrol officers, as a result of supervisory inaction in violation of clear policy, being in a position to use deadly force even if the use of force was ultimately justified.” (Ibid.) The city notes that Martinez and Lockwood deserve more severe penalties than the Third District supervisors because of the repeated order for Third District patrol officers to disengage from or not to join the pursuit.

Sergeants Mark Bickerstaff, Jason Edens, and Matthew Gallagher - The city argues that the penalties imposed on Bickerstaff, Edens, and Gallagher are appropriate. It suggests that they are deserving of lesser penalties as Third District supervisors than the Second District supervisors. The city asserts that Bickerstaff’s 10-day suspension is justified because he had a disciplinary suspension within the prior year and because he falsified his Daily Duty Report regarding the events of November 29, 2012.

Union’s Affirmative Defenses

The city argues that any actions by the grievants after they arrived in East Cleveland are irrelevant. It points out that they were charged with taking “no supervisory actions during the Pursuit.” The city notes that “the charge is unambiguously directed at the actions of the five supervisors ‘during’ the Pursuit, not ‘after’ it was over.” (City Post-Hearing Brief, page 48)

The city contends that the grievants were accorded due process. It indicates that constitutional due process merely requires a public employer to provide an employee with notice of discipline and an opportunity to be heard. The city reports that the grievants received written notices of their pre-disciplinary hearings and that their pre-disciplinary hearings were

held prior to the imposition of discipline. It adds that each grievant was able to challenge the discipline he received through the grievance and arbitration process.

The city dismisses the union's objection to the creation of the CIRC. It states that the CIRC was not formed to issue discipline, determine culpability, or exonerate police officers. The city indicates that it was McGrath who issued the disciplinary charges and Flask who imposed the discipline after conducting pre-disciplinary hearings. The city observes that McGrath and Flask dismissed a number of the disciplinary charges suggested by the CIRC and disciplined only 67 of the 70 Patrolmen involved in the pursuit. It adds that in any event, the union waived any objection to the CIRC over one year prior to the arbitration hearing.

The city rejects the union's argument that McGrath created a conflict of interest when he named Stevens, the Third District Commander, and Drummond, the Fifth District Commander, to the CIRC. It acknowledges that some of their personnel were involved in the pursuit but it claims that the union failed to show how their appointment created "an illegal or unethical conflict of interest." The city stresses that it is commonplace for supervisors to review the work of their subordinates.

The city contends that the union's conflict of interest charge is curious given the testimony of Captain Brian Betley, the President of FOP Lodge No. 8. It observes that he stated that "the supervisors in a certain chain of command ... in that particular district took care of those [pursuit] investigations." (City Post-Hearing Brief, AAA Case No. 53 390 00288 13, page 57) The city claims that "if an immediate supervisor of the sector supervisor in charge of managing a police pursuit (i.e., usually a Lieutenant) is not conflicted out of reviewing the manner in which one of his or her sector supervisors managed a police pursuit, the commander of the police district likewise possesses no improper conflict of interest either in conducting the

initial review of the pursuit, particularly when ordered by the Chief to be part of such of the review process, or in reviewing the pursuit when it is forwarded up the chain of command to the Deputy Chief of Field Operations for further review.” (Ibid.) It reports that in any event, Stevens and Drummond were not on duty during the pursuits so their actions regarding the pursuit were not and are not in question.

The city rejects the union’s argument that it should not have imposed discipline before the completion of the criminal investigation of the events of November 29, 2012. It states that there is nothing in the collective bargaining agreement that bars it from conducting an administrative investigation prior to or concurrently with a criminal investigation. The city indicates that the only contractual language regarding criminal investigations addresses bargaining unit members’ constitutional and statutory protections.

The city discounts the union’s objection to its April 24, 2013, release of the CIRC’s findings and possible disciplinary charges. It points out that BCI had released the results of its criminal investigation almost three months earlier. The city notes that Flask testified that “the City endeavored to be proactive in addressing the widespread media coverage and public unrest that was a byproduct of the incident by being transparent regarding the results of its administrative investigation.” (City Post-Hearing Brief, AAA Case No. 53 390 00288 13, page 59)

The city challenges the union’s argument that it was a matter of the system failing the officers rather than the officers failing the system. It acknowledges that a press release from the Ohio Attorney General states:

Policy, training, communications, and command have to be so strong and so integrated to prevent subjective judgment from spiraling out of control. The system has to take over and put on the brakes. (Ibid.)

The city suggests, however, that the words “command” and “system” include all of the personnel who were on duty on November 29, 2012. It challenges the union’s view that “command” includes only “command officers,” i.e., those holding the rank of Commander or above, as “myopic” and “unjustified.”

The city characterizes as “misdirection” the union’s attempt to “reframe [the] charge of failure to use available resources as being a charge of failure to obtain or direct the use of the CPD helicopter and a failure to obtain or direct the use of stop sticks.” (City Post-Hearing Brief, AAA Case No. 53 390 00288 13, page 60) It points out that Flask testified that the problem was that the grievants failed to use “simple telephone communications, the police radio, or the automated vehicle locator and to properly evaluate the usage (i.e., too many or too few) of the most important asset of the Division of Police -- its police personnel.” (Ibid.)

The city rejects the union’s charge that supervisors did not receive training regarding the pursuit policy other than during their initial training in the Cleveland Police Academy. It states that the union’s witnesses failed to mention that the pursuit policy is reviewed with all the newly promoted Police Officers during their week-long supervisory training. The city indicates that the pursuit policy was reviewed multiple times in the Second District in 2011 and 2012 and in the Third District in 2012. The city adds that “the case ... is not about [the grievants’] failure to stop the Pursuit earlier than it did on its own [but] it is about a more fundamental lack of knowledge borne out of a lack of communication with their subordinates (e.g., asking questions) and the lack of use of available resources (e.g., radio, AVL, & personnel).” (City Post-Hearing Brief, AAA Case No. 53 390 00288 13, page 61)

The city maintains that McGrath’s testimony encapsulates the fallacy ... of the union’s position regarding training. It points out that he testified:

Mr. Phillips, there is a difference between training and policy. Training, for example, is if you have spike sticks you ensure the officers know how to use them. Policy is exactly what it is. It's in the manual of rules and regulations... The issues [sic] on this particular night was policy, violation of policy. (City Post-Hearing Brief, AAA Case No. 53 390 00288 13, page 50)

It claims that in the instant case, "the policies requiring 'active,' not 'passive,' direction of patrol officers by sector supervisors and use of AVL in connection with police pursuits are clear."

(Ibid.)

Conclusion

The city concludes that the five grievances should be denied in their entirety. It adds, however, that if the Arbitrator sustains any of the grievances, he cannot order it to remove a record of the discipline from a grievant's personnel file. It points out that the collective bargaining agreement prohibits an Arbitrator from "pass[ing] upon issues governed by the law" or "mak[ing] an award in conflict with the law." The city notes that under the Ohio Public Records Act, ORC §149.43, an employee's disciplinary record is subject to a public records request. It asserts that "the Arbitrator, at most, could order [it] to include a copy of his opinion and award ... in [a grievant's] ... personnel file." (City Post-Hearing Brief, AAA Case No. 53 390 00288 13, page 62)

UNION POSITION

Burden of Proof

The union argues that the city bears the burden of proving that it had just cause to discipline the grievants. It points out that Arbitrators have held that this places a three-fold burden on an employer. The union indicates that an employer must prove that the employee engaged in misconduct or committed the offense of which he is accused; that the penalty is

proportional to the seriousness of the misconduct and otherwise is fair, reasonable, and nondiscriminatory; and that the employee could reasonably have been expected to know the penalty for his misconduct.

The union contends that the standard of proof required depends on the nature of the allegation against the employee. It states that Arbitrators apply a heightened standard of “clear and convincing evidence” or “proof beyond a reasonable doubt” where the conduct involves criminal issues or issues of moral turpitude. The union indicates that in applying a higher standard of proof, Arbitrators cite the impact on an employee’s future employment.

The union maintains that in the instant case, the Arbitrator should apply the clear and convincing standard. It reports that the grievants are charged with neglecting their duties as ranking officers. The union observes that “the stigma attached to the allegations imposed in the instant case can have very serious consequences in terms of later promotions and employment opportunities.” (Union Post-Hearing Brief, page 9)

The union argues that at the very least, equitable interests are at stake. It points out “at least one arbitrator has applied a heightened burden of clear and convincing evidence where equitable interests were at stake, and another arbitrator applied the same heightened burden where neglect of duty was alleged.” (Ibid.)

The union contends that “as a predicate and axiomatic to an understanding of the grievants’ conduct is the fact that the vehicle pursuit was ‘justified.’ ” (Union Post-Hearing Brief, page 10) It points out that a “vehicle pursuit” is defined as follows:

Vehicular Pursuit - occurs when there is an active attempt by an officer in an authorized emergency vehicle to apprehend a fleeing suspect who is actively attempting to elude the police. (Ibid.)

The union maintains that the General Police Orders draw a distinction between Command Officers and Superior Officers. It states that Superior Officers, including the grievants, are primarily operational with administrative oversight of their immediate subordinates compared to Command Officers who provide training and instruction and regularly inspect facilities, vehicles, and equipment. The union claims that “with very minor exception discovered ‘after the fact,’ each grievant was compliant with his or her assigned roles on November 29, 2012.” (Union Post-Hearing Brief, page 11)

Just Cause for Discipline

The union argues that the city did not have just cause to discipline the grievants or alternatively, that the penalties imposed were too severe.

Sergeant Brian Lockwood - The union argues that Lockwood fulfilled his duties. It states that the pursuit was being monitored by Daley, a seasoned Sergeant, and Sergeant Patricia Coleman, a seasoned veteran, was in the pursuit. The union indicates that as a result, Lockwood “merely conducted his usual routine while the pursuit progressed.” (Union Post-Hearing Brief, page 12)

The union contends that Lockwood properly responded to East Cleveland after hearing that shots had been fired. It points out that when he arrived, he learned for the first time that his subordinates were involved in the pursuit. The union notes that “after being assured of their well-being, [Lockwood] returned to the Second District and completed his tour of duty.” (Ibid.)

The union acknowledges that Lockwood should have been “more aware” of his subordinates. It observes that “in the 25-30 minute elapsed time of the pursuit he, like all others, focused on the radio transmission of the pursuit.” (Ibid.) The union claims that since “none of his subordinates made any radio contact, his instincts were to follow the pursuit via the radio to its

end [until] ... on hearing shots fired, he ... instinctively joined all hands on deck in what was now not a pursuit but an emergency event.” (Union Post-Hearing Brief, pages 12-13)

The union rejects the city’s charge that Lockwood failed to supervise or acknowledge the pursuit. It claims that it was “not his pursuit.” The union adds that “as for his subordinates you can only control that [of] which you have knowledge [and] his subordinates deprived him of that knowledge.” (Union Post-Hearing Brief, page 13)

The union maintains that Lockwood’s 10-day suspension does not “serve the interests of justice.” It points out that he has a Distinguish Service Medal for his efforts as a police officer and has received letters of distinction for his service. The union adds that he is acknowledged to be a successful police officer and has no prior discipline.

The union concludes that there was not just cause to discipline Lockwood.

Sergeant Richard Martinez - The union argues that at the scene, Martinez followed Captain Zouhar’s directions. It points out that he remained in his car until returning to the Second District at 0500 hours. The union claims that Martinez “was merely following instructions from his immediate supervisor, Captain Zouhar ... [and] he had not had any training relating to pursuit performance which would dictate otherwise than to follow the captain’s instructions.” (Union Post-Hearing Brief, page 14)

The union contends that Martinez has an unblemished record. It states that he has numerous commendations, excellent performance evaluations, and distinguished training certificates. It adds that he had a very distinguished military career prior to joining the Division of Police.

The union maintains that it is inappropriate to charge Martinez with failing to supervise subordinates during and after the pursuit. It states that he was following Zouhar’s instructions

and was aware that a Second District officer was in charge of handling pending assignments in the district. The union acknowledges that Martinez did not access the AVL but claims that “it certainly did not warrant a 10 day (80 hour) unpaid suspension.” (Union Post-Hearing Brief, page 15)

The union concludes that there was not just cause to discipline Martinez.

Sergeant Mark Bickerstaff - The union argues that Bickerstaff responded appropriately to the pursuit. It states that he monitored Channel 3 as the pursuit traveled through the Third District; assisted a Second District car which broke down; responded to East Cleveland when he heard the report of shots being fired; assisted in establishing the crime scene at East Cleveland; and determined that none of his subordinates had fired their weapons. The union indicates that he “was aware of all aspects of the pursuit and clearly did not want, nor did he authorize his subordinates to engage [and that] his responding to East Cleveland was in essence responding to an emergency event based on the shots fired transmission.” (Union Post-Hearing Brief, page 16)

The union contends that Bickerstaff has an exemplary record with the Division of Police. It points out that he has been free of any significant disciplinary measures and has received several awards for heroism and multiple letters of appreciation from business owners. The union notes that Bickerstaff’s contributions were recognized by the Mayor, Safety Director, and Police Chief.

The union concludes that there was not just cause to discipline Bickerstaff.

Sergeant Jason Edens - The union argues that Edens responded properly. It states that he and Lieutenant Wilson proceeded on East 79th St. to Wade Park and used their patrol car to block civilian traffic. The union indicates that Edens and Wilson “did ... slowly get behind the

last car in the pursuit to simply be in a position if the suspects decided to ‘bail’ which was a distinct possibility.” (Union Post-Hearing Brief, page 17)

The union contends that Edens provided assistance at East Cleveland. It points out that he took some pictures which he later provided to BCI. The union notes that he spent approximately one-half hour assisting in establishing the crime scene. It reports that he then returned to the Third District and responded to calls for service.

The union maintains that Edens has an enviable record as a police officer. It observes that his annual evaluations are in large part “outstanding” and that he has numerous letters of commendation and appreciation. The union reports that Edens has absolutely no discipline in his 16 years of service. It adds that on December 20, 2013, he was promoted to the rank of Lieutenant.

The union concludes that there was not just cause to discipline Edens.

Sergeant Matthew Gallagher - The union argues that Gallagher fully complied with all directives and with all of the Division’s rules and regulations. It indicates that he did not engage in the pursuit and “only went to East Cleveland after shots were fired and reacted instinctively to that transmission.” (Union Post-Hearing Brief, page 21) The union indicates that after providing assistance at the scene and instructing his subordinates to return to the district, Gallagher did so himself. The union claims that “the allegation of his failing to engage the Automatic Vehicle Locator (AVL) is not supported by the evidence.” (Ibid.)

The union concludes that there was not just cause to discipline Gallagher.

Affirmative Defenses

The union argues that the alleged failures of the grievants on November 29, 2012, were in large measure the consequence of a “systemic failure.” It claims that “the system failed the officers -- the officers did not fail the system.” (Union Post-Hearing Brief, page 21)

The union contends that Arbitrators recognize the importance of training in considering whether there is just cause for discipline. It points out that in Michigan Dept. of Corrections, 93 LA 339 (1989), where a corrections officer was discharged for failing to take proper security precautions, Arbitrator Knott found that the lack of evidence of specific security instructions or training mitigated the grievant’s poor judgment. The union notes that in Cincinnati State, 130 LA 1205 (2012), Arbitrator Heekin reinstated the grievant with full back pay when he found that the employer’s vehicle pursuit policy was ambiguous and that the grievant had received no training in vehicle pursuits.

The union maintains that in the instant case, the grievants were confronted with the same lack of training. It states that the vehicle pursuit of November 29, 2012, which involved reports of shots fired at or near a police officer, went through four of the city’s five police districts, lasted nearly 30 minutes, and ended outside the city, was unprecedented. The union indicates that this suggests that “there was no template on how to respond.” (Union Post-Hearing Brief, page 23)

The union argues that it is a “virtual certainty” that there was no vehicle pursuit training until after the incident of November 29, 2012. It reports that witness after witness testified that their only hands-on training was during their initial training at the Police Academy. The union adds that “training focused on inter-district chases with the inherent problems of communications between the districts, span of control beyond City limits, and training central radio/dispatch

center personnel to recognize the global magnitude and variables of the pursuit was also nonexistent.” (Ibid.) It stresses that “it is unjust for the City to retroactively question the grievants’ professional judgment, when the City failed to equip them with the proper training and knowledge to make an informed decision prior to the night in question.” (Ibid.)

The union contends that inadequate communications created circumstances where “the right hand did not know what the left hand was doing.” (Ibid.) It observes that four of five districts “had a hand in the pursuit” and that each had its own radio channel so that there was no common channel to keep all of the pursuing officers on the same page. The union adds that “between the radio communications and the global monitoring of the automatic vehicle locator (AVL), it should fall on radio central to have kept all the parties on the same page.” (Union Post-Hearing Brief, pags 23)

The union maintains that there were significant problems with the communications system in place on November 29, 2012. It points out that there was no common radio channel to ensure reliable communications but instead the Division of Police relied upon verbal exchanges in radio central between the dispatchers assigned to each district. The union notes that officers in the field needed to have multiple radios tuned to different district radio channels.

The union argues that the city failed to adopt a system that allowed for inter-district communications. It states that the city’s Motorola radio system had a “patching” component that could do this. The union indicates, however, that Stacho testified that the patching feature was not in use because it had inherent problems.

The union rejects the city’s allegation that the grievants failed to monitor pending assignments. It acknowledges that while they had “some responsibility” for doing this, CCS had equal or greater responsibility. The union charges that “unfortunately on the night of November

29, 2012, the nerve center inclusive of less than reliable equipment failed to serve the officers included in the pursuit as policy, custom, practice and common sense required.” (Union Post-Hearing Brief, page 25)

The union contends that the equipment needed in the pursuit was not available. It points out that the Vehicle Pursuit Policy incorporates the aviation unit and that the Road Spikes Policy discusses their use in vehicle pursuits. The union notes that while “reference to these assets for use in vehicle pursuits ... raises the expectation of [their] availability by officers in the trenches,” neither was available on November 29, 2012. (Ibid.) It adds that “it seems inconceivable that the road spikes couldn’t even be located not to mention that there was never any training or demonstration evidenced for the use of the spikes as required by existing policies.” (Ibid.)

The union maintains that Arbitrators have reduced penalties where an employer’s action or inaction contributed to an employee’s inability to follow a policy or procedure. It cites Steel Branch Mining, 96 LA 391 (1991), where Arbitrator Roberts reduced a discharge to a 30-day suspension because the employer failed to replace a missing part on the grievant’s vehicle, which contributed to the damage caused by his unsafe driving. The union also relies on Southwest Airlines, 93 LA 575 (1989), where Arbitrator Morris found that a two-week suspension was excessive where the employer was partially at fault for the grievant’s careless behavior because it failed to paint lines on a ramp to show safe areas.

The union concludes that the grievants were not responsible for the lack of training and assets or the communications problems. It claims that the “failure of training, communications and/or assets ... lies squarely at the feet of the City administration.” (Union Post-Hearing Brief, page 26) The union asserts that “the Ohio Attorney General got it right when after an exhaustive

investigation he declared that ‘we are dealing with a systemic failure ... Command failed ... Communications failed ... The system failed.’ “ (Ibid.)

Proper Penalties

The union argues that public pressure explains the harsh discipline imposed on the grievants. It indicates that “Cleveland Safety Director Flask got it right when he opined that the community wanted ‘heads to roll’... [and] went on to say that ‘unless the officers involved went to jail the public would not be happy.’ ” (Union Post-Hearing Brief, page 27) The union states that “the question must then be asked whether the public outcry was so loud, and the attendant publicity so intense, that it clouded the City’s sensibilities of reason in meting out discipline.” (Ibid.)

The union cites City of Portland Bureau of Police, 77 LA 820 (Axon, 1981). It points out that in that case, the city discharged two police officers who placed a number of opossum carcasses in front of a restaurant in a primarily black neighborhood. The union notes that it was undisputed that in Portland, the police commissioner and the police chief gave great weight to public opinion when determining that the officers should be terminated.

The union reports, however, that Arbitrator Axon reinstated the two officers. It observes that he held that the city could not claim that the grievants, who had excellent records, were beyond rehabilitation. The union reports that Axon also found that the city had only discharged police officers who had engaged in serious criminal activity. It emphasizes that he found that “the grievants were not charged with criminal activity... [and] that he was compelled to conclude that [they] were singled out for discipline because of the substantial amount of media attention given to the incident.” (Union Post-Hearing Brief, page 28)

The union contends that the same intense media scrutiny was present in the instant case. It states that Chura, the chairman of CIRC, acknowledged that the city's PowerPoint presentation about the incident was made for the public. The union indicates that the media played portions of the presentation "almost weekly with editorial comment placing the police in a bad light." (Union Post-Hearing Brief, page 29) It claims that "the grievants were essentially scapegoats for the Department's 'systemic failure.'" (Ibid.)

The union maintains that Bickerstaff, Edens, Gallagher, Lockwood, and Martinez, along with other supervisors, became the "poster children" for the events of November 29, 2012. It points out that the testimony of their superior officers, the commendations they received, and their evaluations suggest that they are most probably in the top 10% of Cleveland Police supervisors.

The union relies on the testimony of Captain Brian Betley. It states that he has supervised several of the grievants and has an "intimate working knowledge of their work ethics and ability." (Union Post-Hearing Brief, page 29) The union indicates that Betley was "quite concerned as to the interplay between criminal and civil concerns for the grievants" and had counsel for the union "correspond to the City law director cautioning of 'putting the cart before the horse.'" (Union Post-Hearing Brief, page 30) It complains that by settling criminal matters before proceeding with administrative matters, "the entire matter has been tainted ... and not in a good way, including the possibility of conflicts of interest." (Ibid.)

The union argues that the grievants were subject to disparate treatment. It points out that a spreadsheet prepared by Betley shows that "rarely did omissions of administrative protocol such as failing to access AVL, failing to request permission to participate in an event, failing to be wholly aware of subordinates' actions were failing to follow General Policy Orders to the

‘T’ ... result in unpaid suspension for a first action.” (Ibid.) The union notes that since the grievants had no prior discipline, they were denied the “accepted concept” of corrective/progressive discipline.

Conclusion

The union summarizes its position regarding the five grievants as follows:

In reviewing the record as a whole relative to grievants Lockwood, Martinez, Bickerstaff, Edens and Gallagher, it seems rather obvious that they were pawns in an unfortunate game of chess on November 29, 2012 and thus expendable disciplinary-wise. These five were given to suffer the indignation of the public-at-large despite performing their respective roles on the night at issue. And that indignation was fueled by allegations by their employer that they failed in their assigned duties on November 29, 2012 by not supervising subordinates and improper use or non-use of the Automatic Vehicle Locator (AVL) among other administrative shortcomings.

To be sure, with the exception of Sergeant Edens, which Edens categorically denies, none were even close to the pursuit let alone in the pursuit. Sergeant Lockwood only left the Second District after the pursuit had ended and then only to check on his subordinates who improperly and without permission participated in the pursuit. However, the subordinates failed to follow protocol and request permission of Sergeant Lockwood [and] he had absolutely no way of knowing what they were doing. Sergeant Lockwood fully aware of the pursuit “stayed at home” in the Second District since other district supervisors engaged the pursuit. In a word he did what most others were accused of not doing, namely their original assignments on November 29, 2012.

In that regard Sergeant Martinez also remained in the Second District aware that other district supervisors were engaged in the pursuit. Not until nearly an hour after the pursuit had terminated and then at the direction of his immediate superior Captain Zouhar, did Martinez leave the district. Moreover when on the scene in East Cleveland he did what he was told to do by the captain. Stay in the car and monitor Second District radio traffic. Being under the direct control of the captain at all relevant times there was little else he could do without risking being insubordinate.

Likewise in the Third District Sergeant Edens was beholden to the direction of his immediate supervisor, Lt. Wilson. Specifically Lt. Wilson was a passenger in a police car being driven by Edens at the lieutenant’s request. From Sergeant Edens’ testimony it was the lieutenant with the suggestion to “go, go, go” that in truth set the tone for the sergeant’s actions. Consequently and while acknowledging that

Sergeant Edens was at or near the pursuit at relevant times, he was there because the lieutenant wanted to be there. Once in East Cleveland Sergeant Edens again performed those tasks as requested by supervision. He also assessed his own subordinates' wellbeing. Much like Sergeant Martinez there was little that Edens could do differently without risking insubordination.

As for the other Third District sergeants who are grievants, namely Bickerstaff and Gallagher, the evidence fails to support the allegations of rules violations. Sergeant Bickerstaff as the evidence supports was not only aware of the pursuit but transmitted a terminate directive for Third District personnel. This in fact mirrored other termination orders for Third District folks. The simple fact that he did listen to the transmissions and take appropriate supervisor action undercuts the City's allegations of not taking action. In relation to the colocation of the sergeant and his Daily Duty Report and his AVL, his testimony that being in the vicinity of East 82nd Street was appropriate. He lives in the area and it is adjacent to the Third District while bordering the Fifth District. Moreover the times in question of his colocation bear no relationship to the pursuit issue. This alleged "failure" was before the pursuit began.

Sgt. Gallagher, as the evidence supports, spent the majority of the time during the actual pursuit within his assigned Sector 2 of the Third District. Only after shots were fired did he proceed to East Cleveland and rendered whatever assistance was requested of him. He also checked on his immediate assigned subordinates in East Cleveland and, assured of their wellbeing, immediately directed them back into service in the Third District. He himself returned to service within the Third District after remaining in East Cleveland for a scant 20-25 minutes. And as all other of the grievants who were charged with failing to supervise by virtue of not knowing that some of their subordinates were in East Cleveland, all assumed the subordinates would not be there since none requested permission.

As stated above these five grievants, as were previous supervisor grievants, were mere pawns in an unfortunate game of chess. For the City to cavalierly level charges of failing to supervise, failing to check AVLS, and in general failing to adhere to General Police Orders on vehicle pursuits that existed on November 29, 2012, begs the question. These five grievants were in the top 10% of performing sergeant supervisors within the Cleveland Division of Police. All had impressive commendations and evaluative portfolios. All had been free of actionable discipline. All had performed in the manner each thought appropriate given that the only hands-on vehicle pursuit training they had was in the police academy when first hired. And all performed as best they could with the limited physical assets at hand including poor communications, lack of stop sticks and even questionable vehicles owing to the vehicles being ill-equipped. Lastly, the unfortunate ending of the pursuit in East Cleveland had absolutely no relationship to these grievants. Nothing they did or did not do on November 29, 2012 would have altered the outcome. (Union Post-Hearing Brief, pages 32-34)

The union asks the Arbitrator to sustain the grievances and restore the grievants to their “pre-pursuit status.” It adds that if the Arbitrator finds the grievants committed “some technical oversight,” he should be sure that any discipline is consistent with the principles of progressive and corrective discipline.

ANALYSIS

The instant dispute involves five separate grievances. In each case, the city argues that there was just cause to discipline the grievant and that the penalty it imposed was proper. The union charges that the city’s actions violated Article II, Section 2(e), of the collective bargaining agreement, which requires just cause to suspend, discipline, demote or discharge an employee. It claims that even if there was just cause for discipline, the penalties were excessive.

Just Cause for Discipline

The Arbitrator believes that there was just cause to discipline the grievants. Section 9.1.03 of the General Policies and Procedures requires sergeants to “actively” supervise their subordinates. The record establishes that the grievants failed to meet this requirement. Among other things, one or more of the grievants did not use the AVL system to check on their subordinates; did not disregard late responding cars; did not monitor the radio; and did not inquire about pending assignments.

Proper Penalties

Once it is determined that there is just cause for discipline, the issue becomes the proper penalty. Arbitrators have different views regarding their role in reviewing disciplinary penalties

imposed by an employer.² Some Arbitrators believe that they should not alter a penalty unless the employer acted in an arbitrary, capricious, or discriminatory manner. Most Arbitrators, however, will modify a penalty if they find that it is unreasonable under all of the circumstances or not consistent with accepted standards of discipline.

In the instant case, the positions of the parties regarding the penalties are clear. The city argues that the penalties were justified by the grievants' multiple failures to meet their job responsibilities and because of the impact their behavior may have had on the events of November 29, 2012. The union contends that the severe penalties imposed on the grievants are the result of the city's failure to use progressive discipline. It further maintains that the events in question constituted a "systemic failure" rather than a failure by the grievants and that the severity of the penalties was due to public pressure rather than the grievants' offenses.

Progressive Discipline - The Arbitrator must reject the union's claim that the city was required to use progressive discipline and failed to do so. While most Arbitrators consider the use of progressive discipline as necessary to meet the just cause standard for discipline, they also recognize that it is not required in every case.

The instant case is one of those times when the usual steps of progressive discipline, typically beginning with a verbal warning, do not have to be followed. A pursuit involving 62 police cars, 105 police officers, passing through several cities, lasting 22 minutes, and leading to the shooting death of two unarmed civilians suggests that the initial steps of progressive discipline are not applicable.

Systemic Failure - While the events of November 29, 2012, may or may not have constituted a "systemic failure," as noted in the case involving Donegan, Wilson, and Zouhar,

² See the discussion on pages 15-33 - 15-39 of the Seventh Edition of Elkouri and Elkouri's How Arbitration Works.

American Arbitration Association Case No. 53 390 00288 13, which was decided by this Arbitrator on June 12, 2014, some of the union's complaints have merit. First, the Arbitrator believes that certain resources which should have been available to the Police Officers during the pursuit were not available to them. The Road Spikes Policy describes the use of the stop sticks and indicates where they are and how they are to be deployed. It is undisputed that either they no longer existed or could not be located. If the stop sticks had been available, it is possible that their deployment could have ended the pursuit much sooner and perhaps the events that occurred at Heritage Elementary School in East Cleveland could have been avoided.

Second, the Arbitrator believes that more extensive pursuit training would have been useful. The record indicates that there was limited training in vehicle pursuits beyond the training that Police Officers received in the Police Academy. If nothing else, additional training may have resulted in more compliance with the Vehicle Pursuit Policy, including by Patrolmen who appear to have ignored some of the requirements of the policy. Clearly, any ambiguity about who is responsible for monitoring a pursuit should have been eliminated.

Third, as noted by Attorney General DeWine, the radio communications system may have contributed to the problems on November 29, 2012. At the time of the pursuit, each district had its own radio channel and a department policy prohibited linking the channels together. Since a pursuit is monitored by the supervisor of the Patrolman initiating the pursuit on his district's radio channel, Police Officers in other districts are required to monitor a second radio channel. In addition, information regarding a pursuit must sometimes be relayed from the dispatcher for one district to the dispatcher for another district for broadcast over the second district's radio channel. While the city was aware of the limitations of its radio communications

system and may have been working to find a solution, they may have contributed to the events at issue in this arbitration.

Based on these factors, the Arbitrator concludes that despite the city's denial, it bears some of the responsibility for the events of November 29, 2012. This finding must be taken into account in determining the propriety of the penalties imposed on each of the grievants.

Public Pressure - The Arbitrator does not believe that the union was able to establish that the severity of the penalties imposed on the grievants was the result of public pressure. The city acknowledges that the public expected "heads to roll" but it attempted to reduce public pressure by creating the CIRC to promptly investigate the events of November 29, 2012, and by making public a one-hour video presentation of the pursuit using footage from numerous surveillance cameras along the route of the pursuit and the AVL system to show the location and identity of the Cleveland police cars in the pursuit.

In any event, even if the city was subject to public pressure to severely punish the grievants, the Arbitrator's decision is not driven by public opinion. It is based on five days of testimony and a large number of exhibits, including the video of the pursuit; the transcripts and recordings of the grievants' multiple interviews; the BCI report to Cuyahoga County Prosecutor McGinty; the comments of Attorney General DeWine; and all of the documents related to the disciplinary process. The evidence and testimony are viewed in the light of well-established principles of labor arbitration to determine whether the penalties imposed by the city were proper.

Conduct of the Grievants

The Arbitrator believes that it is appropriate to divide the grievants into two groups. Three of the grievants, Bickerstaff, Edens, and Gallagher, were Sector Supervisors in the Third

District where Bickerstaff, Shepard, and the district dispatcher broadcast orders over Channel 3 that Third District patrol officers should not join the pursuit or should disengage from the pursuit. While this does not absolve Bickerstaff, Edens, and Gallagher of responsibility for determining the locations of their subordinates, it would not have been entirely unreasonable for them to have assumed that their subordinates heard the orders and complied with them.

The two remaining grievants, Lockwood and Martinez, were Second District Sector Supervisors. In the Second District, no orders were broadcast over Channel 2 directing patrol officers not to join the pursuit or to disengage from the pursuit. This makes Lockwood's and Martinez's failure to determine the whereabouts of their subordinates a more significant shortcoming and justifies more severe penalties in their cases than in the cases of Bickerstaff, Edens, and Gallagher.

Sergeants Jason Edens and Matthew Gallagher - The union was unable to establish that the discipline imposed on Edens and Gallagher was unreasonable or out of line with accepted standards of discipline. First, while the city must bear some responsibility for the events of November 29, 2012, Edens and Gallagher failed to fully meet their supervisory responsibilities. If they had more actively monitored the pursuit and their subordinates, the pursuit might not have involved 62 cars and would not have left the Third District without the usual complement of cars to respond to calls for service.

Second, the penalties imposed on Edens and Gallagher cannot be characterized as "severe." They were suspended for three days but two of the days were held in abeyance. Given their employment records, it is unlikely that they will serve more than a one-day suspension.

Third, Edens and Gallagher received significantly less severe penalties than Third District Lieutenant Wilson. In AAA Case No. 53 390 00288 13, this Arbitrator concluded that Wilson's

open-ended demotion to Sergeant was excessive and unreasonable and returned him to the rank of Lieutenant on July 12, 2014. Wilson, however, still lost more than \$10,000 in pay, which is roughly equivalent to a 40-day suspension.

Sergeant Mark Bickerstaff - While Bickerstaff is also a Third District Sector Supervisor, his case is different from Edens and Gallagher. Bickerstaff's 10-day suspension is based not only on his failure to supervise his subordinates but on two additional factors. First, GPO 1.2.02 requires an officer to remain in his assigned district "unless engaged in exigent law enforcement action or otherwise on other City employment-related activity pre-approved by a superior officer." During the investigation of the pursuit, an examination of AVL records revealed that Bickerstaff left the Third District for approximately 30 minutes and failed to report it in his Daily Duty Report.

Second, while the other grievants in the instant case and in AAA Case No. 53 390 00288 13 had no prior discipline, Bickerstaff had prior discipline. Chura testified that the severity of his discipline was based in part on his "past disciplinary history" and claimed that Bickerstaff was fortunate to have avoided even more severe discipline. (Arbitration Hearing Transcript, page 75)

While Bickerstaff served a longer suspension than Edens and Gallagher, as noted above, Wilson, even with the Arbitrator's decision to restore him to the rank of Lieutenant on July 12, 2014, received a significantly more severe penalty than Bickerstaff's 10-day suspension.

Sergeants Brian Lockwood and Richard Martinez - The Arbitrator believes that the ten-day suspensions imposed on Lockwood and Martinez are not inappropriate. Both failed to use the AVL system to check on their subordinates, who as noted above, had not been ordered not to join or to disengage from the pursuit. As a result, 7 of Lockwood's 10 subordinates and 8 of Martinez's 9 subordinate were involved in the pursuit.

The Arbitrator notes that other Second District Supervisors received significantly more severe penalties than Lockwood and Martinez. In AAA Case No. 53 390 00288 13, this Arbitrator held that Captain Zouhar, who was the highest ranking officer on duty in the Second District and in the city, failed to see that his Sector Supervisors properly performed their duties and did not check on pending priority assignments. While the Arbitrator modified Zouhar's open-ended demotion to Lieutenant by returning him to his former rank on July 12, 2014, Zouhar's 13-month demotion cost him nearly \$13,000 in pay, which is roughly equivalent to a 40-day suspension.

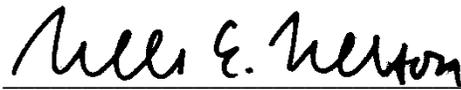
Sergeant Donegan was the other Second District Supervisor involved in AAA Case No. 53 390 00288 13. While the Arbitrator could not uphold his termination, he reinstated him as a patrolman and restored him to the rank of Sergeant on July 12, 2014. This resulted in a substantial loss of pay, which was equivalent to a lengthy suspension -- a significantly more severe penalty than Lockwood's or Martinez's 10-day suspension.

Conclusion

While the Arbitrator might have chosen different penalties than the city imposed on the grievants, as noted above, he cannot modify a penalty unless the record indicates that it is unreasonable or inconsistent with accepted standards of discipline. In AAA Case No. 53 390 00288 13, the Arbitrator concluded that the discipline imposed on Donegan, Wilson, and Zouhar was unreasonable and exceeded the accepted standards of discipline but the Arbitrator cannot reach that conclusion with respect to the discipline imposed on Bickerstaff, Edens, Gallagher, Lockwood, and Martinez. For that reason, he must deny their grievances.

AWARD

- 1) The grievance filed by Sergeant Mark Bickerstaff is denied.
- 2) The grievance filed by Sergeant Jason Edens is denied.
- 3) The grievance filed by Sergeant Matthew Gallagher is denied.
- 4) The grievance filed by Sergeant Brian Lockwood is denied.
- 5) The grievance filed by Sergeant Richard Martinez is denied.



Nels E. Nelson
Arbitrator

October 30, 2014
Russell Township
Geauga County, Ohio

American Arbitration Association

LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

City of Cleveland

and

Fraternal Order of Police, Lodge No. 8

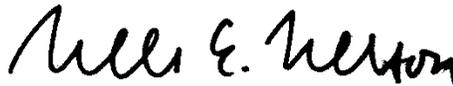
CASE NUMBER: 53 390 00289 13

AWARD OF ARBITRATOR(S)

I (WE), THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the arbitration agreement entered into by the above-named parties and dated April 1, 2010, and having been duly sworn and having duly heard the proofs and allegations of the parties, AWARD as follows:

- 1) The grievance filed by Sergeant Mark Bickerstaff is denied.
- 2) The grievance filed by Sergeant Jason Edens is denied.
- 3) The grievance filed by Sergeant Matthew Gallagher is denied.
- 4) The grievance filed by Sergeant Brian Lockwood is denied.
- 5) The grievance filed by Sergeant Richard Martinez is denied.

October 30, 2014
(Date)



(Signature of Arbitrator)

STATE OF
COUNTY OF

On this day of , 19 , before me personally came and appeared , to me known and he acknowledged to me that he executed the same.