

IN RE: THE GRIEVANCE ARBITRATION
BETWEEN PALM BEACH COUNTY
POLICE BENEVOLENT ASSOCIATION, INC., ON
BEHALF OF CITY OF RIVIERA BEACH, FLORIDA
POLICE OFFICER MR. NIR MORDECHAY,

PBA/Grievant,

and,

FMCS Case No. 16-51316-3

CITY OF RIVIERA BEACH FLORIDA,
POLICE DEPARTMENT,

City/Department.

ARBITRATION OPINION AND AWARD

Arbitrator: Martin A. Soll, Esq.

For the PBA/Grievant:

Lawrence Fagan, Esq.

Legal Counsel

Palm Beach County Police Benevolent Association, Inc.

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For the City/Department:

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Witnesses:

Captain Tanzy Vassell; Mr. Keon Dawkins; Ms. Yvonne Luke; Ms. KB; Chief of Police Clarence Williams, III; Assistant Chief of Police David Harris (Retired); Police Officer Joseph Hoffman; Police Officer Cornelius McGriff; Captain John Mammino, Corporal Jeremy Summers; Police Officer/Grievant Nir Mordechay; Sergeant Peter Modica

Collective Bargaining Agreement ("CBA"):

Agreement Between the City of Riviera Beach, Florida and Palm Beach County Police Benevolent Association (Police Officers & Sergeants), October 1, 2013, thru September 30, 2016

JURISDICTION

In this disciplinary arbitration matter, Palm Beach County Police Benevolent Association, Inc. (“PBA” or “Union”) on behalf of City of Riviera Beach (“City”) police officer, Mr. Nir Mordechay (“Mordechay,” or “Sergeant Mordechay,” or “Grievant,” or “Grievant Mordechay”), protests and grieves Mordechay’s November 6, 2015-disciplinary demotion from the rank of police sergeant to police officer. Mordechay has been employed by City’s Police Department (“Department”) since August 2006, and was promoted to police sergeant in May 2011. Other than the instant matter, his work record shows no prior discipline(s). His work record also includes numerous law enforcement commendations, achievement certificates, and appreciation letters (Union Exhibits #2, 4 & 8).

Mordechay’s demotion directly results from his charged inactions and/or failures to investigate, document, and report to his chain of command a January 18, 2015-telephone complaint from Florida Department of Children and Families (“DCF”) Child Protective Investigator (“CPI”), Ms. Yvonne Luke (“CPI Luke,” or “Luke”). CPI Luke’s complaint, as more specifically described below, protested and objected to the January 18, 2015-on duty violative conduct of City Police Officer Jose Hernandez (“Officer Hernandez,” or “Hernandez”), who had accompanied CPI Luke and CPI Melonie Hull that day to an unannounced on-site DCF investigation of reported child abuse and/or neglect at a Riviera Beach home occupied by three minor children and their mother, Ms. JH. Luke’s telephone complaint was directed to Sergeant Mordechay since he was Officer Hernandez’s immediate

sergeant/supervisor.¹

Remaining unresolved, the instant grievance was submitted to binding arbitration before the undersigned neutral arbitrator. Transcribed evidentiary hearings were held at the City's offices on April 18, and 19, 2016, wherein, the parties were accorded the full opportunity to call, examine and cross-examine witnesses and submit all evidence pertinent and material to their opposing positions. On August 22, 2016, the undersigned received opposing comprehensive closing arguments/briefs from each the parties' advocates.²

APPLICABLE COLLECTIVE BARGAINING AGREEMENT
LANGUAGE, AND POLICE DEPARTMENT
RULES AND REGULATIONS

1. Applicable Collective Bargaining Agreement Language

ARTICLE 7: MANAGEMENT RIGHTS

The PBA recognizes that the City has and will continue to retain, whether exercised or not the responsibility and authority to operate and manage its affairs in all respects and the powers or authority which the City has not officially abridged, delegated, or modified by the express provisions of this Agreement, are retained by the City. The rights of the City, through its management officials, shall include, but shall not be limited to the following:

* * *

C. To suspend, demote, discharge or take disciplinary action against employees from duties for just cause.

ARTICLE 21: GRIEVANCE PROCEDURES

¹ The record shows that Officer Hernandez's employment was terminated by City, and, in turn, subsequently grieved and arbitrated. However, the outcome of that arbitration is not known by the undersigned, nor material or relevant to the undersign's disposition of the instant case.

² Because of the undersign's unforeseen illnesses and the voluminous hearing record, additional time was needed to complete this opinion and award.

B. Withdrawal of Grievance

* * *

... The arbitrator shall have no authority to consider or rule upon any matter which ... is not specifically cover by this Agreement;

ARTICLE 22: DISCIPLINE

* * *

Section 2: Disciplinary Action

No bargaining unit employee who has completed the initial probationary period shall be disciplined except for cause. Progressive, consistent, and appropriate discipline will be administered according to the seriousness of the offense. The following disciplinary actions may be utilized and, depending on the severity of the offense, the first action may be at any level including dismissal.

- A. Written Reprimand
- B. Suspension without Pay
- C. Demotion
- D. Dismissal

2. *Applicable Riviera Beach Police Department Rules and Regulations*

PART IV

SECTION II - STANDARDS OF CONDUCT

2.5 Duty to be Familiar with Law and Responsibility of Self and Other Public Officials:

The law enforcement officer shall apply himself to the study of the principles of the laws which he is sworn to uphold. He will make certain of this responsibilities in the particulars of their enforcement, seeking aid from his superiors in matters of technicality or principle when these are not clear to him; he will make special effort to fully understand his relationship to other public officials, including other law enforcement agencies, particularly on matters of jurisdiction, both geographically and substantively.

SECTION II - ADMINISTRATION AND SUPPORT

POLICY 2.32 COMPLAINT PROCESS:

1.1 POLICY:

The Department will investigate all allegations of employee misconduct appropriately and promptly and those against the Department regarding police actions or responsibility by appropriate Shift Lieutenants or, designated Supervisors when the best interest of the employee and the Department can be served in this manner.

1.2 PROCEDURE:

- A. Complaints of all types will be directed to the Shift Lieutenant or designated Supervisor or the available Supervisor on duty.
- B. The Supervisor who receives the information concerning a complaint will meet, if possible, in person with the complainant and verbally ascertain the nature of the complaint and take appropriate action to resolve the complaint.

* * *

- F. The Supervisor receiving the complaint, upon determining the nature of the complaint, will initiate the recording or documenting of the complaint form and any or all subsequent detailed statements should be attached.

* * *

- I. If the Supervisor determines that the seriousness of the complaint warrants a formal, investigation, then a complaint form will be completed by the Supervisor, and forwarded through the chain of command.

* * *

- N. Any complaints documented and resolved by the appropriate supervisor shall be forwarded to the Internal Affairs Authority for filing within twenty-four (24) hours (excluding weekends and holidays).

PART IV, SEC IV - NEGLECT OF DUTY OFFENSES

4.24 Citizen Complaints to be Recorded:

Riviera Beach Police Department personnel shall courteously and promptly adhere to policies and procedures established for processing citizen complaints (A violation is subject to reprimand, suspension, and/or demotion, or dismissal.)

4.14 Neglect of Duty Loafing, Inattention to Duties/Procedures:

Riviera Beach Police Department personnel shall be attentive to job duties and shall avoid any appearance of loafing or neglecting work while on duty. Riviera Beach Police Department personnel shall adhere to standard operating procedures, policies and directives, and shall faithfully execute all the duties and responsibilities of their assigned position (A violation is subject to reprimand, suspension, and/or demotion, or dismissal.)

6.57 Untruthfulness:

Riviera Beach Police Department personnel shall not knowingly make false or untrue statements except as authorized in the performance of duties and as necessary for maintaining covert operations during investigation of criminal activities. (A violation

is subject to reprimand, suspension, and/or demotion, or dismissal.)

ISSUE

Did City of Riviera Beach have just cause to demote Grievant Nir Mordechay from police sergeant to police officer?

CHRONOLOGICAL OVERVIEW OF THE CASE AND THE RELEVANT DOCUMENTARY EVIDENCE AND TESTIMONY

January 18-23, 2015

The record shows that on January 23, 2015, City's senior management first became aware of CPI Yvonne Luke's January 18, 2015-telephone complaint to then Sergeant Mordechay. On that date/January 23, 2015, a copy of the below quoted January 18, 2015-email from CPI Luke to her DCF chain of command describing the events on January 18, was provided to City's Chief of Police, Clarence Williams, III ("Chief of Police Williams," or "Chief Williams"). The email (City Exhibit #1), stated, in relevant part, as follows:

From: Luke, Yvonne
Sent: Sunday, January 18, 2015 - 10:08 P.M.
To: Dawkins, Keon; Vazquez, Patricia
Subject: Riviera Beach PD incident.

Per our conversation, I am sending you and Patricia Vasquez this email I did notify Sgt. Mordechay . . . [i.e., Officer Hernandez's] commanding officer of the incident. He [Sergeant Mordechay] was very nonchalant about it.

On 1/18/15 approximately 4:30 P.M., we (CPI Luke and CPI [Melonie] Hull) arrived at the Riviera Beach Police Department to seek assistance in commencing [child abuse/neglect] report #15015634. [City Exhibit #13 ³].

³ The record shows that child abuse/neglect report #15015634 (City Exhibit #13) concerned three minor children and their mother, Ms. JH. The report was initiated by Ms. KB (i.e., the

About 4:50 P.M. Police Officer Hernandez arrived in the lobby [of the Police Department] and I handed him a copy of the [child abuse/neglect] report [#15015634]. He [Officer Hernandez] is familiar to me because he has assisted me on many signal 16 (child abuse) investigations. He [Officer Hernandez] approached stating in an angry voice “how many times must I tell you not to come to the station when it is almost 5:00 P.M..” “He [Officer Hernandez] stated that now he is not able to leave work on time.” I advised him that this case appears to be about a neighbor dispute and it shouldn’t take up too much of his time.

We left the [Police Department] building together. He [Officer Hernandez] was parked on the west side of the building near the mayor’s parking space. I was parked by the library on the NE corner of the [Police Department] building. I drove around and met with him in the parking lot. He [Officer Hernandez] drove off ahead of me. CPI Hull realized that she had left her phone in the lobby. I blew the horn and flash[ed] the lights [at Officer Hernandez’s police car] in an attempt to get him to stop, but he continued. CPI Hull retrieved her phone and we proceeded to the address [of the child abuse/neglect investigation, i.e., at 1408 . . . in Riviera Beach].

When we arrived at the address, Officer Hernandez was sitting in his vehicle in front of 1408 . . . , Riviera Beach, FL. We approached the home

neighbor and/or the reporter), who lives in the house next store to Ms. JH and her children. The record also shows that the mother/Ms. JH, was subject to ongoing Department of Children and Families (“DCF”) child care investigations and monitoring.

Ms. KB’s complaint was received by DCF at 6:56 p.m. on January 17, 2015. It stated the following:

The mother [Ms. JH] doesn't properly supervise her children. They are constantly vandalizing neighbors property and picking on other children. They have slapped another child in the face and hit another with a padlock. The mother does nothing to stop this, despite reports to law enforcement and complaints from the neighbors to the mother. She always gets upset with the neighbors who complain and threatens them. She blames [her son’s ...] behavior on ADHD. The children don’t appear to go school because they are always home and about the neighborhood. The mother is not employed. She does not get along with her neighbors. The family has no water, and they steal water from neighbor's homes. There is laundry piled in the laundry room to the point that it is spilling out into the yard and the door will not close. There are clothes and shoes in the yard. The children wear the same clothes for three days in a row. The clothes are dirty. The family is illegally getting electricity. They have no food in the home and the children are always begging neighbors for food, saying they are hungry and don't have food. There are three children who belong to the mother, and "Fat Mac." There may be other children and adults living in the home, but their names and relationships are unknown. (City Exhibit #13).

and knocked on the door, but no one answered. We knocked several more times, and again no one answered. He handed me back the copy of the [child abuse/neglect] report and we left the area.

Prior to commencing the case and [while] waiting in the [Police Department's] lobby, CPI Luke (this writer) spoke [by telephone] to the reporter [i.e., Ms. KB, the neighbor who initiated the child abuse complaint being investigated, who lived next store to the 1408 . . . Riviera Beach address] who stated that the family [i.e., the mother and her minor children] w[ere] home. [This] CPI advised the reporter [i.e., Ms. KB/neighbor] that she [i.e., CPI Luke] was on the way [to the 1408 . . . Riviera Beach home]. After leaving the home, [this] CPI made contact [by telephone with] the reporter [Ms. KB/neighbor] once more. The reporter [Ms. KB/neighbor] advised [me] that prior to CPI's [i.e., Luke and Hull's] arrival on the scene, [the] LE [i.e., "law enforcement" Officer Hernandez] made contact with the family. The reporter [Ms. KB/neighbor] observed the family running from the home and [the] LE returning to his [police] vehicle, and then CPI[s] [Luke and Hull] arrived [on the scene at the 1408 . . . Riviera Beach house].

The reporter [Ms. KB/neighbor] stated it is not a problem to give [a] written statement to attest to the above. (City Exhibit #1).

Likewise, on January 23, 2015, having reviewed CPI's Luke's above quoted email, Chief of Police Williams then directed the Department's Internal Affairs ("IA") commander, Captain Tanzy Vassell, to initiate a Department IA investigation of the January 18 events.

January 27-March 18, 2015

From January 27, thru March 18, 2015, Captain Vassell conducted sworn recorded interviews (hereinafter, for brevity, "sworn interviews") of, among others, CPI Yvonne Luke, CPI Melonie Hull; Sergeant Nir Mordechay; Officer Jose Hernandez; Ms. JH (the mother, of the three minor children being investigated by DCF on January 12, 2015); and Ms. KB (i.e., the reporter/neighbor, who lived next door to Ms. JH, and who reported the alleged child abuse/neglect of Ms. JH's minor children to DCF).

Similar to her arbitration testimony here, Captain Vassell's detailed written summaries

of the sworn interviews of Sergeant Mordechay; Officer Hernandez; CPI Luke, Ms. JH, and Ms. KB, stated, in relevant part, as follows:

A. SYNOPSIS OF COMPLAINT

Subject: Sergeant Nir Mordechay

On January 18, 2015 [at or about 4:30 p.m.], Child Protective Investigators (CPI) Yvonne Luke and Melonie Hull from the Florida Department of Children and Families ["DCF"] presented themselves at the Riviera Beach Police Department requesting assistance in order to conduct a welfare check.

Prior to leaving the Police Department, CPI Luke made [telephone] contact with the neighbor [/reporter], Ms. KB, to confirm if the family [being checked/investigated] was at the[ir] [Riviera Beach] residence. Upon the arrival of CPI[s] Luke and Hull [at the residence, at or about 5:00 p.m. on January 18], Officer Fernandez escorted them to the residence [of Ms. JH], wherein they knocked on the door and no one answered.

Prior to leaving [Ms. JH's] residence, CPI Luke made [a second telephone] contact with Ms. KB [i.e., the neighbor/reporter], who alleged that an officer [i.e., Officer Hernandez] made contact with the residents prior to the arrival of CPI[s] Luke and Hull. Specifically, it was alleged [by the neighbor/reporter, Ms. KB] that after the officer [i.e., Officer Hernandez] made contact with the residents, they were seen [by her, i.e., Ms. KB] running from the residence, at which time, the officer [i.e., Officer Hernandez] returned to his police vehicle to await the arrival of the CPIs [Luke and Hull at the residence].

After hearing the neighbor's [/reporter's] allegations, CPI Luke contacted her [immediate DCF] supervisor, Keon Dawkins, and explained the allegation as it was told to her [by the neighbor/reporter - Ms. KB]. Supervisor Dawkins informed CPI Luke to contact Officer Fernandez's immediate [Riviera Beach Police Department] supervisor in reference to the allegation. CPI Luke made contact with Officer Hernandez's supervisor, Sergeant Nir Mordechay, and told him about the [neighbor/reporter's, i.e., Ms. KB's] allegations.

After making contact with Officer Hernandez's supervisor, CPI Luke made contact with [her own supervisor] Mr. Dawkins and informed him that she did not believe that the complaint [against Officer Hernandez's actions] was taken seriously by Sergeant Mordechay. Mr. Dawkins then advised CPI Luke to send an email to the Riviera Beach Police Department's law enforcement liaison Ms. Patricia Vasquez.

This email [from CPI Luke, dated January 18, 2015, City Exhibit #1] was then forwarded to the Riviera Beach Chief of Police [Williams] on January 23, 2015, to look into the allegations. Following receipt of [CPI Luke's January 18, 2015-email] complaint from the Chief of Police, the

undersigned [IA] investigator [Captain Tanzy Vassell] began this [IA] investigation [Case #15-01]. (City Exhibit #3).

B. INVESTIGATIVE SUMMARY

On January 18, 2015, CPI[s] [Yvonne] Luke and [Melonie] Hull presented themselves at the Riviera Beach Police Department requesting [police] officer assistance in order to conduct a child welfare check at 1408 . . . in Riviera Beach.

Upon arrival at the Police Department, Investigator Luke contacted the Riviera Beach Dispatch to request officer assistance to escort them to the aforementioned address regarding their investigation.

In a sworn recorded interview, CPI Luke and CPI Hull stated that prior to leaving the Police Department, she [CPI Luke] called the neighbor [/reporter], Ms. KB, to ascertain whether the family was home. During a sworn recorded interview, Ms. KB [the neighbor/reporter] confirmed that she received a call from CPI Luke to confirm whether the family was at the [1408] residence [in Riviera Beach].

Officer Jose Hernandez was dispatched to the lobby of the Police Department and met with the DCF investigators [Luke and Hull]. Officer Hernandez was briefed and given a copy of the [above quoted/City Exhibit #13] report containing the allegations and all other information regarding the family. All parties left the lobby together, to go to their vehicles and were in route to conduct the investigation.

During the commute to the [1408] address, CPI[s] Luke and Hull (who were in the same vehicle) stated that they had to return to the Police Department because CPI Hull left her cellular phone in the lobby. CPI[s] Luke and Hull stated that they tried to get Officer Hernandez's attention to let him know that they had to return to Police Department. However, they were unsuccessful.

In a sworn recorded interview, Officer Hernandez acknowledged that he arrived at [the] 1408 [address of the residence in Riviera Beach] before the DCF investigators [arrived at the residence], and parked in front of the driveway facing west. Officer Hernandez acknowledged that there was a car in the driveway facing the house. Officer Hernandez stated that he exited his vehicle, because he saw a female, "Coming out, walking down the ramp," and he wanted to, "make sure it wasn't the person who we were supposed to see" [i.e., Ms. JH, the mother of the three minor children].

In a sworn recorded interview, Officer Hernandez said that he asked the female if she was [the mother of the minor children] Ms. JH, and the female replied, "Why?" Officer Hernandez stated that he told the female, "Well because DCF needs to speak to you." Officer Hernandez stated that the female replied, "Nope," got in the car that was already in the driveway and left the residence. Officer Hernandez stated that he returned to his vehicle to wait for the DCF investigators [Luke and Hull]. During Officer Hernandez's Interview, he maintained that he did not have the right to detain

the female - whom he states he did not know was [the mother] Ms. JH.

In a sworn recorded interview, Officer Hernandez stated that he returned to his vehicle to wait for the DCF investigators. Officer Hernandez stated that the DCF investigators arrived a short time after and he accompanied them to knock on the door of the residence. Officer Hernandez stated that no one answered the door and they prepared to leave.

In a sworn recorded interview, CPI Luke acknowledged that when she arrived at [the] 1408 [residence in Riviera Beach with CPI Hull] Officer Hernandez was parked in front of the residence on the north side of the street, facing west. CPI Luke stated that Officer Hernandez was waiting in his police vehicle. CPI Luke stated that they went to the residence and knocked on the door several times, but no one answered. CPI Luke stated that after they started walking down the stairs [of the residence], Officer Hernandez commented, "Maybe I told them told them to leave." CPI Luke stated that she laughed and said, "You probably did."

In a sworn recorded interview, CPI Luke stated that prior to leaving the residence, she called [the neighbor/reporter] Ms. KB, who stated that [the mother] Ms. JH and her family were at home prior to their arrival [at the 1408 residence/home], but left after Officer Hernandez exited his vehicle and approached the residence.

In a sworn recorded interview, CPI Luke stated that after she returned to her office, she contacted her supervisor, Keon Dawkins, who informed her to contact Officer Hernandez's supervisor and ask him to look into the allegations that were made by [the neighbor/reporter] Ms. KB. CPI Luke stated that she called Riviera Beach [Police] Communication/Dispatch and left a message for Sergeant Nir Mordechay. The Police Department's Communications/Dispatch recorded line reflects that on January 18, 2015, at approximately 17:23 (5:23 p.m.), CPI Luke contacted Communications/Dispatch and requested to speak to Officer Hernandez's supervisor (Sergeant Mordechay).

In a sworn recorded interview, CPI Luke acknowledged that she received a return call from Sergeant Mordechay, Officer Hernandez's supervisor. CPI Luke stated that she relayed the information to Sergeant Mordechay as it was told to her by [the neighbor/reporter] Ms. KB, and asked him to look into the matter. CPI Luke stated that she did not believe the complaint [she] made to Sergeant Mordechay was taken seriously. CPI Luke also stated that she never received a follow up telephone call from Sergeant Mordechay.

In a [June 8, 2015] sworn, recorded interview [Union Exhibit #1], Sergeant Mordechay acknowledged that he returned CPI Luke's telephone message left with Communications/Dispatch, and was informed of the [the neighbor/reporter, Ms. KB's] allegations. The Police Department's phone log for the District Two Sergeant's Office [City Exhibit #5] reflects that on January 18, 2015, at approximately 17:25 hours (5:25 p.m.), Sergeant Mordechay returned CPI Luke's telephone message that was left with

Communications/Dispatch. The call lasted for six (6) minutes [i.e., from 5:25 p.m. to 5:31 p.m.]

Sergeant Mordechay stated that after the [phone] conversation with CPI Luke, he [personally] met and questioned Officer Hernandez regarding the allegations. Sergeant Mordechay stated that Officer Hernandez denied the allegations. Sergeant Mordechay stated that following this discussion [with Officer Hernandez], he called CPI Luke several times, but was unsuccessful in making contact with her.

Based on the phone records of CPI Luke's cell phone carrier [City Exhibit #4] and from the District Two Sergeant's Office [City Exhibit #5], there was only one outgoing call made to CPI Luke on January 18, 2015, from the District Two Sergeant's Office - the six minute call that lasted from 17:25 hours (5:25 p.m.) through 17:31 hours (5:31 p.m.).

While not determinative of the outcome of the instant case - which is limited to the resolution of Sergeant Mordechay's demotion grievance - the undersigned, however, takes notice that Officer Hernandez's "denial of the allegations" appears to be undermined (in legal terms, "impeached") by the below quoted April 18, 2016, eyewitness arbitration testimony of the neighbor/reporter Ms. KB, who lived right next door to the mother's/Ms. JH's house.

In the course of her arbitration testimony (and consistent with her January 27, and February 26, 2015-sworn interviews before Captain Vassell (*see* City Exhibit #3, at pp. 14-22), Ms. KB stated the following when asked by City's counsel Mr. McLean, Esq., among other things (1) why and when she made the above quoted child abuse complaint (i.e., City Exhibit #13) to DCF, and (2) what she personally observed just after Officer Hernandez arrived at the house in his marked police car, at or about 5:30 p.m. on January 12, 2015.

Q. (By Mr. McLean, Esq.)

All right. Were you the reporter [a/k/a neighbor] -- did you report to DCF what you thought might be happening in that [i.e., Ms. JH's, the mother's] house?

A. (By Ms. KB)

Yes.

Q. Okay. Do you remember when you did that?

A. I remember it was in January, and I believe it was the 19th or the 20th [of January 2015] because the day before that, it was a Martin Luther King parade.

* * *

Q. And what did you report to DCF?

A. I called DCF and I made a report that there were some kids that were living next door to me that were hungry, there was no lights, water, or anything in the house. And that I was concerned for the kids under the circumstances that I was also feeding those kids because they were hanging out of their bedroom windows. And if my fiance was barbecuing, they would beg for food. I noticed these kids walking around with the same clothes on three days at a time and not going to school, filthy.

So I called DCF and made a report because the mother [Ms. JH] is there everyday, yet these kids are living in these horrible conditions. And that's not right. I have kids of my own. I would never let my kids be like that, ever.

(Tr. pp. 271-272).

* * *

A. So I observed the SUV [police car] pull up [to the mother's/Ms. JH's house]. I'm familiar with DCF procedures and stuff like that because I've seen it happen with other people, and I know that I just talked to this DCF worker [i.e., CPI Luke], so I know she's [i.e., CPI Luke is] soon to be coming [to Ms. JH's house]. So I know that's why the police is there . . . (Tr. p. 273).

* * *

A. And I'm standing in my window here and I observed this officer [i.e., Officer Hernandez] get out of his SUV. He gets out of the [police] car and he walks up to the door [of Ms. JH's house]. I'm standing there watching, why is he going to the door without DCF? I said, "Okay. Well, I'm just going to stay here and see what's going on here." I give them two minutes. They -- he comes out, the [police] officer comes out. He's walking, he's looking, looking. I'm still in my window.

Q. And you're turning your head back and forth?

A. He's [i.e., Officer Hernandez is] looking back as he's walking out. The mother, the children, they all come running out of the property. Everybody jumps in a silver Impala, speed up the street. The officer goes back to his [police] vehicle and gets back in.

. . . Next thing you know, here comes the DCF van, which is on the opposite side of the street . . .

The officer [Hernandez] gets out of his car, out of the SUV again, and he meets up with DCF. He's talking to them and they walk up to the residence . . . So then they're [i.e., CPis Luke and Hull, and Officer Hernandez are] not even up there [at the house] not even a minute, they come back. The [police] officer, two DCF workers, they come back. He [Officer Hernandez] goes back to his SUV. The DCF worker gets back in her van. She [CPI Luke] calls me. She said, "Ma'am, I thought you told me they

were there." I say, "She was there until the [police] officer [Hernandez] went over there . . . and she [the mother, Ms. JH] left." (Tr. pp. 274-275).

* * *

Q. Did you say anything [to CPI Luke] about the [silver Impala] car?

A. I told her, I say, "Did you see that silver Impala that just almost ran into your van?"

She [i.e., CPI Luke] was like, "Yes." I said, "Well, the mother and the children were in that car." (Tr. p. 276).⁴

⁴ The undersigned also takes notice that Ms. KB's testimony is corroborated in Captain Vassell's IA summary of the sworn interviews of CPI Luke on January 27, 2015, and the minor children's mother, Ms. JH, on February 19, 2015:

[CPI Luke's January 27, 2015-sworn interview before Captain Vassell]

. . . I [Captain Vassell] asked CPI Luke how she got the information that the reporter [i.e., the neighbor, Ms. KB] gave her as far as the officer [i.e., Officer Hernandez] allegedly making contact with the person that she went to see. CPI Luke stated, "I spoke to her [Ms. KB, the neighbor/reporter] on the phone. I called her. And I met with [the minor children's] mom [i.e., Ms. JH], yesterday [January 26, 2015] at school. Mom confirmed the allegation that he [Officer Hernandez] did say to her, 'Either you're gonna lock your door and not open it, or you're gonna leave now because DCF is coming to get your kids.'" . . . (City Exhibit #3, p. 10).

* * *

[Ms. JH's February 19, 2015-sworn interview before Captain Vassell]

I [Captain Vassell] asked Ms. JH [i.e., the mother of the children being investigated by CPs Luke and Hull on January 18, 2015] if she remembered an officer coming to her residence that day [i.e., on January 18, 2015]. Ms. JH stated, "Yes. Yes." I asked Ms. JH if the officer knocked on the door. Ms. JH stated, "Yeah, knocked on the door." I asked Ms. JH if she answered the door. Ms. JH stated, "Not at first," I asked Ms. JH if she called the police that day. Ms. JH stated, "No. I didn't call the police. I happened to look out the window, and I seen the police, and I opened the door like, what." I asked Ms. JH if she opened the door. Ms. JH stated, "Uh-huh." I asked Ms. JH who was at the door. Ms. JH stated, "A police officer. He [the police officer, i.e., Officer Hernandez] told me that they was coming. He said I didn't have to open - I could - I could close my door and don't come to the door, or, I could be there." I asked Ms. JH to repeat what she said, as I could hardly hear her. Ms. JH stated again, "He [the police officer] told me I could either not come to my door, or I don't have to be there. So my ride was already in the yard."

I asked Ms. JH why the [police] officer allegedly told her the foregoing. Ms. JH stated. "Cause the Department of Children and Families was behind him." I asked Ms. JH if the officer was by himself when he was at the door. Ms. JH stated, "Yes." I asked Ms. JH if he [the police officer, i.e., Officer Hernandez] told her that the Department of Children and Families were coming. Ms. JH stated, "DCF, Uh-huh." I asked Ms. JH to repeat what the officer said again. Ms. JH stated, "He [the police officer] told me they [i.e., DCF] was behind him, and he told me I could either go - they could knock on the door, I don't come to the door, or either I could

October 9-and November 5, 2015

City's specific grounds and reasons for demoting Sergeant Mordechay are detailed in City generated letters dated October 9, 2015 (City Exhibit #17, titled "Recommendation To Administer Disciplinary Action - Sergeant Nir Mordechay - I.A. #15-01" signed and issued by Chief of Police Williams), and November 5, 2015 (City Exhibit #16 - i.e., Sergeant Mordechay's "Demotion Letter," signed by City Manager Ruth C. Jones). The two letters stated and charged, in relevant part, as follows:

City Exhibit #17, dated October 9, 2015

TO: RUTH C. JONES, CITY MANAGER
FROM: CLARENCE D. WILLIAMS III, CHIEF OF POLICE
DATE: OCTOBER 9, 2015
RE: RECOMMENDATION TO ADMINISTER DISCIPLINARY ACTION -
SERGEANT NIR MORDECHAY - I.A. #15-01

leave, so I choose to leave."

I asked Ms. JH if there was anyone else in the house with her at that time. Ms JH stated, "Yeah." I asked Ms JH who else was in the house. Ms JH stated, "My two kids. Only two - I have three, but only two was with me. My two kids - 'cause one of - my oldest boy was going to the skating rink, so I had the two little ones 'cause they wanted to go to Chuck E. Cheese to the party and my boyfriend." I asked Ms. JH to confirm that her two kids and her boyfriend were present at that time. Ms. JH stated, "Uh-huh. And my friend was in the yard. She was in the yard in the car, waiting on me to get ready."

I asked Ms. JH what she did after the [police] officer [i.e., Officer Hernandez] told her the foregoing. Ms. JH stated, he went back in his truck." I asked Ms. JH if it was a marked police truck. Ms JH stated, "Yeah. The white truck. It was like, a little Jeep. Well, I don't know, the Expedition. Whatever it is." I asked Ms. JH what she did at that point. Ms. JH stated, "I left." I asked Ms. JH who she left with. Ms. JH stated, "I left with my kids. Me, my boyfriend, my kids - I left and I ain't come back." I asked Ms. JH what color the car was that she got into. Ms. JH stated, "It was in a gray Impala. As I was leaving, I did see the white van coming. I seen the white van coming when I was going towards S Avenue. I seen the white van coming, and I was like, oh, yeah, they go - they [were] fixing to take my damn kids." "Cause I seen the van, '[be]cause usually they'll come in a car." I asked Ms. JH who is "they." Ms. JH stated, "DCF, Department of Children and Families. When I seen that van - I know that van because I know two kids that done got took before in that same van." (City Exhibit #3, pp. 32-33).

* * *

On January 18, 2015, [Police] Officer [Jose] Hernandez was dispatched to the lobby at the Police Department where he met with the DCF [Child Protective] Investigators ["CPI"] [Yvonne Luke and Melonie Hall] who were requesting assistance in order to conduct a child welfare check. Officer Hernandez was briefed and given a copy of the report containing the allegations and all the pertinent information regarding the family. During this encounter, the DCF Investigators indicated that Officer Hernandez was discourteous toward them.

Upon his arrival at the address, it is alleged that Officer Hernandez exited his police vehicle and made contact with a female [i.e., Ms. JH] at the residence, and thereafter, the occupants [of the house, i.e., the mother, Ms. JH and her minor children] were observed leaving the residence. Officer Hernandez did not tell the DCF investigators of his contact with the female prior to their [i.e., CPI Luke and Hall's] arrival.

On January 18, 2015, the DCF Investigator [Luke] made contact with Sergeant Mordechay [by telephone] and relayed to him the allegations against Officer Hernandez as it was told to her. She [CPI Luke] further asked Sergeant Mordechay to look into the allegations.

Sergeant Mordechay stated that after his [telephone] conversation with the DCF Investigator [Luke], he met with and questioned Officer Hernandez, who denied the allegations. Sergeant Mordechay stated that he attempted to contact the DCF Investigator [Luke] "several times" but was unsuccessful in making contact with her. The DCF Investigator [Luke] stated that she did not receive a follow-up phone call from Sergeant Mordechay.

Based on the telephone records of the DCF Investigator's cell phone carrier and from the District Two Sergeant's Office, there was only one outgoing call made to [CPI Luke] on January 16, 2015, from the District Two Sergeant's Office. It appears that this was the [telephone] call in which Sergeant Mordechay was initially informed about the allegations [against Officer Hernandez, by CPI Luke]. Sergeant Mordechay also did not attempt to meet with CPI Luke, nor did he inform her that she could file a complaint. Sergeant Mordechay's assertion during his IA interview that he believed the [CPI] Investigator [Luke] was satisfied with his investigation makes no sense, in that he never spoke with her to provide an update regarding his findings. Further, Sergeant Mordechay did not prepare a memorandum to his supervisor, or otherwise seek guidance from his supervisor regarding the allegations [against Officer Hernandez].

Conclusion:

Based on my review of the Internal Affairs Report completed in this matter, including all related materials and statements, as well as taking into consideration the statements made by Sergeant Mordechay, his counsel, and others during the Pre-Disciplinary Determination Meeting, there is ample evidence that plainly contradicts Sergeant Mordechay's claim that he attempted to follow up with the DCF Investigator [Luke] "several times," as

he asserted during his IA interview. In this regard, contrary to Sergeant Mordechay's assertions, the Department's [telephone] call log does not reflect *any* other outgoing follow up calls to the DCF Investigator's [i.e., CPI Luke's] telephone number, other than the initial call he made [to CPI Luke] in which she [CPI Luke] initially expressed her concerns with respect to Officer Hernandez. In short, there is no call to the Investigator's cell phone demonstrating an attempt to follow up with her regarding her concern - much less "several" attempts. During Sergeant Mordechay's Pre-Determination Conference, he indicated that he attempted to call the Investigator [Luke], but "accidentally and erroneously misdialed the last two numbers" - with such call being reflected in the District Two Sergeant's Office phone log. I do not find Sergeant Mordechay's assertion credible, particularly when such call only lasted from 17:38 to 17:38, according to the log.

Sergeant Mordechay failed to look into the allegations against Officer Hernandez. He failed to ascertain any information from the DCF Investigator [CPI Luke] regarding the basic details of the complaint. Sergeant Mordechay failed to complete a memorandum seeking aid from, or notifying his supervisor of the DCF Investigator's allegations. Per the Department's policy on the complaint process, allegations of misconduct against employees must be investigated appropriately and promptly and forwarded to the Internal Affairs Authority [IA] for filing within twenty-four hours.

Sergeant Mordechay failed in his responsibilities as a supervisor to seek aid from his superiors in matters of technicality or principle - to the extent they were not familiar to him. Sergeant Mordechay has failed to adhere to the [Police] Department's standard operating procedures; he knowingly failed to execute the duties and responsibilities of his assigned position as a Police Sergeant and he violated the public trust and confidence.

As such, as to the allegations and information contained in the Notice of Intent issued to Sergeant Mordechay dated August 14, 2015, I find the following:

1. 2.5Duty to be Familiar with Law and Responsibility of Self and Other Public Officials **SUSTAINED**
2. Policy 2.32 Complaint Process
 - 1.1.....Policy
 - 1.2.....Procedure (A, B, F, I, N)..... **SUSTAINED**
3. 4.24...Citizen Complaints to be Recorded..... **SUSTAINED**
4. 4.14....Neglect of Duty: Loafing, Inattention to Duties/Procedure **SUSTAINED**
5. 6.57...Untruthfulness..... **SUSTAINED**

Based on the aforementioned, I am recommending [to City Manager Ruth Jones] the following:

- DEMOTION IN RANK FROM POLICE SERGEANT TO POLICE OFFICER

City Exhibit #16, dated November 5, 2015

Certified Mail - Hand-delivered

November 5, 2015

Dear Sergeant Mordechay:

This letter is to advise you that effective Friday, November 6, 2015, you will be demoted in rank from Police Sergeant to Police Officer with the City of Riviera Beach.

This action comes as a result of your violation of the City of Riviera Beach Police Department Policy and Procedure Manual, Rules and Regulations Section II, Part IV-Standard of Conduct: 2.5 Duty to be Familiar with Law and Responsibility of Self and Other Public Officials; Section II-Administrative and Support: Policy 2.32 Complaint Process, Policy 1.1 & 1.2 (A, B, F, I, N); Section IV, Part IV Neglect of Duty Offenses: 4.14 Neglect of Duty: Loafing, Inattention to Duties/ Procedures, 4.24 Citizen Complaints to be Recorded; Section VI, Part IV-Improper Conduct Offenses: 6.57 - Untruthfulness.

The attached memorandum dated October 9, 2015, stated that on January 18, 2015, you were contacted by an investigator from the Department of Children and Families (DCF) [i.e., CPI Yvonne Luke] wherein you were asked to look into allegations against Officer Hernandez. You stated that you met with and questioned Officer [Jose] Hernandez regarding the allegations which he denied. You also stated that you attempted to contact the DCF investigator [CPI Luke] several times, but you were unsuccessful in making contact with her.

Contrary to your assertions, the Department's call log did not reflect any other outgoing call to the DCF Investigator [CPI Luke] other than the initial call you made to her wherein she expressed her concerns regarding Officer Hernandez.

You failed to look into the allegations against Officer Hernandez as reported by the DCF Investigator [CPI Luke]. You also failed to complete a memorandum seeking aid from, or notifying your supervisor of the DCF Investigator [Luke's] allegations. Per the Department's policy on the complaint process, allegations of misconduct against an employee must be investigated appropriately and promptly and forwarded to the Internal Affairs Authority for filing within twenty-four hours.

You failed in your responsibility as a supervisor. You also failed to

⁵ The record also shows that on October 9, 2015, Sergeant Mordechay was issued City Exhibit #18 titled "Pre-Disciplinary Determination Meeting - I.A. #15-01." Since City Exhibit #18 is almost identical to Chief Williams' above quoted October 9-letter to City Manager Ruth Jones (entered as City Exhibit #17), City Exhibit #18 is unnecessary to repeat.

adhere to the Department's standard operating procedures and knowingly failed to execute the duties and responsibilities of your assigned position as a Police Sergeant.

It is very unfortunate that this action must be taken, but violations of this nature by employees will not be tolerated by the City.

* * *

/s/ Ruth C. Jones
City Manager

BURDEN OF PROOF

This being a disciplinary grievance, the burden of proving the issue of whether City had "just cause" to demote Mordechay from sergeant to police officer rests exclusively with the City by at least the preponderance (i.e., more than 50%, and/or the greater weight) of the evidence.

- A. SUMMARY OF CHIEF WILLIAMS' AND GRIEVANT MORDECHAY'S RELEVANT TESTIMONIES, AND**
- B. ARBITRATOR'S PRELIMINARY RULING**

Chief Williams' Testimony

At arbitration, speaking on behalf of the City, Chief of Police Williams capsulized City's reasons Mordechay was demoted, as opposed to a different level of discipline in response to his inactions and/or failures on January 18, 2015. Chief Williams testified, in summary and relevant part, as follows:

- That Grievant's tenure of record, job performance, and past relationship with the Department were considered and taken into account in determining the level of Sergeant Mordechay's discipline. (Tr. p. 709).
- That comparable disciplines with prior City of Riviera sergeant disciplinary cases were **not** taken into account since, according to Chief Williams:

We treat each case - case by case. We -- and each one is different and each set of circumstances is different. We try to be consistent in what it is that we do. And for me, the decision matrix is one that I take seriously. What's in the best interest of the community, what's in the best interest of the department and the individual officers. So that's my matrix as I apply it to any decision that I make within the agency. In this case, we did consider all of those things as we evaluated it and it's, quite frankly, the reason why we're probably talking about [Mordechay's] demotion as opposed to [his] termination [of employment] for the nature of the offense as I understood it and understand it to be based on what was provided to me. (Tr. p. 710).

- That when asked by City's counsel Mr. McLean, Esq., “. . . [h]ow would Sergeant Mordechay doing his job as you [i.e., Chief Williams] see it, following up and doing the investigation, how would that have changed [Sergeant Mordechay's] fate, or would it have changed the fate of Officer Hernandez?” - Chief Williams replied:

It may or may not have changed the fate of Officer Hernandez. It would have certainly changed [Sergeant Mordechay's] fate had he simply done half of what he is required to do as a manager. To me, you can't say that I'm this high-performing manager on one hand, and on the other hand ignore and not -- and mishandle something as critical as this under the circumstances.

Now -- and we can't lose sight of the fact that this was an investigation about children. It was an investigation of a woman who was already on supervised probation for not taking care of her children and the allegations that she was continuing in that vein. So that's the backdrop. (Tr. pp. 718-719).

* * *

- And, in response to an similar question from City's counsel, Chief Williams also testified as follows:

The simple matter as I see it, had the sergeant done his job, you know, not only would he not be here, there may be an officer [i.e., Officer Hernandez] that would still be on the job and working, had he simply done his job. (Tr. p. 717).

* * *

Grievant's Testimony

In the course of his direct examination by his counsel, Mr. Fagan, Esq., Grievant Mordechay, among other things, conceded and/or admitted with contrition his violative

January 18, 2015-overall inactions and/or failures to investigate, document, and report to his chain of command CPI Luke' above described telephone complaint. Mordechay testified as follows:

A. (By Grievant Mordechay)

. . . [In my return telephone call to CPI Luke on January 18 at 5:25 p.m.] [s]he [i.e., CPI Luke] said [to me], we were on a DCF call and a neighbor said that Hernandez told the people that we were going to see [i.e., the mother of the three minor children, Ms. JH] to leave. And [CPI Luke] asked [me], Can you talk to him [i.e., Officer Hernandez] and can you look into it? I said, Yeah, absolutely, I could talk to him [i.e., Officer Hernandez] and look into it, because we don't know if this really happened. I have to talk to him [i.e., Officer Hernandez] to find out both sides of the story.

Q. (By Mr. Fagan, Esq.)

You talked to him [i.e., Officer Hernandez]?

A. Yes, I did.

Q. Did you write this up?

A. No, I did not.

Q. Did you write this up, document it, something?

A. Looking back, had I documented it somehow because I -- had I put it on the documentation just for me, I probably wouldn't be here [at arbitration] right now. So, to answer that question, did I learn from this experience and know that, yes, absolutely, I should have documented it and I should have -- I should obviously document anything from here on out, yeah, I should have at least put it on a documentation for me. (Tr. pp. 592-593).

* * *

In the course of his testimony, Mordechay similarly stated the following:

I, for one, can tell you that if put back with my stripes, I don't care if it's the most minor complaint, that it's going to be documented and a phone call is going to be made and I'm going to do whatever I have to do . . . (Tr. pp. 643-644).

* * *

Arbitrator's Preliminary Finding

Based upon the record as submitted, and particularly the following which the undersigned credits:

1. Grievant Mordechay's immediately above quoted and candid sworn arbitration testimony/admission(s); And,

2. Chief Williams' above described and/or quoted arbitration testimony; And,
3. Captain Vassell's sworn testimony and detailed Internal Affairs Report (City Exhibit #3); And,
4. The above quoted text, conclusions and findings stated in Chief Williams' October 9, 2015- Recommendation To Administer Disciplinary Action letter (City Exhibit #17); And,
5. The above quoted text, conclusions and findings stated in City Manager Ruth Jones' November 5, 2015-letter which demoted Mordechay in rank from sergeant to police officer (City Exhibit #16);

the undersigned finds that Grievant Nir Mordechay's January 18, 2015-above described inactions and/or failures, as charged by City, violated the following provisions of the Riviera Beach Police Department's Rules and Regulations and Policy:

- 2.5 - Duty to be Familiar with Law and Responsibility of Self and Other Public Officials;
- Policy 2.32 - Complaint Process, 1.1 - Policy & 1.2 - Procedures A, B, F, I, N;
- 4.24 - Citizen Complaints to be Recorded; and,
- 4.14 - Neglect of Duty: Loafing, Inattention to Duties/ Procedures.

ARBITRATOR'S ADDITIONAL FINDINGS AND RULINGS

In light of the undersign's immediately above preliminary finding(s), what remains to fully resolve the instant case, accordingly, is PBA/Mordechay's remaining arguments requesting the undersigned set aside Grievant's demotion based upon the following collective and/or individual grounds or reasons.

PBA/Mordechay’s Argument One: *That Mordechay was demoted in response to, or in retaliation for his PBA activities.*

The record shows that since 2013, Mordechay has been a PBA bargaining unit representative, and in 2012, he was instrumental in having PBA certified by Florida’s Public Employee Relations Commission as City’s police officers and sergeants exclusive union representative and collective bargaining agent. (Tr. pp. 558-559). In the course of the arbitration, Mordechay, in summary, testified that he “absolutely believe[d],” that his involvement with bringing or voting in PBA, and his participation in the police bargaining unit’s 2012 or 2013-vote of no confidence against Chief Williams, “has everything to do with this case.” (Tr. pp. 637-641).

The undersigned, however, finds no evidence in the record sufficient to support Mordechay’s belief, or charge, or assertion. The undersigned, accordingly, deems and finds Mordechay’s belief, or charge, or assertion unproven and unfounded, and, thus, insufficient grounds, or reason, or cause to set aside, or otherwise change, or amend, or reduce his demotion.

PBA/Mordechay’s Argument Two: *That City violated the Section 6(a)-180 day statutory time limitation to discipline a Florida police officer stated in Florida’s Law Enforcement Officers’ and Correctional Officers’ [Bill of] Rights statute, Florida Statutes §112.532. (For brevity, “Bill of Rights Statute”).*

Regarding Argument Two, in its closing brief, PBA asserts on behalf of Mordechay, that the below quoted Section 6(a) of Florida’s Bill of Rights Statute:

. . . [r]equires that notice of the intent to discipline the [Florida police] officer must be provided within 180 days after the date the agency [here City’s Police

Department] received notice of the [police officer's] alleged misconduct. §112.532(6)(a)(in pertinent part):

(6) LIMITATIONS PERIOD FOR DISCIPLINARY ACTIONS.—

(a) Except as provided in this subsection, disciplinary action, suspension, demotion, or dismissal may not be undertaken by an agency against a law enforcement officer or correctional officer for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within 180 days after the date the agency receives notice of the allegation by a person authorized by the agency to initiate an investigation of the misconduct. If the agency determines that disciplinary action is appropriate, it shall complete its investigation and give notice in writing to the law enforcement officer or correctional officer of its intent to proceed with disciplinary action, along with a proposal of the specific action sought, including length of suspension, if applicable. Notice to the officer must be provided within 180 days after the date the agency received notice of the alleged misconduct, except as follows:

1. The running of the limitations period may be tolled for a period specified in a written waiver of the limitation by the law enforcement officer or correctional officer.
2. The running of the limitations period is tolled during the time that any criminal investigation or prosecution is pending in connection with the act, omission, or other allegation of misconduct.
3. If the investigation involves an officer who is incapacitated or otherwise unavailable, the running of the limitations period is tolled during the period of incapacitation or unavailability.
4. In a multijurisdictional investigation, the limitations period may be extended for a period of time reasonably necessary to facilitate the coordination of the agencies involved.
5. The running of the limitations period may be tolled for emergencies or natural disasters during the time period wherein the Governor has declared a state of emergency within the jurisdictional boundaries of the concerned agency.
6. The running of the limitations period is tolled during the time that the officer's compliance hearing proceeding is continuing beginning with the filing of the notice of violation and a request for a hearing and ending with the written determination of the compliance review panel or upon the violation being remedied by the agency. (PBA's Brief, pp.15-16)

PBA argues and contends further that:

The phone call between Ms. Luke and Sergeant Mordechay occurred on January 18, 2015. See City #5. An email from DCF containing the complaint about Sergeant Mordechay was sent to the Chief of Police on January 23,

2015. Thus, the 180 [day Bill of Rights Statute time limitation or time] period began to run on January 23, 2015. The Notice of Intent to Administer Disciplinary Action is dated August 14, 2015. See City #19; See City #17; See City #18. This is a time difference of 203 days. The [Bill of Rights] statute is clear as to what is required in order to toll the 180-day period in which to discipline an officer. None of the exceptions expressly provided by the statute apply here. The City's time expired on July 22, 2015. Thus, Sergeant Mordechay cannot be disciplined with a demotion as the statutory period has run. (PBA's Brief, pp. 16-17).

The undersigned, however, finds that even if PBA's above Bill of Rights Statute's time limitation argument is true and legally valid, *arguendo*, the neutral arbitrators chosen by the parties to arbitrate their unresolved grievances have no contractual jurisdiction or authority to consider or rule on Bill of Rights Statute violations in light of the specific and binding language stated in the second sentence of the fifth unnumbered paragraph in Section B of Article 21, on page 30 of the CBA (for brevity, "Article 21-B"). Article 21-B clearly advises and states, "The arbitrator shall have no authority to consider or rule upon any matter which . . . is not specifically covered by this Agreement"

To resolve this Argument Two, the undersigned further takes notice that the parties' CBA contains no language which directly, indirectly, or otherwise incorporates the Bill of Rights Statute, nor any of its language into their CBA. In fact, the CBA makes no mention whatsoever of the Bill of Rights Statute.

It follows, accordingly, and the undersigned so finds and rules, that since the parties' CBA makes no mention whatsoever of the Bill of Rights Statute, and since, per Article 21-B's language that grievance arbitrators have "no authority to consider or rule upon any matter which . . . is not specifically cover by the [Collective Bargaining] Agreement," that City's

alleged violation of the Bill of Rights Statute's 180 day time limitation, even if true, *arguendo*, is not arbitrable. And that being the case, the undersigned further finds PBA/Mordechay's Argument Two insufficient grounds, or reason, or cause to set aside, or otherwise change, or, amend, or reduce his demotion.

PBA/Mordechay's Argument Three: *That City failed to use progressive discipline in this case.*

In support of its Argument Three, PBA contends, in summary, the following:

Sergeant Mordechay has been an exemplary Sergeant and has never before been disciplined by the City. As such, there was no just cause for the City to jump straight to the severe level of discipline of a demotion after finding that Sergeant Mordechay violated department policies by merely failing to write a post-complaint report. Police officers forget to complete reports all the time! (PBA's Brief, p.9).

The undersigned, however, find no merit to the above argument for the following three collective reasons.

First, the argument, on its face, is contractually undermined by the following negotiated language stated in Section 2 of the parties' CBA Article 22/*Discipline*. It states:

Progressive, consistent, and appropriate discipline will be administered according to the seriousness of the offense. The following disciplinary actions may be utilized and, depending on the severity of the offense, the first action may be at any level including dismissal.

- A. Written Reprimand
- B. Suspension without Pay
- C. Demotion
- D. Dismissal

Second, the undersigned finds that Sergeant Mordechay's above described and now admitted violative inactions and failures on January 18, 2015, was, without question, a severe offense since CPI Luke's complaint to him involved child abuse and neglect issues. That

Grievant's January 18, 2015, inactions and failures were a severe offence is further evidenced by Chief Williams' unopposed and compelling testimony (which undersigned fully credits and concurs) stating that:

. . . we can't lose sight of the fact that this was an investigation about children. It was an investigation of a woman who was already on supervised probation for not taking care of her children and the allegations that she was continuing in that vein. (Tr. pp. 718-719).

The severity of Grievant's January 18, 2015, inactions and failures is similarly evidenced by the following parts of his June 8, 2015-sworn interview before Captain Vassell, wherein he testified/admitted the following:

Q. (By Captain Vassell)

Okay. If an officer went ahead of a DCF investigator and alerted the occupants of a residence that the DCF investigator was in route, in order to provide them with the opportunity to leave, would you consider that inappropriate?

A. (By Sergeant Mordechay)

I think that would be inappropriate, yes.

Q. Would you consider that to be something that would need to be addressed?

A. Yes.

Q. **Would you consider that a potential issue of safety -- of the safety of the children?**

A. Of -- yeah, **of course**. (Tr. p. 10 of Mordechay's June 8, 2015-sworn interview, Union Exhibit #1) (Emphasis added).

Last, regarding the overall general union/management arbitration principle of "progressive discipline," the undersigned finds the principle long standing and generally sound. However, the progressive discipline of an employee is not appropriate in all disciplinary cases since its overall goal is to correct an employee's generally "minor" violative conduct, actions or inactions by means of increasing/progressive levels of discipline. However, and again, the undersigned finds that Sergeant Mordechay's January 18, 2015-

inactions and/or failures are not minor offences for a police officer since they involved child abuse, neglect, and child safety issues.

The undersigned, accordingly, finds PBA/Mordechay's Argument Three unproven and unfounded, and thus insufficient grounds, or reason, or cause to set aside, or otherwise change, or amend, or reduce Grievant Nir Mordechay's demotion.

PBA/Mordechay's Argument Four: *That Sergeant Mordechay received a disparate/unequal and/or discriminatory level of discipline, i.e., being demoted, when compared to other City police sergeants previously disciplined by City for far more egregious conduct, yet none were demoted.*

In support of its Argument Four, PBA points to what it deems five prior "comparative disciplinary cases" of City sergeants who PBA vehemently argues and contends committed far more egregious conduct than Sergeant Mordechay here, yet, none of the sergeants were demoted.

The undersigned takes notice that similar to progressive discipline, it is a long-standing union/management disciplinary arbitration principle that employees generally be treated/disciplined equally and evenhandedly for similar proven misconduct. However, there also exists numerous exceptions which singularly or collectively justify different levels of discipline given employees. They are, among others, different violative conduct (which is the case here), or if identical violative conduct, different degrees of fault; the severity of the violative conduct; that the employee was warned that a specific violative conduct subjects the employee to severe discipline up to and including the employee's discharge; and mitigating or aggravating factors or circumstances such as, among others, different lengths of service or

seniority, and the employee having an unblemished/discipline free work record, as opposed to the employee having one or more prior disciplines.

The undersigned finds that the general arbitration principle of equal/evenhanded discipline of employees in this matter fails to contractually or otherwise control the level of discipline decided upon by City for Sergeant Mordechay for the following reason. In short, of the five sergeants' disciplines pointed to by PBA, none, as is the case here, involved the "severe" failure of the sergeant to investigate and document a complaint involving the reported child abuse or neglect of a minor child or children. And that being the case, the undersigned finds Mordechay/PBA's Argument Four insufficient grounds, or reason, or cause to set aside, or otherwise change, or amend, or reduce Grievant Nir Mordechay's demotion.

PBA/Mordechay's Argument Five: *That Mordechay's charged "Untruthfulness" was not proven by City.*

According to City, in the course of his June 8, 2015-sworn interview, Mordechay was "untruthful," and thus, violated Department Rule 6.57/*Untruthfulness* when he testified on pages 6, 7 and 13 of his interview that immediately following his January 18-meeting with Officer Hernandez, he called or attempted to call CPI Luke's cell phone "several times" or "more than once." (See Union Exhibit #1, pp. 6, 7, and 13).

Mordechay's "untruthfulness," according to City, is evidenced by the following. First, that the Police Department's January 18, 2015-call log (City Exhibit #5), does not reflect any outgoing calls to CPI Luke' cell phone number other than Sergeant Mordechay's undisputed

initial "six-minute" return call to CPI Luke from 5:25 to 5:31 p.m. on January 18, and a wrong number call to a cell phone number similar to CPI Luke's cell phone number which lasted only seconds. And second, that CPI Luke's cell phone call log (City Exhibit #4), similarly shows she received only one incoming call from Sergeant Mordechay's police department phone number on January 12, i.e., the same six-minute - 5:25 to 5:32 p.m. call.

At arbitration, in opposition to City's untruthfulness charge, Mordechay testified and insisted that he didn't lie, nor was he untruthful in his June 8, 2015-sworn interview, nor at any other time. He testified as follows:

Q. (By Mr. Fagan, Esq., referring to page 6 of Sergeant Mordechay's June 8, 2015-sworn interview before Captain Vassell (Union Exhibit #1))

Then to go further down [page 6] and you [Sergeant Mordechay] talk about how many times you called her [i.e., CPI Luke on January 18, 2015].

A (By Sergeant Mordechay)

Yes.

Q. You say you -- the thrust of it is you spoke to Hernandez. "And I attempted to follow up with her several times. Um."

TV, Tanzy Vassell. Sorry Captain Vassell. "When?"

Nir Mordechay: "Shortly after. I called her [i.e., CPI Luke] from the sergeant's phone downstairs. I -- you can check the records. I called her, uh, her cell phone number, uh, I don't remember the time frame in between the calls, but I called her more than once."

Is it your testimony today that several is more than once?

A. It is.

Q. Explain what you meant by "called her several times," and were you lying?

A. No, I was not lying. Based on the fact that this [June 8, 2015-sworn interview] was six months later [i.e., after January 18, 2015], looking back at it now, I remember calling her several times. After being shown records that the one of the several times that I called her back was actually after being provided her phone number, I specifically told Captain Vassell [during the June 8, 2015-sworn interview], check the records.

So if I was lying, why would I say check the records to prove that I'm lying? I got a complaint in my office. And I called the lady [i.e., CPI Luke] back. I was very professional, and I remember six months later that I called her back several times. Now, whether or not I called her back the first time to talk to her for that six minutes and then the second time when I called her

back I erroneously changed the numbers or flipped them by accident because I'm human, I called her back several times.

If you look at how many times I called her back, I called her back several times. And that's my testimony today. That was my testimony then. I'm not saying I didn't call her back several times because I did. She made and left a message with dispatch and I called her back several times. One of those times obviously was misdialled. It wasn't purposely done. I didn't misdial it and say, you know what, I'm going to pretend to call her back, and don't worry about it, Officer Hernandez [,] I'll cover for you because we're friends and we hang out outside of work and we work out.

So I'm going to cover for you [Officer Hernandez], but I'm going to pretend to just switch the last two numbers purposely.

Q. Did you cover for him? Did you cover up --

A. No.

Q. -- his [i.e., Officer Hernandez's] conduct, anything like that?

A. No. (Tr. pp.627-630).

* * *

At issue, is whether or not Sergeant Mordechay, as charged, violated Department Rule #6.57/*Untruthfulness*, which prohibits all Police Department officers from “**knowingly mak[ing] false or untrue statements . . .**” (Emphasis added). And again, as stated above, and repeated here, it is City’s sole burden of proving its overall case, which includes its Rule #6.57/*Untruthfulness* charge, by at least the preponderance (i.e., more than 50%, and/or the greater weight) of the evidence.

Having (1) personally observed Grievant Mordechay’s arbitration testimony and demeanor, and further;

- (2) multiple times reviewed the transcript of Grievant’s June 8, 2015-sworn interview (Union Exhibit #1), and particularly its pages 6, 7 and 13; And,
- (3) since his June 8, 2015-sworn interview, as Grievant emphasizes, was almost six months following CPI Luke’s January 18, 2015-telephone complaint to Grievant - which is arguably sufficient time for memories to fade; And,
- (4) since in the course of his June 8-sworn interview, Grievant invited or requested Captain Vassell to “check the [phone] records” of his January 18-telephone calls to CPI Luke (*see* pages 6 and 13 of Grievant’s June 8, 2015-sworn

interview); and, since,

- (5) it is Grievant's testimony here that he called back CPI Luke more than one time
He stated:

[I] remember six months later that I called her [CPI Luck] back several times. Now, whether or not I called her back the first time to talk to her for that six minutes and then the second time when I called her back I erroneously changed the numbers or flipped them by accident because I'm human, I called her back several times. (Tr. pp. 628-629).

the undersigned finds that City failed to prove by the requisite preponderance of the evidence its Rule #6.57/*Untruthfulness* charge.

Stated differently, in light of the immediately above stated five items, the undersigned finds that Grievant's June 8, 2015-testimony that he attempted to, or called CPI Luke's cell phone "several times" or "more than once" following his January 18, 2015-meeting with Officer Hernandez was not, nor did it constitute a "knowing false statement" which language or condition is specifically required to prove a Rule #6.57/*Untruthfulness* violation. In other words, to establish or prove a violation of Rule #6.57, it is not enough that the police officer's statement is false or inaccurate. The statement must be shown as a "knowing false statement."

Having personally observed Grievant Mordechay's arbitration testimony and demeanor (which the undersigned credits), and since, as noted above, in the course of his June 8, 2015-sworn interview he even invited or requested Captain Vassell to "check the [phone] records" of his January 18-telephone calls to CPI Luke, the undersigned finds that Grievant's June 8 testimony was not an intentional lie or a coverup about the number of calls he made to CPI Luke. And if the misdialed call was as Grievant contends, his second call to CPI Luke (which

the record supports), he technically made more than one call to her as he testified on June 8, 2015, and he repeated in his testimony here. Thus, the undersigned further finds that Grievant's June 8-testimony falls short of a culpable, and, thus "knowing false statement."

And that being found, the undersigned further finds no violation of City's Rule #6.57/*Untruthfulness* in this matter. The said untruthfulness charge, accordingly, is found and/or deemed unproven and unfounded.

The undersigned also finds that City's contention Mordechay was untruthful in his June 8, 2015-sworn interview testimony was obviously one of the key reasons he was demoted, as opposed to receiving a lesser discipline. It is also clear that the undersign's finding the untruthfulness charge unproven has negatively impacted and/or undermined the reasonableness of the level of Sergeant Mordechay's discipline decided by City/Chief Williams.

Accordingly, based upon the specific and unique facts and circumstance of this case, the undersigned further finds that Grievant Mordechay's now unproven untruthfulness charge, when considered with such other factors listed below, constitutes sufficient cause or grounds to order his reinstatement to a sergeant position when Department's next sergeant vacancy arises. However, in light of the above described severity of Grievant Mordechay's proven January 18, 2015, inactions and/or failures, he shall recover no lost wages or benefits.

AWARD & APPROPRIATE REMEDY

1. On the record as submitted, and all the above, the undersigned finds the preponderance

of the evidence:

- A. established and proved that on January 18, 2015, as charged by City, that Grievant Nir Mordechay failed to investigate, document, and report to his chain of command the above described January 18, 2015-telephone complaint he received from Department of Children and Families CPI, Ms. Yvonne Luke; And,
 - B. The preponderance of the evidence similarly established and proved that on January 18, 2015, as charged by City, that Grievant Nir Mordechay's January 18, 2015-failure(s) and/or inaction(s) violated the Police Department's above quoted Rules & Regulations, and/or Policy & Procedures - 2.5; 2.32; 1.1; 1.2-A, B, F, I, & N; 4.24; and 4.14. And,
 - C. The preponderance of the evidence similarly established and proved that since Grievant Nir Mordechay's January 18, 2015-violative failure(s) and/or inaction(s) involved and/or concerned a reported child abuse or neglect of three minor Riviera Beach children, it constituted severe misconduct; And,
 - D. Since the CBA's Section 2 of Article 22, states and advises, "The following disciplinary actions may be utilized and, depending on the severity of the offense, the first action may be at any level including dismissal. - A. Written Reprimand; B. Suspension without Pay; C. Demotion; D. Dismissal"; Thus,
 - E. Subject to Paragraphs 2, 2-A and 2-B immediately below, the undersigned arbitrator further finds, holds and rules the requisite just cause existed for City to demote Grievant Nir Mordechay, from police sergeant to police officer as it did.
2. However, as noted above, since City's Rule #6.57/*Untruthfulness* charge is unproven; and when the same is combined with Grievant's above quoted arbitration testimony which he candidly admitted and further expressed compelling contrition for his January 18, 2015, inactions and failures; and in light of Grievant's laudable discipline free prior work record; the undersigned finds and orders the following as the appropriate remedy to resolve the instant grievance in its entirety:
- A. City shall reinstate Police Officer Nir Mordechay to the rank of police sergeant

when the next sergeant vacancy arises following the date of this Opinion and Award. However, Mordechay shall recover no lost wages and benefits from the time he was demoted to police officer, up to the time he is actually reinstated to a police sergeant. And,

- B. Should Mordechay be required to complete any sergeant training, or sergeant educational or refresher courses, etc., the same will be timely provided by City at no cost to Mordechay.
- 3. The undersigned shall retain jurisdiction of this matter limited to resolving any disputes pertaining to paragraphs 2, or 2-A or 2-B immediately above.
- 4. Unless specifically addressed and resolved in this Opinion and Award, all other disputed facts, claims, arguments, demands, disputes or issues, etc., raised or argued by the parties in this matter are unnecessary to reach, address, decide or rule upon. All are deemed moot.

Emailed to the parties' representatives this 21st day of September 2017

/s/ Martin A. Soll

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