JOINT EXHIBITS

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JOINT EXHIBITS

JOINT 1

AGREEMENT BETWEEN

THE CITY OF MANCHESTER, NH

AND

THE MANCHESTER POLICE PATROLMAN'S ASSOCIATION

JULY 1, 2016 – JUNE 30, 2019

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ARTICLE 1
UNIT DESCRIPTION

1.1 The unit to which this Agreement is applicable shall consist of Manchester Police Department employees as follows:

> All regular full-time Police Officers, all regular full- time Humane Officers and all regular full-time Parking Control Officers, excluding all other employees of the Manchester Police Department.

ARTICLE 2
MANAGEMENT'S RIGHTS

2.1 The Commission and the Police Chief will continue to have, whether exercised or not, all the rights, powers and authority heretofore existing, including, but not limited to the following: The Commission and/or the Police Chief will determine the standards of services to be offered by the Police Department, determine the standards of selection for employment, direct its employees; take disciplinary action, relieve its employees from duty because of lack of work or for other legitimate reasons; issue and enforce rules and regulations; maintain the efficiency of governmental operations; determine the methods, means and personnel by which the Police Department's operations are to be conducted, determine the content of job classifications; exercise complete control and discretion over its organization and the technology of performing its work; and fulfill all of its legal responsibilities. All of the rights, responsibilities and prerogatives that are inherent in the Commission or the Police Chief by virtue of statutory and charter provisions cannot be subject to any grievance or arbitration proceeding.

ARTICLE 3
EMPLOYEE'S RIGHTS

3.1 The MPPA and the Commission agree that there will be no discrimination against any employee on account of membership or non membership in the MPPA and no disciplinary action shall be taken against an employee except for just cause.

3.2 The Commission agrees that it will not interfere with the formation, existence, operation or administration of the MPPA.

3.3 The members of the MPPA's bargaining committee who are scheduled to work a tour of duty during collective bargaining negotiations shall be granted time off without loss of pay or benefits for all meetings between the Commission, its agents or representatives and the MPPA for the purpose of negotiating the terms of the contract or any supplements thereto.

3.4 The MPPA President or his designee shall be granted reasonable time off during working hours, without loss of pay or benefits, for the purpose of conducting business of the MPPA or attending meetings or legislative hearings related to the *business* of the MPPA; provided, however, the MPPA President or his designee shall request permission from the

Chief of Police or the designee of the Chief of Police or the relief officer in charge prior to taking such time off. It is understood that such permission maybe refused if it will interfere with the normal and orderly operation of the department. The MPPA President and one designee shall be granted reasonable time off during working hours, without loss of pay or benefits to attend three days training during the course of a calendar year; provided, however, the MPPA President and his designee shall provide reasonable notice to the Chief of Police or the designee of the Chief of Police or the relief officer in charge prior to taking such time off. For purposes of attending official negotiation sessions and arbitration *hearings* the MPPA President shall be given working hours off in lieu of hours spent attending such events while off duty.

ARTICLE 4
PRIOR BENEFITS AND PRESERVATION OF RIGHTS

4.1 The Commission agrees that conditions of employment and working conditions previously established as policy of the Commission shall be not less than those now in effect and will remain in effect unless specifically modified by this Agreement. Nothing in this Article will limit the rights of the Commission to revise the Rules and Regulations, policies and/or working conditions to improve the efficiency of the Department, provided, however, any such change or revision shall not be subject to the grievance procedure.

ARTICLE 5
STABILITY OF AGREEMENT

5.1 No amendment, alteration or variation of the terms or provisions of this Agreement shall bind the parties hereto unless made and executed in writing by said parties.

5.2 Any portion of this Agreement found to be in conflict with any current City Ordinance, or with a State statute or governmental regulation now in effect or enacted at a later date will be null and void. However, all other portions of this Agreement will remain in effect.

5.3 This Agreement represents the entire Agreement between the parties hereto and may not be modified in whole or in part except by an instrument in writing duly executed by both parties.

5.4 The Union agrees to provide a copy of this Agreement to each employee in the bargaining unit.

ARTICLE 6
DUES DEDUCTION

6.1 The Commission agrees to authorize the deduction of MPPA dues from each employee who has signed an authorization, and to send the dues to: The Treasurer of the Manchester Police Patrolman's Association.

6.2 The Union will keep the Commission informed to the correct name and address of the Treasurer of the Manchester Police Patrolman's Association.

6.3 This deduction of dues shall be made on a weekly basis and shall be sent monthly to the Treasurer of the Manchester Police Patrolman's Association.

6.4 If any employee has no check coming to him or if his check is not large enough to satisfy the dues, then no deduction will be made from that employee. In no case will the City attempt to collect fines or assessments for the Union beyond the regular dues.

6.5.1 Should there be a dispute between an employee and the Union over the matter of deduction, the Union agrees to hold the City harmless in any such dispute.

6.6 Any employee who is in the Bargaining Unit and is not a member of the Union but wishes to have the Union represent him/her in a grievance, shall assume full financial responsibility as to the actual cost of processing the grievance. Collection of such fees shall be the sole responsibility of the Union.

ARTICLE 7
GRIEVANCE PROCEDURE

7.1(A) A grievance is defined as a claim or dispute arising out of the application or interpretation of this Agreement, under express provisions of the Agreement, and shall be processed by following the steps described in this article.

7.1(B) For the purpose of this article, a "BUSINESS DAY" shall be defined as Monday through Friday with Holidays excluded.

7.2 STEP ONE: A member of the bargaining unit must first take up the grievance with his immediate supervisor. The immediate supervisor shall give his answer within –five (5) business days.

7.3 STEP TWO: Failing adjustment by these parties, the grievant may, within five (5) business days, submit the grievance, which must be in writing and which must list the article and section violated and the specific grievance, to the Supervisor in charge of the Administration Division, or in the case of a Parking Control Officer, to the Parking Division Supervisor. The Supervisor in charge of Administration will render his decision within five (5) business days.

7.4 STEP THREE: Failing adjustment by these parties, the Supervisor in charge of Administration will:

1. Automatically forward the grievance referred to in Step 2 above, to the Chief of Police or Finance Director, depending on the chain of command.
2. Forward a letter to MPPA notifying them of same;
3. The Chief or Finance Director will render his decision within seven (7) business days from the date on the above letter from the Supervisor in charge of

Administration.

7.5(A) STEP FOUR: If the decision of the Chief of Police or Finance Director is not acceptable to the aggrieved member of the bargaining unit, the grievant and the union may submit the grievance to the City of Manchester's Chief Negotiator/Labor Contract Administrator for the scheduling of a pre-arbitration meeting. The grievance must be submitted to the Chief Negotiator/Labor Contract Administrator within ten (10) business days from the date that the Chief of Police or Finance Director rendered his decision. The pre-arbitration meeting must be held within thirty (30) business days from the date that the Chief or Finance Director rendered his decision. This time limit may be extended upon mutual agreement of the parties.

In the event that the City does not respond within the allotted time period, absent an extension, it will be deemed denied.

7.5(B) PRE-ARBITRATION MEETING: Prior to submission of the grievance to arbitration, a meeting will be held to determine if the grievance can be settled without arbitration. Such meeting will include representative(s) from the department, the Union, the Chief Negotiator/Contract Administrator and the Grievant(s).

The parties may agree that the Grievant(s) may not need to attend.

7.5(C) After making full use of the above pre-arbitration procedure and having failed to reach a satisfactory solution, the grievance may be submitted by the Union to the New Hampshire Public Employee Labor Relations Board or other mutually acceptable agency for the appointment of an arbitrator in accordance with the rules and regulations of the agency. The Union must make its submission within fifteen (15) business days after the date of the report of the pre-arbitration meeting and it must simultaneously convey a copy of the submission to the Chief of Police or Finance Director.

If the Union fails to request the appointment of an arbitrator within fifteen (15) business days after the date of the report of the pre-arbitration meeting, the grievance shall be deemed abandoned and no further action shall be taken with respect to the grievance.

7.6 The arbitrator shall not have the power to add to, ignore or modify any of the terms and conditions of this agreement. His decision shall not go beyond what is necessary for the interpretation and application of express provisions of this agreement.

The arbitrator shall not substitute his judgment for that of the parties in the exercise of rights granted or retained by this agreement. The decision of the arbitrator shall be final and binding upon the parties as to the matter in dispute.

7.7 The party submitting a grievance to arbitration shall pay the total administrative fee for the processing of the grievance. Each party shall make arrangements to pay the expenses of witnesses who are called by them. The expenses of the arbitrator shall be paid by the losing party. It shall be incumbent upon the arbitrator to specify the party designated as the losing party to facilitate payment of arbitrator costs.

7.8 If the grievance involved the immediate supervisor, section 7.3 of this article shall become the first step in the grievance procedure.

7.9 A grievance shall be put in motion within thirty (30) business days of the event which gives rise to the grievance or shall be considered null and void. If the grievant does not process the grievance within the time limits set forth in sections 7.2, 7.3, 7.4 and 7.5, it shall be considered as dismissed. If a decision is not rendered within the time limits as set forth in sections 7.2, 7.3 and 7.4 above, the grievant may proceed to the next step. 7.10. The above times may be extended by mutual written agreement of the parties.

7.11 The employee, when discussing his grievance with management, may, at his/her discretion, be accompanied by a Union representative.

7.12 The grievant shall be in a pay status when processing a grievance or acting as a witness if said processing of a grievance or acting as a witness occurs during his/her scheduled duty hours. A representative of the Union shall be in a pay status when processing a grievance or acting as a witness if said processing of a grievance or acting as a witness occurs during his scheduled duty hours, provided said representative shall request permission prior to taking such time off from the Chief of Police or his designee or Finance Director and it is understood that such permission may be refused if it will interfere with the normal and orderly operation of the department, but in no event will such time off be denied for more than two (2) of the representative's consecutive shift periods, not including days off

The parties agree that no more than two (2) union representatives may attend a pre-arbitration meeting or an arbitration hearing while in a pay status, if such meeting/hearing occurs during their scheduled duty hours.

7.13 The Commission shall have the right to initiate a grievance growing out of a claim or dispute arising out of the application or interpretation of this agreement, under express provision of the agreement, provided, however, that the Commission may, in its discretion, submit any claim by the Commission for breach of Article 26 of this agreement entitled "No Strike Clause" to any other forum of the Commission's choice. In the event the Commission initiates a grievance, it shall do so by

filing said grievance with the Union within forty-five (45) business days from the date of the event which gives rise to the alleged grievance. If the matter is not resolved by and between the Commission and the Union, the Commission may submit a written request to the American Arbitration Association or to another mutually agreed upon neutral arbitration and conciliation service to appoint an arbitrator to resolve said grievance in accordance with its rules and regulations and the provisions of sections 7.6, 7.7 and 7.8 of the article shall apply to such processing. The Commission will simultaneously convey a copy of the request for arbitration to the Union President.

ARTICLE 8
HOURS OF WORK

8.1 Effective July 1, 2010 the Manchester Police Department shall continue to implement the following work schedule for all bargaining unit employees except those as noted in Section 8.2 below.

(A) A regular work relief of 8 1/2 hours shall be scheduled on the basis of four consecutive work days on duty followed by two consecutive days off duty, progressing through a six calendar week cycle.

(B) The average work week over the six-week cycle shall consist of forty hours.

(C) The regular work relief shall consist of 8 1/2 hours of which the first thirty minutes shall be used for mandatory in- service training and roll call. The overtime provision of this Agreement will not apply to work performed during a regularly scheduled work relief nor to work performed during a regularly scheduled work week.

(D) K-9 Officers will select their shifts by seniority within their specialty area.

(E) In the Juvenile, Detective and Traffic Division if too many officers seek a particular shift, and the criteria are relatively equal, shift preference will be given to the senior officer if the division head has no objections.

8.2 Exceptions to the above regular work relief of 8 ½ hours and regular work week of four consecutive work days on duty followed by two consecutive days off-duty may be made for Parking Control Officers and Humane Officers because of the nature of their work. Variations of the "four and two" schedule may be implemented for Parking Control Officers and Humane Officers if they are beneficial to the Department and the employees.

Determination of the work schedules for the Humane Officers shall be made by the Police Chief. Determination of the work schedules for the Parking Control Officers shall be made by the Chief of Police or the Parking Manager. Any changes from the schedules in effect for Parking Control Officers and/or Humane Officers immediately prior to the date of the execution of this Agreement shall be implemented only after the employees concerned and the representatives of the bargaining unit have been given at least two calendar weeks notice of such change and an opportunity to discuss the matter with the Chief of Police, or in the case of

the Parking Control Officers, the Parking Manager. The decision of the Chief of Police/Parking Manager shall be final and shall not be subject to the Grievance Procedure.

Date of the shift change. Accordingly, subsequent officers involuntarily placed will be selected inversely, until the 33% level is met.

8.4 The Union agrees that employees who are habitually late in reporting for work shall first be given an oral warning. If the employee continues to report late, he/she shall be given a written warning to be inserted in his/her personnel jacket. If the employee still continues to report late, he/she may be subject to disciplinary action, including suspension and/or dismissal.

ARTICLE 9
OVERTIME

9.1 Subject to all other provisions of this Article:

(a) Eight and one-half (8 1/2) hours shall constitute the "regular work relief", and

(b) the "regular work week" shall be computed on the basis of a six week cycle which includes four calendar weeks Sunday through Saturday consisting of five work reliefs with two consecutive days off and two calendar weeks Sunday through Saturday consisting of four consecutive work reliefs with three non-consecutive days off.

9.2 Overtime shall be paid at the rate of time and one-half the regular hourly rate to include longevity for authorized time worked in excess of the "regular work relief" or the "regularly scheduled work week" as defined in Section 9.1 above, provided, however, that in determining whether an employee is entitled to compensation at the overtime rate for authorized hours work in excess of a "regular work week" as defined in Section 9.1 above, any time worked in excess of a single "regular work relief" shall not be counted.

9.3 The overtime premium or rate shall not be pyramided, compounded, added together or paid twice for the same time worked.

9.4 Absences shall not be counted as hours or days worked in determining whether or not an employee is entitled to compensation at the overtime rate.

9.5 ELECTION DETAIL - Any officer working on election detail shall be paid at the rate of time and one-half the regular hourly rate of pay for such employee, for authorized work performed on such detail, provided that a Reserve Police Officer may, at the discretion of the Chief or his designee, be assigned with a police officer on election details. In such case the Reserve Police Officer will be paid at straight time.

9.6 TRAINING - Effective upon the date of ratification of this Agreement, it is agreed by the Union that members of the Bargaining Unit will report for training courses/classes at the

administrative discretion of the department during off duty hours.

Training hours are to be paid at the regular and overtime hourly rate for the employee. It is further agreed such training courses/classes shall not exceed six (6) full days of training during any calendar year. Each session of training shall be considered as a day of training, whether for a full day or a portion of a day. It is further agreed that employees will not be scheduled for training courses during their scheduled vacations and shall be given advance notice of at least ten (10)days of the scheduled training.

It is understood and agreed that the management of the department may schedule employees for less than six (6) days of training on off-duty days and the employees will only be paid for actual hours of training time, provided that employees shall be paid for a minimum of four (4) hours at the overtime time rate for each training session.

9.7 OVERTIME - Except in cases of emergency all overtime, defined as time worked in excess of a "regular work relief" or a "regular work week" must be authorized in writing by the officer in charge of the relief. All officers shall be required to work emergency or unscheduled overtime when requested, unless excused by the officer in charge.

Planned overtime, which is defined as assignments to parade duty, Christmas traffic duty, election details and other scheduled events shall be assigned to officers on a voluntary basis. If insufficient officers volunteer within five (5) calendar days of the scheduled event then assignments shall be made to regular officers first, in inverse order of seniority, and reserve officers second, as needed.

Officers who volunteer for overtime for planned events must notify the department at least forty-eight (48) hours in advance of the scheduled event if the officer will not be able to perform the planned overtime. Failure to notify the department at least forty-eight (48) hours in advance shall require the officer to perform the scheduled overtime.

9.8 Any employee who fails to appear for emergencies or for planned overtime shall be subject to corrective disciplinary action.

ARTICLE 10
HOLIDAYS

10.1 The following days shall be paid holidays for the bargaining unit members:

New Years' Day	Labor Day	Martin Luther King, Jr. Day
President's Day	Columbus Day	
Veteran's Day	Memorial Day	Election Day
Independence Day	Thanksgiving Day	Christmas Day
Fast Day		

10.2 Employees shall be compensated for the above holidays in lieu of being allowed time off on

holidays. Such compensation shall be at straight time pay of one- fifth (1/5) of a regular week's pay.

10.3 Those employees who are assigned on a straight work week Monday through Friday on day shifts shall, whenever applicable, be allowed time off on the above holidays. In such instances, the employee shall receive his regular pay and shall not receive additional pay in lieu of the holiday.

10.4 If a holiday occurs within an employee's scheduled vacation period, the employee shall be given an extra day's pay.

10.5 For the purpose of this Article, the holiday shall be the twenty-four (24) hour period commencing at 12:01 AM of that day.

10.6 Longevity steps shall be included in the payment for holidays, which are paid for in lieu of employees being allowed time off.

10.7.1 Bargaining unit members, except parking control officers, will be paid twice a year on the basis of the pay rate that was in effect on the date of the holidays involved. Payment will be made each year in the first pay period of June, to include New Year's Day, Martin Luther King, Jr. Day, Fast Day, President's Day and Memorial Day. The second pay period shall be the first pay period of December, including all remaining holidays. The Christmas holiday shall be paid in the employees regular check following Christmas Day.

Article 11
VACATIONS

11.1 Effective on date of ratification employees in the Bargaining Unit shall be entitled to paid vacations as follows:

(A) Accrual rate for two (2) calendar weeks begins on date of hire.
(B) Accrual rate for three (3) calendar weeks begins at the beginning of six (6) years of continuous service.
(C) Accrual rate for four (4) calendar weeks begins at the beginning of ten (10) years of continuous service.
(D) Accrual rate for five (5) calendar weeks begins at the beginning of fifteen (15) years of continuous service.
(E) Accrual rate for six (6) calendar weeks begins at the beginning of twenty (20) years of continuous service.

Employees "shall earn vacation time at the rate of 1/12 of their annual entitlement for each completed month of service. Vacation credits may accrue to two (2) times the employee's annual accrual amount, with the following maximums.

Maximum accrual for 10 years of service is 320 hours
Maximum accrual for 15 years of service is 400 hours
Maximum accrual for 20 years of service is 480 hours

11.2 Employees serving an initial probation period accrue vacation, but are not eligible to use vacation during the first six months of employment. Such probationary employees are not entitled to any vacation benefits if terminated during the initial six-month period.

11.3 Employees shall become eligible for earned vacation after six (6) months of continuous service.

11.4 When an employee terminates his employment with the Manchester Police Department for any reason except as specified in Section 11.2 above, he/she shall be _compensated for all earned vacation time to a maximum of 400 hours.

11.15 Selection of vacation periods shall be by seniority. However, no vacation period shall extend beyond two (2) weeks until every eligible police officer shall have had an opportunity to have a two (2) week vacation, except at the discretion of the Chief.

11.6 SELECTION OF VACATIONS. Vacation selection shall occur two times per year with each vacation pick to coincide with shift picks as specified in article 8.3(B) SHIFT BY

SENIORITY. The two vacation periods will be as follows:
Summer Vacation will be considered May 01 thru October 31. Winter Vacation will be considered November 01 thru April 30. The summer vacation pick will take place after the start of the January shift selection and the winter vacation pick will take place after the start of the September shift selection. All officers must make their vacation selections no later than 24 hours after being personally notified that it is that officer's turn to pick.

If any officer fails to pick his/her vacation within the 24 hour time limit, that officer will be passed over for selection. Officers who were passed over or officers who elected to be passed over will be allowed to select a vacation slot at any time as long as no officer who has already picked is bumped.

The initial selection period for picking vacations by seniority will be for 21 calendar days from the first day of the January shift change and the first day of the September shift change.

11.7 SINGLE VACATION DAYS. Effective August 3, 2004, the Department will continue its practice of allowing employees to take single vacation days at its discretion. In addition, each employee shall be entitled to take one (1) guaranteed single vacation day per fiscal year, even though this day does result in overtime.

No more than one (1) guaranteed single vacation day may be approved per shift on a first-

come, first-served basis. No employee will be charged for the use of his/her guaranteed single vacation day, unless overtime is actually hired for that shift.

ARTICLE 12
EXTRA DETAILS

12.1 An extra detail shall be defined as that duty performed by an off-duty police officer for an employer other than the Manchester Police Department for which payment is not made directly from the Manchester Police Department payroll and will include those duties required by statute or ordinance and those duties for which requests are made to the Manchester Police Department. Members of the bargaining unit will have a right of first refusal, to all details performed within the City of Manchester.

12.2 Personnel performing extra details shall at all times be governed by the rules and regulations of the Manchester Police Department in effect at the time the work is performed.

12.3 Personnel desiring extra details shall submit their names in writing to the Chief of Police or his designee for placement on the extra details roster. Personnel desiring to withdraw their names from the extra detail roster shall do so in writing to the Chief of Police or his designee. Personnel who have so withdrawn may, at any time, apply for reinstatement.

12.4 All names on the extra detail roster will be treated equally. In the event of a swap, a superior officer in charge of headquarters must be notified by the person originally assigned to the detail. Failure to notify a superior officer in charge of headquarters of a swap may disqualify that individual from the extra detail roster for a period not to exceed two weeks.

12.5.1 Any individual who is assigned to and accepts an extra detail must fill that detail as scheduled or notify the Relief Commander as to his/her reason for not filling the detail at least thirty-six (36) hours prior to the start of the detail, except in cases of "confining illness". Failure to notify the Relief Commander or failure to fill the detail shall automatically disqualify that individual from the extra detail roster for a period of two (2) weeks, subject to review by the Police Chief. If a details is cancelled by the contractor and the assigned officer is unable to obtain a replacement details the same week, he/she will be allowed first choice of the details scheduled for the following week. In no case will an officer already assigned to a detail be removed from that detail to compensate the cancelled officer.

The Union accepts that when a job is designated as weather-related, it is incumbent upon the officer to check his voice mail one hour prior to the start of the job for a cancellation notice.

12.6 If a question arises over use of sick leave or recurring injuries by an individual whose name is on the extra detail roster, action may be taken by the Chief of Police or his designee to have him disqualified from performing extra details.

12.7 Personnel on the extra detail roster shall not be assigned or allowed to take more than twenty-four (24) hours, combined, of extra details, planned overtime and/or special details in any work week. Court appearances, emergency overtime and training overtime shall not be included for the purpose of calculating this twenty-four (24) hour limit.

12.8(A) The hourly rate for an extra duty detail will be set at $43.36 (pensionable) or $54.33 (non-pensionable) per hour hour or any fraction of an hour with a minimum of four hours, including for scholastic events. The rate of pay for establishments serving alcohol after midnight and mandated by the Department to hire a detail for that event will be one and one half (1 1/2) times the normal rate of Yarger *Decker* salary schedule Grade 18 Step 13, plus twelve dollars ($12.00) per hour. Any hours worked in excess of eight (8) hours on details shall be compensated for at one and one half (Xit) times the extra details rate as described above. Extra details performed on Christmas Eve, Christmas Day, New Years Eve, New Years day shall be paid at double the normal Extra Detail hourly rate as described above. Extra details performed on Thanksgiving Day, Memorial Day, July 4th, and Labor Day shall be paid at double the normal Extra Detail hourly rate as described above except for City athletic events.

The rate of pay for Extra Details in cases of declared strikes (company requests police presence during a labor dispute) shall be one and one half MO times the normal Extra Details rate as specified above. It is expressly understood and agreed that declared strikes, by location, may be deemed priority Extra details and must *be* filled before any other Extra Details.

The City may deduct from the Extra Detail rates, paid to the bargaining unit member, as specified above *such* amounts as are necessary to pay the employer and the employee contributions to the New Hampshire Retirement System.

During peak detail season from May 1 to December 1 the detail cap will be raised to 30 hours per week. Emergency overtime, Training, and Court Time will not be included in the cap. The definition of emergency overtime is overtime work in a division to fill a regular or mandatory work assignment.

12.8(B) As a consideration for the Police Department to continue to administer the Extra Details program the MPPA Bargaining Unit agrees to the following method of payment for the program: an administrative fee of one dollar and seventy cents ($1.70) per hour of extra detail worked.

shall be returned to the Police Department for the purpose of administering the extra detail program. Such fee, plus an amount sufficient to cover the City's retirement contribution shall be

withheld prior to payment to the officer working the extra detail. In addition, the City shall deduct the proper amount, to cover the employee's share, from the earnings paid to the bargaining unit member for the extra detail work, and shall make payments to the employees retirement system.

12.8(C) Subject to approval of the Finance Director of the Administrative procedure required in this section, one dollar ($1.00) from the payment for each extra detail hour worked shall be placed in a revolving fund. This fund shall be used for the pre-payment to officers for extra details pending payment by the contractors. This fund shall be administered jointly by the Police Department and the Finance Department. Payment of $1.00 per extra detail hour worked shall be made until June 30, 1999, at which time an accounting of the fund will be made. During such period the officer shall be paid in accordance with Section 12.8(B) (with exceptions as noted). The City shall receive $1.70 per hour and the Revolving Fund shall receive $1.00 per hour. On June 30, 1999 the payment into the Revolving Fund shall cease and the officer shall receive one additional dollar per hour. The Revolving Fund will be maintained thereafter by the re-payment of pre-paid extra details as the officers receive payment from the contractors.

As soon as practicable, with the implementation of the new computer system, the Police Department agrees to provide the Association with a quarterly accounting of the revolving fund. Additionally, the Association's representative may arrange to review the revolving fund during normal business hours. The Association reserves the right, at its own expense, to have an annual audit prepared by a certified public accountant. The Association acknowledges that the City has sole responsibility for administering the extra detail program.

Nothing in this section shall obligate the department or the City to expend any City funds for the implementation of this Article.

In the event the Revolving Fund is dissolved then any remaining funds shall be paid into the Police Relief Association Fund for use by such Association.

12.8(D) The administration costs shall include the salary and fringe benefits costs of the individual who handles the Extra Work assignment and bookkeeping functions, overhead costs which are a direct cost to the employer and the cost of Workers' Compensation Insurance.

12.8(E) In addition to the above administrative costs the MPPA Bargaining Unit members agree that if in the future the City is required to make payments into any other retirement system or Unemployment Compensation fund on the earnings paid to bargaining unit members for Extra Detail work then the hourly rate shall be increased to cover the City's actual costs for such retirement and/or Unemployment Compensation costs. If the hourly rate is to be increased more than $.50 per hour then such increase shall be negotiated with MPPA. Such retirement and unemployment compensation payments shall be deducted from monies owed to the individual participant from funds collected from the employing agencies.

12.9 Reserve Police Officers shall not be utilized by the Chief of Police for extra details assignments as long as regular full-time Manchester Police Officers are available, except for election details as established by Article 9, Section 9.5.

12.10 Personnel on the extra detail roster shall submit on the required form the date, place, name of employer, starting and finishing time and the amount of money paid or due them for such details. Personnel will not perform such extra details on either a voluntary or paid basis without having such extra details recorded in the extra detail book and must complete the required form even though the extra detail was a voluntary non-paid basis.

12.11 Work being performed for any Funeral Director shall not be deemed that an individual is performing as a police officer and the performance of such work shall not be subject to the provisions of Article 23, Section 23.6, of this Agreement.

12.12 Disputes arising out of any of the foregoing sections, other than Section 12.5, may first be settled in an informal manner. Failing adjustment informally, such disputes may be subject to the Grievance Procedure (Article 7) of this Agreement. No grievance shall be filed for redress of monetary claim against the City of Manchester or Police Commission.

12.13 Subject to review and approval of this section by the City Solicitor funds owed to Police Officers as payment for Extra Details performed which are owed in excess of sixty (60) calendar days will be referred to the City Solicitor's Office for assistance in collecting such funds.

12.14 Extra Details for traffic control specified in the Manchester, New Hampshire Code of Ordinances § 70.07 Departmental Authorities and Responsibility shall endure regardless of the expiration of this Agreement and/or state or local legislative changes.

ARTICLE 13
SALARIES

13.1 Effective July 1, 2016, the Salary Schedules shall be increased by one percent (1.0%).

13.2 Effective July 1, 2017, the Salary Schedules shall increased by three percent (3.0%).

13.3 Effective July 1, 2018, the Salary Schedules shall be increased by three percent(3.0%).

13.4.1 Employees will receive a step increase on their anniversary date of current position. This step increase will be subject to a satisfactory performance evaluation. An incomplete evaluation will be considered a satisfactory performance evaluation. This process may be changed at any time by mutual agreement. Evaluation step increases will stop when an employee reaches Step 13 on the included pay matrix.

13.5 Outstanding performance evaluation bonus payments will cease, effective on date of ratification.

13.6.1 Employee appeals on their annual performance evaluation will be according to the process mutually agreed to by the Union and the City. See Appendix B.

13.6.2 Employees being promoted from one grade to a higher grade shall be placed on the lowest step of the new grade, which will provide for a minimum of a ten-percent (10%) increase in salary.

13.7 Employees who have attained the requirements for the achievement grade (A-Step) associated with their positions will be placed on the corresponding step on the achievement grade in accordance with the following mutually agreed provisions as detailed on attached Appendix A to this agreement.

13.8 Effective July 1, 2016, all parking control officers will receive a one (1) labor grade adjustment upward. The adjustment shall be step for step. Thereafter new hires will enter the system at the higher labor grade (LG12).

ARTICLE 14
LONGEVITY

14.1 Effective July 1, 2010 or date of ratification whichever is later, The longevity waiting periods for employees shall be 5-10-15-20-25-30-35-40 and 45 years of service. An increase of three-percent (3%) will take effect on the employee's anniversary date of employment.

ARTICLE 15(A)
SICK LEAVE ACCRUAL AND PAYMENT

15.A.1 All employees of the Manchester Police Department who have satisfactorily completed six (6) months of continuous employment shall be entitled to paid sick leave which shall accrue at the rate of one and one-quarter (1 1/4) work days with pay for each completed month of service. Accrual shall include the probationary period. Effective on date of ratification unused sick leave may be accumulated up to a maximum of one hundred twenty (120) work days.

15.A.2 Any employee eligible for sick leave with pay may use such sick leave for absence due to his or her illness or injury. The employee may use sick leave for the illness injury of a spouse, child or blood relative when FMLA is approved. The employee may also use sick leave for a ward residing in the same household when FMLA is approved.

15.A.3 Employees shall be required to substantiate sick leave usage in excess of three (3)days with a

letter from a qualified physician. In case of chronic absenteeism or if the Chief has reason to believe that an employee is abusing his/her sick leave, he shall give a written warning. If the abuse continues, the Chief may request a doctor's certificate for each period of illness.

If, after a written warning has been issued, there is a substantial improvement in the employee's sick leave record for twelve (12) months, the written warning shall be removed from the employee's record.

15.A.4 Effective on the date of ratification of this Agreement, when an employee terminates his employment with the Manchester Police Department, all sick leave credits shall be cancelled, except in cases of retirement, duty disability retirement or death. In such cases accrued sick leave shall be payable to the employee or his/her designated beneficiary, provided, however, that payment shall not exceed eighty (80) days of pay.

Effective on July 1, 2010, or the date of ratification of this Agreement, whichever comes sooner, when an employee terminates his/her employment with the Manchester Police Department due to death, paid retirement or duty disability retirement, all accrued sick leave up to a maximum of eighty (80) days, plus one-quarter (1/4) of the balance of the days accrued over eighty (80) but not more than one hundred twenty (120) days shall be payable to the employee or the designated beneficiary.

ARTICLE 15(B)
SICK LEAVE BANK

15.B.1 A voluntary sick leave bank, to cover Police Department personnel in the event of a long-termed disability due to illness or non-service connected injury, is hereby established. The operation of such sick leave bank shall be subject to the rules and guidelines set forth in this Article.

The purpose of the sick leave bank is to provide relief to employees who suffer long-term illness or injuries which are non-job connected. It is established to provide additional paid benefit days beyond the employee's accrued sick leave and who continues disabled for an additional fifteen (15) days. For example, it is not established to provide relief for one or two days beyond the employee's accrued sick leave.

15.B.2 SICK LEAVE BANK ADMINISTRATION. In order to provide for representation for members of the MPPA and the Manchester Association of Police Supervisors the Sick Leave Bank shall be administered by four members of the Department, two to be appointed by the Union Board of Stewards, one by the Police Commission and one by the Executive Board of the Manchester Association of Police Supervisors and shall hereinafter be called the "Administrative Committee" or the "Committee". Committee members shall be appointed in the following manner: One for one year, one for two years and two for three years; and upon expiration of each of these terms one member

shall be appointed each year to serve a term of three years. Vacancies, when they occur, shall be filled by appointment in the same manner as the original appointments and shall be for the entire remaining term so filled.

The original appointee of the Police Commission shall be for a one year term and subsequent appointments shall be for three year terms. One appointee of the MPPA shall be for one year and one appointee shall be for two years and subsequent appointments shall be for three year terms. The appointee for MAPS shall be for a three year term and subsequent appointments shall be for the three year terms.
The Committee shall select one of its members as Chairman by a majority vote, at the first meeting in January of each year, who shall serve a one year term.

The Committee shall meet upon the second Wednesday of each month. Three members present shall constitute a quorum and a majority of those members present and voting shall decide all questions. Members who are absent for either three (3) consecutive meetings or any six (6) meetings in any 12 months period shall be automatically terminated from the Committee and their terms shall be declared vacant.

15.B.3 SICK LEAVE BANK MEMBERSHIP. Each member of the Manchester Police Department desiring to be covered by the sick leave bank agrees to donate one (1) day per year from his accumulated number of sick leave days and a adjustment of minus one (1) day shall be made on all records showing the applicant's accumulated sick leave days upon his acceptance as a member of the bank and for each day donated thereafter. Application for membership shall be made on a form provided by the Committee.

Membership of all employees will be subject to the following restrictions:

(a) Probationary employees will be admitted to membership providing they shall have fulfilled the requirements set forth in Article 15.A.1 of this Agreement.

(b) Full-time employees having less than 30% of their accumulated sick leave days limit as of the date of their application shall be limited in the extent of their participation in the bank. Members who fall below the 30% restriction during the period of membership, except for long periods of illness or injury, except those with less than one year of service with the department, shall have not less than fifteen (15) days of accrued sick leave as of the date of their application for membership. An employee whose sick leave balance falls below fifteen (15) days of accrual due to recent illness or injury may be admitted at the discretion of the Committee.

Employees whose sick leave falls below fifteen (15) days after they are admitted for the Sick Leave Bank, where the usage of sick leave was not the result of extended illness or injury, shall have their membership status reviewed by the Committee.

The number of benefit days in the Bank shall not exceed 600 benefit days on December 31st of any calendar year. All excessive days shall be discarded. In the event the Bank is terminated,

all sick leave benefit days remaining in the Bank shall be null and void.

15.B.6 **ADMINISTRATIVE OVERSIGHT** In the event the Board of Police Commissioners or the Chief of Police questions a recipient's eligibility to receive benefits from the Bank, the Board of Commissioners or the Chief may require of the Administrative Committee and the employee proof of such eligibility as well as a physician's certified report of the disabling illness or injury of the recipient.

15.B.7 This Article or any Section thereof may not be amended except through the collective bargaining process or mutual written agreement of the parties concerned by law in that process.

ARTICLE 15(C)
INCENTIVE FOR NON-ABUSE OF SICK LEAVE

15.C.1 Members of the bargaining unit will be eligible for two (2) days of Personal Leave per year, or payment in lieu of taking personal leave, provided they are determined to not have mis-used or abused their sick leave privileges during the preceding twelve months.

(A) At twenty 20 years of service, bargaining unit members are eligible for three (3) days of Personal *Leave* per year in accordance with the provisions of this article. At twenty five (25) years of service bargaining unit members are eligible for four (4) days of Personal leave per year in *accordance* with the provisions of this article.

(B) A bargaining unit member may receive payment in lieu of taking Personal Leave to a maximum of two (2) days in any one calendar year. At twenty (20) years of Service a bargaining unit member *may* receive payment in lieu of taking Personal Leave to a maximum of three (3) days in any one calendar year. At twenty five (25) years of service a bargaining unit member may receive payment in lieu of taking Personal Leave to a maximum of four (4) days in any one calendar year.

(C) Personal Leave may accrue to a maximum accrual of six (6) days; no more than six (6) Personal Leave *days,* including payment in lieu of taking Personal Leave, can *be* taken within one calendar year.

15.C.2 The determination whether or not employees have misused or abused their sick leave privileges will be made by the Sick Leave Bank Administrative Committee.

15.C.3 Standards and procedures to determine sick leave misuse or abuse will be established by the Sick Leave Bank Administrative Committee, subject to approval by the signators to this Agreement.

15.C.4 This Article or any Section thereof may be amended through the collective bargaining process or mutual agreement of the parties concerned by law in that process.

ARTICLE 16
BEREAVEMENT LEAVE

16.1 Any employee shall be excused from work for not more than five (5) working days, not to include regularly scheduled days off, because of death in the immediate family and shall be paid his/her normal rate of pay for the scheduled hours missed.

Immediate family shall mean:

Spouse, parents, children, brothers, sisters, mother-in-law, father in law, daughter-in-law, son-in-law, grandchild, maternal or paternal grandparents and any other blood relative. Immediate family shall also include a ward living in the same household.

16.2 Under extenuating circumstances, five (5) additional days with pay, for the purpose of attending the funeral, may be granted under Sections 16.1 and 16.3 with written approval of the Department head; such days to be charged to the employee's accrued sick leave.

16.3 Special leave of one (1) working day with pay, for the purpose of attending the funeral, shall be granted an employee in the event of the death of an Aunt, Uncle, Brother-in-law or Sister-in-law.

16.4 Under no circumstances shall bereavement leave be paid on an overtime basis.

ARTICLE 17
CLOTHING AND UNIFORMS

17.1 The City will provide the required uniforms for the Police Department Bargaining Unit members. Simultaneously the uniform allowance for uniformed personnel shall be discontinued;

17.2 The City will provide for the dry cleaning of uniforms and the Officers' civilian clothes, at a vendor of the City's choosing, but not to exceed $300.00 per Officer per year effective on the date of ratification; and further provided the cleaning of winter jackets shall be included in the above amounts allowable per year; such cleaning of winter jackets shall be at the discretion of the officer, but subject to the requirements of the department.

Effective July 1,2008 the provision for cleaning maximum shall increase to $325.00 per employee per year.

17.3 provided, further, the City shall review the issuance of uniforms no later than June 30 of each year, at which time the City retains and reserves the right to discontinue providing uniforms, and if such action is taken by the City, the Department will revert to the payment of an

allowance for the Bargaining Unit members to purchase and clean their uniforms, such allowance to be the subject of negotiations with the Union at the time of such reversion;

17.4 provided, further, that upon the effective date of the City's providing uniforms to Bargaining Unit members all issued uniforms, or parts of uniforms, shall be the property of the City and shall revert to the City upon the separation of an employee from the Police Department.

17. 5 Members of the bargaining unit who are assigned to duties requiring the wearing of Civilian Clothes will receive semi-annual payments of $150.00 as an allowance therefore in addition to being issued uniforms and will be entitled to have said civilian clothes cleaned in accordance with Section 17.2 by the contractor selected by the City for the cleaning of uniforms. Effective July 1,2000 the provision for clothing allowance shall increase to $200.00 semi-annually. Members assigned to Street crime will be ineligible for civilian clothing allowance.

17.6 An Administrative Committee composed of one MPPA representative, one MAPS representative and one Administrative representative shall be established to review each case of civilian clothes and personal belongings destroyed in the line of duty. Guidelines will be established by the Administrative Committee, subject to approval by the Police Chief, for determining replacement values. The Committee shall submit such reports and recommendations to the Police Chief. The Police Chief shall have the final decision in such matters and such decision shall not be subject to the Grievance Procedure contained in this contract.

ARTICLE 18
COURT TIME

18.1 Effective July 1, 2010 bargaining unit members who are called in during off-duty hours for court appearances pertaining to their official duties, including DCYS hearings, DMV hearings, depositions and civil cases, shall be paid at the rate of time and one-half (1 1/2) their regular hourly rate including longevity with a minimum payment of three (3) hours at time and one half (1 1/2).

18.2 Effective July 1, 2010 bargaining unit members who are held over from their shift for court appearances pertaining to their official duties, etc., shall be paid at the rate of time and one-half (1 1/2) their regular hourly rate including longevity, for all time actually worked in excess of their scheduled shift.

18.3 In return for the payments under sections 1 and 2 above, the bargaining unit member shall remit the court witness fee to the City Treasury.

18.4 The parties agree to cooperate to maintain a list showing when officers are on vacation.* Officers will be responsible to advise the Department of vacations at least sixty (60) days in advance. The Department will make a good faith effort to avoid officers being subpoenaed while on vacation. However, since the Department does not control the issuance

of subpoenas, if an officer is subpoenaed while on vacation the matter shall not be grievable.

*For the purpose of this section, vacation shall include combinations of vacation days, swaps, regular days off, personal day or compensatory time which extend regular vacation.

ARTICLE 19
SENIORITY

19.1(A) Seniority for employees covered by this Agreement shall be defined as the period of employment with the Manchester Police Department in the work covered by this Agreement. Probationary employees shall have no seniority, but upon satisfactory completion of the probationary period shall have their names added to the seniority list from the date of employment as probationary employees.

19.1(B) Effective July 1, 2010 an employee of the Police Department who is assigned or promoted from a non-uniformed status (not sworn) to a uniformed (sworn) status, such employee shall be placed at the bottom of the seniority list as a sworn officer; provided, however, incumbents in Police Officer positions who were promoted, transferred or assigned from non-sworn positions and who were credited with prior seniority status shall retain such seniority rights.

19.2 Whenever more than one person starts employment in the department on the same day, they shall draw lots to determine seniority status on the seniority list.

19.3 Seniority shall not be broken by vacations, paid sick time, jury duty, suspension or any authorized leave of absence or military duty.

19.4 Employees who resign voluntarily or who may be discharged for just cause shall lose all seniority; provided, however, that employees who resign in good standing and who are returned to duty before the expiration of one (1) year shall regain their seniority provided, however, that the period of separation will not count for or entitlement to benefits based on length of service.

19.5 Seniority shall not give any employee the right to choose his/her assignment or his/her job since it is recognized that these factors are a part of management's inherent rights and any dissatisfaction with assignments, etc., shall not be subject to the grievance procedure. However, the Commission will give consideration to seniority in making assignments that are not promotional.

19.6 Whenever a senior employee feels he/she has been by passed for an assignment, he/she may request and be entitled to an explanation.

19.7 LAYOFF PROCEDURE - The following layoff procedures shall be confined to the

members of the bargaining unit:

(A) In the event of a layoff probationer employees shall be laid off first. The order of layoffs of probationers shall be determined by the Chief.

(B) The order of layoff of regular employees with less than 4 years of service shall be based on job performance, absentee record and seniority.

(C) Regular employees with four or more years of service shall be laid off in inverse order of seniority, with the least senior employee laid off first.

(D) Exceptions may be made by the Chief to the order of layoffs as outlined in Sections (A), (B) and (C) above to maintain Affirmative Action goals for minorities and females.

ARTICLE 20
HOSPITAL/MEDICAL INSURANCE PAYMENT

20.1 Effective July 1, 2017, the City will pay 84% of the premium for the Blue Choice New England POS Plan or the Access Blue New England family, HSA two person or single plan for employees hired before July 1, 2012.

The following co- is will apply to both the Blue Choice New England POS Plan and the Access Blue New England Plan:

Office Visit - $20.00
Specialist Visit - $20.00
Chiropractic - $20.00
Emergency roam visit - $150.00
Inpatient care, Outpatient surgery, skilled nursing or rehab facility - $100/$200 co-pay (single/2 person or family)
Proscriptions other than mail order (one month supply) -$10/$30/$50 (Generic, Preferred, Premium)
Mail order prescriptions (three month supply) $20/$60/$100 (Generic, Preferred, Premium)

For bargaining unit members hired on or after July 1, 2012 who are eligible for Health Insurance the City shall pay 80% of the premium. The Blue Choice New England POS Plan and the Access Blue New England Plan-will-have increased co-pays $250/$500 (single/2 person or family) for inpatient care, outpatient surgery, skilled nursing and rehab facilities.

The City will make available up to five (5) slots on the payroll for deductions requested by the Employee, provided the entity will accept electronic transfers. The City will not discriminate in the uses of these payroll deduction slots.

The City may offer a high deductible health insurance plan accompanied by the establishment of a Health Savings Account (HAS) for each enrolled bargaining unit member with a present contribution of $1,500.00 for an individual. and $3,000.00 for a two person or a family plan. The City retains the right to set the annual City contribution and shall each year prior to the open enrollment period

disclose any changes to high deductible benefit plan and/or its contribution to the HAS or continuation of the HAS in the following fiscal year. Effective July 1, 2012 for Bargaining unit members availing themselves of this option the City shall pay $87.50 of the premium. Effective July 1, 2013 the City shall Pay 85% of the premium. Bargaining unit members will be charged on the basis of a single, two person or family plan irrespective of the single, two person or family plan designation in the plan Itself.

20.1 (A) To a bargaining unit member who elects not to receive coverage under any City health insurance plan the City shall pay $4,000.00 annually in lieu of health insurance coverage. The City shall make said payment in two equal payments of $2,000.00. The first payment, in arrears, will be made in January/February and the second payment, in arrears will be made in July/August. Bargaining unit members who encounter a qualifying event so as to make them eligible for enrollment in the City's health insurance plans during either six month period will receive a pro rata amount based on the next $2,000.00 payment. Bargaining unit members will be able to enroll in the City health plans notwithstanding a qualifying event in the annual open enrollment period.

20.2 Effective July 1, 2003 all employees shall be required to pay the employee share of the health and dental insurance premiums as specified in the collective bargaining agreement.

20.3 It is agreed by all parties concerned that the City reserves and shall have the right to change insurance carriers provided that there is no significant decrease in overall benefits and that the New Hampshire Retirement System must accept the new plan for retired officers.

20.4 Effective July 1, 1999, or date of ratification, whichever is later, bargaining unit members will have the option to enroll in Delta Dental's Plan including coverage A, B & C with a total yearly maximum of $1000.00 on a voluntary basis in which case the City will pay eighty-five percent (85%) of the single, two-person or family premium.

Effective July 1, 2003, the total yearly maximum will be increased to $1,500.00.

20.5 All members of the bargaining unit shall be entitled to Full participation in the City's Employee Assistance Program (EAP). The parties agree that if the EAP is terminated by the city that this benefit will lapse.

20.6 For two (2) years after retirement any bargaining unit member who retires on or after March 1, 2012 and prior to June 30, 2015 shall be entitled to participate only in the High Deductible Health Insurance Plan, and not in any other City health insurance plan. The bargaining unit member shall pay the entire cost of the plan The deductibles for the High Deductible Health Insurance Plan shall be $2,000.00/$4,000.00 (single person/two person or family plan).

20.7 The City will make available up to 5 slots on the payroll for deductions requested by the employee, The City will not discriminate in the uses of these payroll deduction slots.

ARTICLE 21
TEMPORARY DUTY IN HIGHER RANK

21.1 Any bargaining unit member required to perform the duties of an officer of a higher rank for one (1) continuous work week, except for training purposes, shall be compensated at the rate of pay for said rank in accordance with Section II, paragraph (E) of the Compensation Ordinance.

ARTICLE 22
JOINT SAFETY COMMITTEE

22.1 A joint Committee shall be formed by the Commission, the MPPA and the Manchester Association of Police Supervisors which shall meet once a month, or more often by mutual agreement of the parties, to review and recommend safety and health conditions and to discuss matters of mutual interest and benefit pertaining to safety and health conditions. Said Committee shall consist of one individual appointed by the Police Commission, one individual appointed by the Manchester Association of Police Supervisors and two members appointed by the MPPA.

22.2 The MPPA and MAPS appointees shall attend the meetings without loss of pay or benefits when such meetings occur during the regular working hours of the employee.

22.3 Each member of the Committee shall be a permanent member for the duration of this Agreement and an Alternate shall be named for each; provided, however, the permanent members shall attend whenever possible.

ARTICLE 23
MISCELLANEOUS

23.1 The Commission agrees to permit representatives of the MPPA to have reasonable access to Manchester Police Station, subject to security regulations, provided that any such representative notifies the Chief of Police or his designee of the reason for his/her presence when he/she arrives and exercises care not to interfere with the performance of duties assigned to employees.

23.2 The Commission agrees to provide suitable space for a bulletin board to be used for Union announcements, notices, social events and other such non-controversial matters. The Union agrees to provide the Chief with a copy of all notices to be posted. The bulletin board space shall not include advertising, political matter or any kind of literature other than herein provided.

23.3 The Commission will annually furnish the Union with a seniority list showing the names of all employees in the bargaining unit.

23.4 The Union agrees to furnish the Commission with a list of MPPA officials and to keep said list up to date.

23.5 One local official shall be allowed to attend the MPPA monthly meeting without loss of pay or benefits if said meeting occurs during the officer's regular tour of duty.

23.6 Officers may be employed on their off duty hours up to a maximum of twenty-four (24) hours in any one work week. The Police Department shall be considered the primary employer and when a callback order is issued by the Department, any employee must immediately respond. It is mandatory that the employee notify the Chief of Police or his designee, in writing, as to the name of the employer, the location of employment, a description of the type of work being performed, the work hours scheduled, the days of the week involved and any changes in his/her work or work schedule. If injured in the performance of this off-duty work, he/she must submit a detailed report of such injury. No officer shall be allowed to accept and continue employment without the express knowledge of the Chief of Police or his designee who shall have the sole right to determine whether a conflict of interest exists or whether the work is in the best interest of the department and the City of Manchester.

23.7 An individual's personnel folder shall be available to that department member upon request at reasonable times for inspection and review, provided, however, any such inspection or review shall be conducted in the presence of the Chief or his designee. Excluded from inspection and review are personal and business references obtained prior to employment. No item shall be removed from an individual's personnel folder, except by mutual agreement of the individual and the Chief of Police or his designee.

23.8 REMOVAL OF REPRIMANDS - All written reprimands shall be removed from an employee's personnel folder after twelve (12) months, provided the employee has satisfactorily corrected the nature of the reprimand and there have been no additional reprimands issued during the twelve month period. The employee will be notified when a reprimand has been removed from his/her personnel folder.

23.9 OFF DUTY HANDGUNS. Off duty officers will be allowed to carry semiautomatic handguns, provided they attend training and become certified with such handguns. The officer shall be responsible to provide for ammunition and any other costs associated with training and certification. Training shall be done during off duty hours and officers shall not be entitled to any pay for such training.

23.10 INDEMNIFICATION. The City of Manchester currently purchases liability insurance and/or self-insures which includes coverage of liability of public officials and employees for actions

taken as part of their official duties while employed by the City.

Furthermore, on the 25th of November, 1975, the Board of Mayor and Aldermen acted under the provisions of RSA 31:105 by voting to indemnify the hold harmless for loss or damage any person employed by the City while acting in their official capacity. Such action by the Board of Mayor and Aldermen protects the officials and employees of the City for the deductible amount of liability insurance.

Employees of the City within the bargaining unit, acting within the scope and authority of their offices, are covered under the liability insurance and the indemnification for the deductible amount of the liability coverage which are currently in effect.

23.11 The City agrees that for the safety of the parking control officers any tickets or documents issued by a parking control officer will not have any identifying marks or representation of an individual parking control officer that is recognizable by the general public. This does not prohibit the City from creating a system of accountability for the issuance of ticket, including badge numbers, provided the public cannot identify the individual parking control officer on the face of the ticket.

ARTICLE 24
MEDICAL EXAMINATIONS

24.1 It shall be the responsibility of each member of the Manchester Police Department to keep himself/herself in the proper physical condition to enable him/her to carry out the normal functions of a Police Officer. Employees shall be required to take a physical examination every year and meet the physical standards as established by the Joint Safety Committee referred to in Article 22. An employee may be required to take a physical examination more frequently if deemed necessary by the Chief of Police. Failure to maintain oneself in the prescribed physical condition may subject an employee to disciplinary action, including dismissal.

However, any disciplinary action, including dismissal, as a result of said physical examination shall be subject to review under the Grievance Procedure of this Agreement.

ARTICLE 25
RULES AND REGULATIONS

25.1 The Rules and Regulations of the Manchester, New Hampshire, Police Department which are now in effect or as may be amended by the Police Commission shall be the prime governing factor in the conduct and actions of all police officers and every police officer shall be thoroughly conversant with them.

ARTICLE 26
NO STRIKE CLAUSE

26.1 No employee covered by this Agreement shall engage in, induce or encourage any strike, work stoppage, "sick-in", "sick- out", slowdown or withholding of services to the City of Manchester.

26.2 The Union agrees that neither it, nor any of its officers or agents, national or local, will call, institute, authorize, participate in, sanction or ratify any such strike, work stoppage, slowdown or withholding of services of the City of Manchester.

26.3 In the event of a strike, work stoppage, slowdown or withholding of services to the City of Manchester any employees participating in the same shall be subject to disciplinary action, including immediate dismissal.

ARTICLE 27
EDUCATION INCENTIVE REIMBURSEMENT POLICY

27.1 The City will reimburse employees for approved courses, which are in accordance with the established procedures of the Department and the City, on the basis of 75% of the cost of tuition, books and materials to a maximum of $1000.00 per calendar year provided, however, the City will not reimburse an employee for a course or courses and books or materials which are paid for through Federal or State Programs.

27.2 Courses must be approved in advance by the Department Head concerned as meeting the requirement that such course is related to the employee's job or is part of a career development program. Approval must be obtained through the Human Resources Department for payment for the course in accordance with the established procedure.

27.3 Approval for courses will be considered on the basis of relevancy of the course, number of employees applying and funds available. The total amount expended for Tuition Reimbursement for Bargaining Unit members shall not exceed twelve thousand ($12,000.00) Dollars.

ARTICLE 28
CRITICAL INCIDENT PAY

28.1 In recognition of the increasingly hazardous working conditions, including but not limited to, the proliferation of violence against police officers, increased frequency of critical incidents, and the heroin and other illegal drugs epidemic, each sworn officers and animal control officers shall receive an additional forty ($40) dollars a week as critical incident/hazardous duty pay effective January 1, 2017. The critical incident/hazardous duty pay shall be increase to $50 per week effective January 1, 2018.

ARTICLE 29
LIFE INSURANCE

29.1 Effective July 1, 2010, or date of ratification, whichever is later, the City will provide for a Life Insurance Fund to provide for the payment of a death benefit of an amount equal to the employee's last yearly base pay, but not to exceed fifty thousand ($50,000.00) to the named beneficiary or estate of any member of the Bargaining Unit who dies from any cause while employed by the City or within sixty (60) calendar days after retirement or resignation for health reasons.

29.2 The City reserves the right to obtain insurance coverage for the above amounts, and reserves the sole right to select such insurance carrier.

ARTICLE 30
DURATION

TERMINATION AND RENEWAL

30.1 This agreement shall be in full force and effect and remain in full force and effect from *July 1, 2016*, to and including *June 30, 2019* except as otherwise specified in individual articles, and shall continue from year to year thereafter unless written notice of desire to cancel or terminate the Agreement is served by either party upon the other at least sixty (60) days prior to the date of expiration.

30.2 Where no such cancellation or termination notice is served and the parties desire to continue said Agreement, but also desire to negotiate changes or revisions in this Agreement, either party may serve upon the other a notice at least sixty (60) calendar days prior to June 30, 2019, advising that such party desires to revise or change terms or conditions of such Agreement, and which, terms and conditions are desired to be renegotiated.

ARTXCLE 31
HEALTH BENEFITS AND SALARY INCREASES

31.1 Should, subsequent to January 1, 2012, any other bargaining unit within the City of Manchester, New Hampshire negotiate health care benefits set forth in paragraph 20.1 of this agreement which are more favorable that the health care benefits contained in paragraph 20.1, 20.1 A and 20.6, the Manchester Police Patrolman's Association shall be entitled to receive the more favorable benefits.

31.2 Should, subsequent to January 1, 2012, any other *bargaining* unit within the City of

Manchester, New Hampshire negotiate Salary Schedule increases for the years set forth in paragraphs 13.3.2 and 13.3.3 of this agreement which are more favorable than the Salary Schedule increases contained in paragraphs 13.3.2 and 13.3.3, the Manchester Police Patrolman's Association shall be entitled to receive the more favorable Salary Schedule increases for those years.

31.3 In recognition of prior service any bargaining unit member with twenty years of service, of which ten (10) must be with the City of Manchester, who retires after July 1 , 2017 will be paid a severance benefit of $10,000. The City may withhold from this benefit such amounts that are necessary for contributions to the New Hampshire Retirement System.

For MPPA

Date: 4-26-17

City Negotiating Team

Date: 26 APR 17

APPENDIX A
QUALIFICATIONS FOR ACHIEVEMENT STEPS

Current members of the MPPA bargaining unit will be grandfathered to assure those presently holding an A-Step status keep it at their current rank.

Upon ratification of the contract members with Post Secondary Education (degrees +) will carry forward through the ranks as outlined in Appendix A.

Bargaining unit members who attain any of the following shall be deemed to have achieved the "A-STEP."

Any certification or experience in a specialized area that brings added benefit to the assigned duties of the member's position (as solely determined by the Chief of Police).

Police Officer:

- An Associates Degree or higher in, Criminal Justice; Social Services; Business Management/Administration; Public Administration or Medical Sciences, i.e., RN, P.A., Paramedic, EMT (All employees currently having the EMT A-Step shall retain such A-Step whether or not licensed by the State of New Hampshire or by any other agency. New EMT's, after August 3, 2004, must be licensed by the State of New Hampshire).
- Certified Polygraph Examiners
- Certified Accident Reconstructionist
- 30 Continuing Education Units (CEU) from the NH Police Standards and Training Council [Courses required for Police Officers Certification shall not count]
- Animal Control Officer I&II:
- An Associates Degree or higher in, Criminal Justice; Veterinary Sciences; Social Services; Business Management/Administration; Public Administration or Medical Sciences, ie, RN, P.A., Paramedic.

- Or completes (pre-approved) six courses, six workshops or six seminars appropriate to assigned duties.

Parking Control Officer:

- An Associates Degree or higher in , Criminal Justice; Social Services; Business Management/Administration; Public Administration or Medical Sciences, i.e., RN, P.A., Paramedic
- or completes (pre-approved) six courses, six workshops or six seminars appropriate to assigned duties.

[NOTE]The following paragraph shall apply only to bargaining unit members who are hired after the date of ratification of this Agreement:

Achievement Pay Standards for each class of positions are grouped into three different kinds of categories:

1. Qualifying Additional Formal Education;
2. Qualifying Additional Specialized Training; and
3. Qualifying Additional Skills

In order for an employee to advance into an Achievement Pay Grade, the employee must successfully complete the required items within two (2) of the three (3) categories. One will suffice to achieve an A-STEP provided the required items are proposed by the employee and/or bargaining unit representative and approve by the department head. All employees shall be provided equal opportunity to pursue completion of Achievement Pay Standards appropriate to their assigned duties and
responsibilities.

APPENDIX B
EMPLOYEE DEVELOPMENT APPEALS PROCESS

Only employees who are denied a merit step increase on their anniversary date of position due to a sub-standard performance evaluation may file an appeal. All appeals shall be initially filed with the employee's department head. Any employees receiving a satisfactory performance evaluation shall not have the right to appeal or grieve their evaluation, their pay step or the supervisor's comments. In the event that there is a disagreement between the employee and his/her supervisor over the EDP goals, the employee, after discussing the disagreement with the Department Head or his/her designee may with the concurrence of the Union, file a grievance.

If the department head rules in the employee's favor, the employee shall receive his/her merit step as of their anniversary date of position. If the department head rules against the employee, the employee shall have the right to appeal the decision to the city-wide appeals committee.

Employees will have thirty (30) days from the date of denial by their department head to

file an appeal with the Human Resources Director or their right to appeal shall be forfeited.

- An appeals committee shall be comprised of the following representatives:
- Two union representatives appointed by the unions (with two alternates).
- One department head (with one alternate).
- One non-affiliated (with one alternate).
- An independent neutral party to act as tie breaker. This person to be selected through agreement between the City and the unions. If no decision can be reached, the neutral shall be appointed by the P.E.L.R.B. Any costs associated with the neutral party hearing appeals shall be borne half by the City and half proportionally split amongst the unions whose members are appealing. The unions shall not be responsible for any costs incurred in appeal hearings from non-affiliated employees.

The Human Resources Director as non-voting chairman to provide staff resources. Members cannot sit in on appeals where the appellant is a member of the same department or union.

Terms of the members on this committee shall be staggered with two (2) year terms and members cannot serve more than two consecutive terms. Members must take at least one year off after serving two terms before being allowed to serve on the committee again. Alternates shall have no term limitations.

Unless agreed to by the appellant and the Human Resources Director the committee shall have sixty (60) days from receipt of the appeal to conduct a hearing on the matter.

The committee shall have thirty (30) days to render a decision on the matter.

A majority vote shall rule and all decisions are final, binding and non-grieveable. A decision favorable to the employee means the employee shall receive their merit step effective (including retro-active pay) to their date of position. Evaluation step increases will stop when an employee reaches Step 13 on the included pay matrix.

The provisions of this Article shall expire on the last day of this Agreement, provided that any employee denied a merit pay increase during the duration of this agreement shall be entitled to an appeal under this Article.

CITY OF MANCHESTER, NEW HAMPSHIRE PAY DULE - (FY2017) - 1%

GRADE		2016 STEP 1	2016 STEP 2	2016 STEP 3	2016 STEP 4	2016 STEP 5	2016 STEP 6	2016 STEP 7	2016 STEP 8	2016 STEP 9	2016 STEP 10	2016 STEP 11	2016 STEP 12	2016 STEP 13	2016 STEP AL1
GRADE 1	Ex	14,609.11	15,047.41	15,498.80	15,963.79	16,442.71	16,935.98	17,444.07	17,967.38	18,506.40	19,061.59	19,633.46	20,222.47	20,829.14	21,454.00
	H	7.10	7.30	7.52	7.77	7.99	8.21	8.47	8.73	8.99	9.26	9.53	9.83	10.13	10.42
	O	10.650	10.950	11.280	11.655	11.985	12.315	12.705	13.095	13.485	13.890	14.295	14.745	15.195	15.630
GRADE 1A	Ex	15,120.45	15,574.07	16,041.25	16,522.53	17,018.19	17,528.72	18,054.62	18,596.25	19,154.15	19,728.75	20,320.62	20,930.25	21,558.14	22,204.88
	H	7.27	7.48	7.72	7.95	8.19	8.42	8.69	8.96	9.20	9.47	9.77	10.08	10.36	10.69
	O	10.905	11.220	11.580	11.925	12.285	12.630	13.035	13.440	13.800	14.205	14.655	15.120	15.540	16.035
GRADE 2	Ex	15,631.76	16,100.70	16,583.76	17,081.26	17,593.71	18,121.52	18,665.12	19,225.08	19,801.86	20,395.90	21,007.79	21,638.02	22,287.17	22,955.77
	H	7.49	7.76	7.97	8.21	8.46	8.72	9.00	9.26	9.53	9.83	10.13	10.42	10.74	11.05
	O	11.235	11.640	11.955	12.315	12.690	13.080	13.500	13.890	14.295	14.745	15.195	15.630	16.110	16.575
GRADE 2A	Ex	16,178.88	16,664.25	17,164.17	17,679.09	18,209.47	18,755.73	19,318.41	19,897.98	20,494.93	21,109.75	21,743.06	22,395.36	23,067.23	23,759.22
	H	7.81	8.02	8.26	8.50	8.77	9.03	9.29	9.56	9.86	10.16	10.45	10.79	11.10	11.42
	O	11.715	12.030	12.390	12.750	13.155	13.545	13.935	14.340	14.790	15.240	15.675	16.185	16.650	17.130
GRADE 3 (6A0)	Ex	16,725.98	17,227.75	17,744.61	18,276.96	18,825.24	19,390.00	19,971.71	20,570.87	21,188.01	21,823.63	22,478.35	23,152.67	23,847.26	24,562.67
	H	8.05	8.28	8.53	8.81	9.06	9.33	9.60	9.90	10.20	10.48	10.83	11.15	11.47	11.80
	O	12.075	12.420	12.795	13.215	13.590	13.995	14.400	14.850	15.300	15.720	16.245	16.725	17.205	17.700
GRADE 3A (6AA)	Ex	17,311.39	17,830.73	18,365.68	18,916.64	19,484.15	20,068.64	20,670.71	21,290.83	21,929.57	22,587.46	23,265.09	23,963.04	24,681.92	25,422.36
	H	8.31	8.56	8.84	9.10	9.37	9.65	9.96	10.25	10.53	10.88	11.20	11.53	11.90	12.24
	O	12.465	12.840	13.260	13.650	14.055	14.475	14.940	15.375	15.795	16.320	16.800	17.295	17.850	18.360
GRADE 4 (6B0)	Ex	17,896.80	18,433.72	18,986.72	19,556.32	20,143.01	20,747.29	21,369.74	22,010.80	22,671.14	23,351.28	24,051.82	24,773.36	25,516.58	26,282.07
	H	8.62	8.90	9.14	9.42	9.70	10.00	10.29	10.57	10.92	11.26	11.57	11.95	12.29	12.65
	O	12.930	13.350	13.710	14.130	14.550	15.000	15.435	15.855	16.380	16.890	17.355	17.925	18.435	18.975
GRADE 4A (6BA)	Ex	18,523.21	19,078.88	19,651.27	20,240.81	20,848.04	21,473.47	22,117.67	22,781.18	23,464.64	24,168.56	24,893.60	25,640.43	26,409.65	27,201.97
	H	8.91	9.18	9.45	9.73	10.05	10.32	10.65	10.96	11.30	11.64	11.99	12.35	12.70	13.10
	O	13.365	13.770	14.175	14.595	15.075	15.480	15.975	16.440	16.950	17.460	17.985	18.525	19.050	19.650
GRADE 5 (6C0)	Ex	19,149.58	19,724.05	20,315.81	20,925.27	21,553.02	22,199.63	22,865.60	23,551.59	24,258.13	24,985.85	25,735.44	26,507.50	27,302.74	28,121.82
	H	9.22	9.48	9.77	10.08	10.36	10.69	11.00	11.33	11.67	12.02	12.38	12.74	13.14	13.51
	O	13.830	14.220	14.655	15.120	15.540	16.035	16.500	16.995	17.505	18.030	18.570	19.110	19.710	20.265
GRADE 5A (6CA)	Ex	19,819.82	20,414.40	21,026.84	21,657.66	22,307.38	22,976.60	23,665.92	24,375.89	25,107.16	25,860.37	26,636.19	27,435.26	28,258.33	29,106.09
	H	9.52	9.84	10.14	10.43	10.76	11.08	11.40	11.74	12.10	12.47	12.84	13.22	13.61	14.03
	O	14.280	14.760	15.210	15.645	16.140	16.620	17.100	17.610	18.150	18.705	19.260	19.830	20.415	21.045
GRADE 6 (6D0)	Ex	20,490.04	21,104.75	21,737.90	22,390.03	23,061.72	23,753.59	24,466.22	25,200.21	25,956.19	26,734.89	27,536.92	28,363.04	29,213.91	30,090.32
	H	9.87	10.18	10.46	10.80	11.11	11.43	11.77	12.13	12.50	12.87	13.25	13.67	14.06	14.47
	O	14.805	15.270	15.690	16.200	16.665	17.145	17.655	18.195	18.750	19.305	19.875	20.505	21.090	21.705
GRADE 6A (6DA)	Ex	21,207.21	21,843.43	22,498.72	23,173.68	23,868.92	24,584.97	25,322.53	26,082.19	26,864.64	27,670.60	28,500.74	29,355.73	30,236.41	31,143.52
	H	10.20	10.49	10.84	11.16	11.49	11.84	12.19	12.55	12.94	13.31	13.73	14.12	14.54	15.01
	O	15.300	15.735	16.260	16.740	17.235	17.760	18.285	18.825	19.410	19.965	20.595	21.180	21.810	22.515

CITY OF MANCHESTER, NEW HAMPSHIRE P[illegible]HEDULE - (FY2017) - 1%

GRADE		2016 STEP 1	2016 STEP 2	2016 STEP 3	2016 STEP 4	2016 STEP 5	2016 STEP 6	2016 STEP 7	2016 STEP 8	2016 STEP 9	2016 STEP 10	2016 STEP 11	2016 STEP 12	2016 STEP 13	2016 STEP AL1
GRADE 7	Ex	21,924.36	22,582.10	23,259.56	23,957.35	24,676.06	25,415.98	26,178.84	26,964.18	27,773.12	28,606.32	29,464.51	30,348.44	31,258.88	32,196.67
(6E0)	H	10.52	10.87	11.20	11.53	11.89	12.24	12.59	12.98	13.35	13.79	14.19	14.61	15.06	15.49
	O	15.780	16.305	16.800	17.295	17.835	18.360	18.885	19.470	20.025	20.685	21.285	21.915	22.590	23.235
GRADE 7A	Ex	22,691.72	23,372.48	24,073.64	24,795.84	25,539.72	26,305.89	27,095.11	27,907.94	28,745.19	29,607.53	30,495.77	31,410.67	32,352.96	33,323.56
(6EA)	H	10.91	11.26	11.57	11.95	12.30	12.66	13.06	13.43	13.84	14.26	14.68	15.12	15.55	16.03
	O	16.365	16.890	17.355	17.925	18.450	18.990	19.590	20.145	20.760	21.390	22.020	22.680	23.325	24.045
GRADE 8	Ex	23,459.08	24,162.84	24,887.73	25,634.36	26,403.40	27,195.50	28,011.35	28,851.70	29,717.25	30,608.78	31,527.01	32,472.86	33,447.01	34,450.43
(6F0)	H	11.29	11.63	11.98	12.34	12.69	13.09	13.47	13.88	14.30	14.73	15.18	15.60	16.11	16.57
	O	16.935	17.445	17.970	18.510	19.035	19.635	20.205	20.820	21.450	22.095	22.770	23.400	24.165	24.855
GRADE 8A	Ex	24,280.12	25,008.55	25,758.79	26,531.56	27,327.51	28,147.35	28,991.74	29,861.51	30,757.35	31,680.06	32,630.48	33,609.39	34,617.70	35,656.21
(6FA)	H	11.66	12.01	12.38	12.74	13.15	13.52	13.95	14.36	14.80	15.24	15.69	16.18	16.64	17.18
	O	17.490	18.015	18.570	19.110	19.725	20.280	20.925	21.540	22.200	22.860	23.535	24.270	24.960	25.770
GRADE 9	Ex	25,101.22	25,854.26	26,629.88	27,428.76	28,251.64	29,099.16	29,972.14	30,871.31	31,797.46	32,751.38	33,733.91	34,745.94	35,788.31	36,861.96
(6G0)	H	12.07	12.46	12.83	13.21	13.60	14.02	14.43	14.88	15.33	15.80	16.27	16.75	17.26	17.76
	O	18.105	18.690	19.245	19.815	20.400	21.030	21.645	22.320	22.995	23.700	24.405	25.125	25.890	26.640
GRADE 9A	Ex	25,979.77	26,759.13	27,561.92	28,388.76	29,240.43	30,117.63	31,021.20	31,951.81	32,910.36	33,897.68	34,914.60	35,962.05	37,040.92	38,152.09
(6GA)	H	12.50	12.87	13.25	13.67	14.06	14.47	14.95	15.38	15.86	16.31	16.80	17.32	17.81	18.36
	O	18.750	19.305	19.875	20.505	21.090	21.705	22.425	23.070	23.790	24.465	25.200	25.980	26.715	27.540
GRADE 10	Ex	26,858.27	27,664.05	28,493.95	29,348.80	30,229.23	31,136.14	32,070.20	33,032.32	34,023.29	35,043.96	36,095.30	37,178.17	38,293.48	39,442.29
(6H0)	H	12.92	13.28	13.70	14.10	14.51	14.99	15.43	15.91	16.36	16.85	17.36	17.86	18.42	18.97
	O	19.380	19.920	20.550	21.150	21.765	22.485	23.145	23.865	24.540	25.275	26.040	26.790	27.630	28.455
GRADE 10A	Ex	27,798.33	28,632.28	29,491.24	30,375.99	31,287.26	32,225.88	33,192.65	34,188.46	35,214.09	36,270.51	37,358.65	38,479.38	39,633.76	40,822.76
(6HA)	H	13.35	13.80	14.20	14.62	15.07	15.50	15.98	16.43	16.93	17.43	17.98	18.51	19.07	19.62
	O	20.025	20.700	21.300	21.930	22.605	23.250	23.970	24.645	25.395	26.145	26.970	27.765	28.605	29.430
GRADE 11	Ex	28,738.36	29,600.50	30,488.54	31,403.18	32,345.29	33,315.65	34,315.13	35,344.56	36,404.88	37,497.03	38,621.97	39,780.65	40,974.03	42,203.27
(6I0)	H	13.84	14.24	14.67	15.11	15.54	16.03	16.51	17.01	17.49	18.05	18.57	19.14	19.72	20.30
	O	20.760	21.360	22.005	22.665	23.310	24.045	24.765	25.515	26.235	27.075	27.855	28.710	29.580	30.450
GRADE 11A	Ex	29,744.19	30,636.55	31,555.62	32,502.29	33,477.38	34,481.68	35,516.15	36,581.62	37,679.05	38,809.46	39,973.72	41,172.94	42,408.12	43,680.37
(6IA)	H	14.31	14.74	15.19	15.62	16.13	16.59	17.12	17.62	18.16	18.69	19.25	19.83	20.42	21.04
	O	21.465	22.110	22.785	23.430	24.195	24.885	25.680	26.430	27.240	28.035	28.875	29.745	30.630	31.560
GRADE 12	Ex	30,750.06	31,672.52	32,622.71	33,601.39	34,609.47	35,647.73	36,717.17	37,818.65	38,953.25	40,121.86	41,325.48	42,565.26	43,842.22	45,157.47
(6J0)	H	14.78	15.23	15.68	16.17	16.63	17.16	17.66	18.21	18.74	19.30	19.87	20.46	21.10	21.74
	O	22.170	22.845	23.520	24.255	24.945	25.740	26.490	27.315	28.110	28.950	29.805	30.690	31.650	32.610
GRADE 12A	Ex	31,826.29	32,781.13	33,764.55	34,777.45	35,820.75	36,895.40	38,002.25	39,142.32	40,316.58	41,526.11	42,771.91	44,055.04	45,376.71	46,737.98
(6JA)	H	15.30	15.76	16.24	16.73	17.24	17.74	18.28	18.84	19.40	19.98	20.59	21.20	21.83	22.48
	O	22.950	23.640	24.360	25.095	25.860	26.610	27.420	28.260	29.100	29.970	30.885	31.800	32.745	33.720

CITY OF MANCHESTER, NEW HAMPSHIRE PA[illegible]EDULE - (FY2017) - 1%

GRADE		2016 STEP 1	2016 STEP 2	2016 STEP 3	2016 STEP 4	2016 STEP 5	2016 STEP 6	2016 STEP 7	2016 STEP 8	2016 STEP 9	2016 STEP 10	2016 STEP 11	2016 STEP 12	2016 STEP 13	2016 STEP AL1
GRADE 13	Ex	32,902.54	33,889.65	34,906.34	35,953.50	37,032.10	38,143.08	39,287.36	40,465.98	41,679.95	42,930.37	44,218.32	45,544.81	46,911.21	48,318.50
(6K0)	H	15.85	16.30	16.78	17.31	17.80	18.35	18.91	19.48	20.04	20.66	21.27	21.92	22.56	23.26
	O	23.775	24.450	25.170	25.965	26.700	27.525	28.365	29.220	30.060	30.990	31.905	32.880	33.840	34.890
GRADE 13A	Ex	34,054.15	35,075.76	36,128.06	37,211.88	38,328.24	39,478.09	40,662.42	41,882.31	43,138.77	44,432.93	45,765.91	47,138.93	48,553.05	50,009.67
(6KA)	H	16.36	16.86	17.38	17.89	18.44	18.99	19.56	20.15	20.75	21.38	22.02	22.66	23.36	24.08
	O	24.540	25.290	26.070	26.835	27.660	28.485	29.340	30.225	31.125	32.070	33.030	33.990	35.040	36.120
GRADE 14	Ex	35,205.75	36,261.92	37,349.77	38,470.25	39,624.36	40,813.09	42,037.49	43,298.63	44,597.58	45,935.51	47,313.53	48,732.97	50,194.97	51,700.81
(6L0)	H	16.91	17.43	17.98	18.50	19.04	19.61	20.23	20.81	21.45	22.09	22.77	23.45	24.16	24.87
	O	25.365	26.145	26.970	27.750	28.560	29.415	30.345	31.215	32.175	33.135	34.155	35.175	36.240	37.305
GRADE 14A	Ex	36,437.94	37,531.07	38,657.00	39,816.70	41,011.22	42,241.52	43,508.81	44,814.08	46,158.49	47,543.25	48,969.54	50,438.62	51,951.75	53,510.36
(6LA)	H	17.49	18.06	18.58	19.15	19.73	20.32	20.93	21.54	22.20	22.87	23.55	24.26	24.97	25.72
	O	26.235	27.090	27.870	28.725	29.595	30.480	31.395	32.310	33.300	34.305	35.325	36.390	37.455	38.580
GRADE 15	Ex	37,670.13	38,800.25	39,964.26	41,163.19	42,398.07	43,670.03	44,980.12	46,329.54	47,719.41	49,150.99	50,625.51	52,144.28	53,708.59	55,319.87
(6M0)	H	18.12	18.64	19.21	19.81	20.40	21.02	21.64	22.28	22.96	23.64	24.35	25.07	25.83	26.61
	O	27.180	27.960	28.815	29.715	30.600	31.530	32.460	33.420	34.440	35.460	36.525	37.605	38.745	39.915
GRADE 15A	Ex	38,988.59	40,158.25	41,362.98	42,603.89	43,882.00	45,198.46	46,554.42	47,951.06	49,389.59	50,871.27	52,397.41	53,969.33	55,588.40	57,256.06
(6MA)	H	18.76	19.31	19.90	20.50	21.14	21.77	22.41	23.08	23.75	24.47	25.22	25.96	26.74	27.55
	O	28.140	28.965	29.850	30.750	31.710	32.655	33.615	34.620	35.625	36.705	37.830	38.940	40.110	41.325
GRADE 16	Ex	40,307.06	41,516.25	42,761.74	44,044.57	45,365.94	46,726.90	48,128.71	49,572.59	51,059.75	52,591.56	54,169.30	55,794.37	57,468.20	59,192.23
(6N0)	H	19.39	19.97	20.59	21.20	21.83	22.48	23.15	23.83	24.57	25.32	26.07	26.85	27.65	28.46
	O	29.085	29.955	30.885	31.800	32.745	33.720	34.725	35.745	36.855	37.980	39.105	40.275	41.475	42.690
GRADE 16A	Ex	41,717.80	42,969.33	44,258.40	45,586.19	46,953.74	48,362.35	49,813.24	51,307.62	52,846.87	54,432.25	56,065.23	57,747.16	59,479.59	61,263.96
(6NA)	H	20.04	20.66	21.27	21.92	22.58	23.28	24.00	24.69	25.44	26.18	26.99	27.81	28.64	29.50
	O	30.060	30.990	31.905	32.880	33.870	34.920	36.000	37.035	38.160	39.270	40.485	41.715	42.960	44.250
GRADE 17	Ex	43,128.55	44,422.41	45,755.07	47,127.72	48,541.55	49,997.81	51,497.72	53,042.69	54,633.93	56,272.95	57,961.13	59,699.98	61,490.97	63,335.71
(6O0)	H	20.74	21.37	22.01	22.65	23.35	24.07	24.78	25.51	26.29	27.08	27.87	28.70	29.56	30.46
	O	31.110	32.055	33.015	33.975	35.025	36.105	37.170	38.265	39.435	40.620	41.805	43.050	44.340	45.690
GRADE 17A	Ex	44,638.06	45,977.17	47,356.50	48,777.19	50,240.49	51,747.71	53,300.15	54,899.15	56,546.13	58,242.53	59,989.78	61,789.47	63,643.15	65,552.46
(6OA)	H	21.46	22.10	22.78	23.46	24.17	24.88	25.62	26.41	27.18	27.99	28.87	29.71	30.60	31.55
	O	32.190	33.150	34.170	35.190	36.255	37.320	38.430	39.615	40.770	41.985	43.305	44.565	45.900	47.325
GRADE 18	Ex	46,147.53	47,531.95	48,957.91	50,426.66	51,939.46	53,497.65	55,102.58	56,755.65	58,458.32	60,212.06	62,018.41	63,878.98	65,795.33	67,769.20
(6P0)	H	22.19	22.86	23.53	24.24	24.96	25.71	26.51	27.29	28.13	28.99	29.86	30.75	31.66	32.62
	O	33.285	34.290	35.295	36.360	37.440	38.565	39.765	40.935	42.195	43.485	44.790	46.125	47.490	48.930
GRADE 18A	Ex	47,762.71	49,195.56	50,671.45	52,191.61	53,757.32	55,370.06	57,031.14	58,742.11	60,504.37	62,319.48	64,189.08	66,114.74	68,098.18	70,141.14
(6PA)	H	22.97	23.65	24.36	25.09	25.85	26.63	27.43	28.26	29.10	29.96	30.86	31.76	32.76	33.73
	O	34.455	35.475	36.540	37.635	38.775	39.945	41.145	42.390	43.650	44.940	46.290	47.640	49.140	50.595

CITY OF MANCHESTER, NEW HAMPSHIRE PA IEDULE - (FY2017) - 1%

GRADE		2016 STEP 1	2016 STEP 2	2016 STEP 3	2016 STEP 4	2016 STEP 5	2016 STEP 6	2016 STEP 7	2016 STEP 8	2016 STEP 9	2016 STEP 10	2016 STEP 11	2016 STEP 12	2016 STEP 13	2016 STEP AL1
GRADE 19	Ex	49,377.87	50,859.21	52,384.97	53,956.52	55,575.22	57,242.50	58,959.76	60,728.55	62,550.41	64,426.89	66,359.72	68,350.52	70,401.03	72,513.04
(6Q0)	H	23.74	24.45	25.20	25.94	26.71	27.54	28.37	29.20	30.10	30.98	31.94	32.88	33.87	34.90
	O	35.610	36.675	37.800	38.910	40.065	41.310	42.555	43.800	45.150	46.470	47.910	49.320	50.805	52.350
GRADE 19A	Ex	51,106.08	52,639.27	54,218.44	55,845.00	57,520.36	59,245.98	61,023.32	62,854.07	64,739.67	66,681.85	68,682.30	70,742.78	72,865.06	75,051.00
(6QA)	H	24.59	25.35	26.09	26.87	27.68	28.49	29.34	30.24	31.16	32.09	33.03	34.03	35.06	36.12
	O	36.885	38.025	39.135	40.305	41.520	42.735	44.010	45.360	46.740	48.135	49.545	51.045	52.590	54.180
GRADE 20	Ex	52,834.30	54,419.31	56,051.89	57,733.49	59,465.49	61,249.45	63,086.94	64,979.55	66,928.92	68,936.78	71,004.90	73,135.03	75,329.10	77,588.98
(6R0)	H	25.41	26.15	26.95	27.79	28.62	29.48	30.35	31.28	32.20	33.18	34.16	35.17	36.25	37.34
	O	38.115	39.225	40.425	41.685	42.930	44.220	45.525	46.920	48.300	49.770	51.240	52.755	54.375	56.010
GRADE 20A	Ex	54,683.51	56,324.01	58,013.75	59,754.17	61,546.78	63,393.19	65,294.95	67,253.81	69,271.44	71,349.56	73,490.07	75,694.77	77,965.59	80,304.57
(6RA)	H	26.32	27.11	27.90	28.73	29.59	30.49	31.41	32.36	33.34	34.32	35.35	36.41	37.50	38.62
	O	39.480	40.665	41.850	43.095	44.385	45.735	47.115	48.540	50.010	51.480	53.025	54.615	56.250	57.930
GRADE 21	Ex	56,532.70	58,228.67	59,975.56	61,774.83	63,628.05	65,536.92	67,503.01	69,528.09	71,613.94	73,762.36	75,975.25	78,254.49	80,602.15	83,020.19
(6S0)	H	27.17	27.99	28.86	29.70	30.59	31.54	32.48	33.44	34.46	35.47	36.52	37.63	38.77	39.94
	O	40.755	41.985	43.290	44.550	45.885	47.310	48.720	50.160	51.690	53.205	54.780	56.445	58.155	59.910
GRADE 21A	Ex	58,511.35	60,266.70	62,074.71	63,936.94	65,855.04	67,830.70	69,865.60	71,961.60	74,120.44	76,344.06	78,634.37	80,993.42	83,423.18	85,925.90
(6SA)	H	28.15	29.01	29.88	30.77	31.68	32.65	33.63	34.63	35.68	36.75	37.84	38.98	40.15	41.36
	O	42.225	43.515	44.820	46.155	47.520	48.975	50.445	51.945	53.520	55.125	56.760	58.470	60.225	62.040
GRADE 22	Ex	60,490.00	62,304.68	64,173.81	66,099.07	68,082.03	70,124.51	72,228.22	74,395.06	76,626.91	78,925.73	81,293.50	83,732.31	86,244.26	88,831.58
(6T0)	H	29.09	29.95	30.85	31.75	32.75	33.72	34.71	35.78	36.84	37.98	39.10	40.27	41.49	42.72
	O	43.635	44.925	46.275	47.625	49.125	50.580	52.065	53.670	55.260	56.970	58.650	60.405	62.235	64.080
GRADE 22A	Ex	62,607.15	64,485.37	66,419.94	68,412.51	70,464.90	72,578.85	74,756.23	76,998.88	79,308.87	81,688.13	84,138.79	86,662.95	89,262.83	91,940.73
(6TA)	H	30.12	31.00	31.96	32.90	33.89	34.94	35.94	37.04	38.13	39.29	40.45	41.66	42.94	44.21
	O	45.180	46.500	47.940	49.350	50.835	52.410	53.910	55.560	57.195	58.935	60.675	62.490	64.410	66.315
GRADE 23	Ex	64,724.29	66,666.02	68,666.03	70,725.97	72,847.79	75,033.18	77,284.19	79,602.74	81,990.80	84,450.54	86,984.05	89,593.57	92,281.37	95,049.81
(6U0)	H	31.09	32.07	33.01	34.01	35.04	36.09	37.17	38.27	39.43	40.60	41.82	43.07	44.39	45.69
	O	46.635	48.105	49.515	51.015	52.560	54.135	55.755	57.405	59.145	60.900	62.730	64.605	66.585	68.535
GRADE 23A	Ex	66,989.64	68,999.35	71,069.32	73,201.40	75,397.44	77,659.38	79,989.14	82,388.81	84,860.49	87,406.30	90,028.49	92,729.33	95,511.21	98,376.56
(6UA)	H	32.20	33.18	34.16	35.18	36.27	37.35	38.47	39.62	40.81	42.02	43.28	44.59	45.93	47.31
	O	48.300	49.770	51.240	52.770	54.405	56.025	57.705	59.430	61.215	63.030	64.920	66.885	68.895	70.965
GRADE 24	Ex	69,254.99	71,332.64	73,472.65	75,676.83	77,947.11	80,285.54	82,694.07	85,174.92	87,730.18	90,362.09	93,072.92	95,865.11	98,741.07	101,703.30
(6V0)	H	33.30	34.29	35.33	36.38	37.48	38.60	39.76	40.97	42.19	43.44	44.74	46.12	47.49	48.91
	O	49.950	51.435	52.995	54.570	56.220	57.900	59.640	61.455	63.285	65.160	67.110	69.180	71.235	73.365
GRADE 24A	Ex	71,678.94	73,829.31	76,044.18	78,325.50	80,675.28	83,095.52	85,588.39	88,156.02	90,800.72	93,524.73	96,330.46	99,220.40	102,197.00	105,262.92
(6VA)	H	34.47	35.49	36.54	37.65	38.79	39.96	41.14	42.38	43.66	44.98	46.32	47.70	49.13	50.61
	O	51.705	53.235	54.810	56.475	58.185	59.940	61.710	63.570	65.490	67.470	69.480	71.550	73.695	75.915

CITY OF MANCHESTER, NEW HAMPSHIRE P/ EDULE - (FY2017) - 1%

GRADE		2016 STEP 1	2016 STEP 2	2016 STEP 3	2016 STEP 4	2016 STEP 5	2016 STEP 6	2016 STEP 7	2016 STEP 8	2016 STEP 9	2016 STEP 10	2016 STEP 11	2016 STEP 12	2016 STEP 13	2016 STEP AL1
GRADE 25	Ex	74,102.86	76,325.93	78,615.71	80,974.18	83,403.42	85,905.55	88,482.68	91,137.15	93,871.31	96,687.41	99,588.04	102,575.69	105,652.96	108,822.53
(6W0)	H	35.63	36.70	37.78	38.94	40.10	41.30	42.56	43.83	45.14	46.49	47.88	49.31	50.79	52.33
	O	53.445	55.050	56.670	58.410	60.150	61.950	63.840	65.745	67.710	69.735	71.820	73.965	76.185	78.495
GRADE 25A	Ex	76,696.46	78,997.36	81,367.24	83,808.30	86,322.55	88,912.19	91,579.58	94,326.96	97,156.79	100,071.49	103,073.64	106,165.84	109,350.81	112,631.32
(6WA)	H	36.88	38.00	39.13	40.30	41.51	42.76	44.05	45.36	46.73	48.13	49.58	51.07	52.58	54.17
	O	55.320	57.000	58.695	60.450	62.265	64.140	66.075	68.040	70.095	72.195	74.370	76.605	78.870	81.255
GRADE 26	Ex	79,290.05	81,668.76	84,118.82	86,642.37	89,241.63	91,918.92	94,676.47	97,516.77	100,442.26	103,455.54	106,559.19	109,755.98	113,048.63	116,440.11
(6X0)	H	38.13	39.29	40.45	41.66	42.93	44.20	45.53	46.88	48.30	49.75	51.23	52.77	54.36	55.97
	O	57.195	58.935	60.675	62.490	64.395	66.300	68.295	70.320	72.450	74.625	76.845	79.155	81.540	83.955
GRADE 26A	Ex	82,065.22	84,527.17	87,062.99	89,674.88	92,365.11	95,187.57	97,990.14	100,929.86	103,957.74	107,076.47	110,288.77	113,597.41	117,005.37	120,515.52
(6XA)	H	39.46	40.65	41.87	43.13	44.43	45.73	47.13	48.55	50.00	51.50	53.03	54.64	56.28	57.95
	O	59.190	60.975	62.805	64.695	66.645	68.595	70.695	72.825	75.000	77.250	79.545	81.960	84.420	86.925
GRADE 27	Ex	84,840.35	87,385.56	90,007.14	92,707.34	95,488.56	98,353.22	101,303.82	104,342.95	107,473.21	110,697.40	114,018.35	117,438.88	120,962.08	124,590.91
(6Y0)	H	40.80	42.01	43.27	44.58	45.92	47.30	48.69	50.17	51.67	53.24	54.82	56.47	58.17	59.92
	O	61.200	63.015	64.905	66.870	68.880	70.950	73.035	75.255	77.505	79.860	82.230	84.705	87.255	89.880
GRADE 27A	Ex	87,809.76	90,444.05	93,157.39	95,952.10	98,830.66	101,795.59	104,849.43	107,994.93	111,234.79	114,571.82	118,008.97	121,549.25	125,195.72	128,951.62
(6YA)	H	42.23	43.47	44.77	46.15	47.53	48.95	50.40	51.93	53.49	55.07	56.74	58.44	60.20	61.99
	O	63.345	65.205	67.155	69.225	71.295	73.425	75.600	77.895	80.235	82.605	85.110	87.660	90.300	92.985
GRADE 28	Ex	90,779.17	93,502.56	96,307.61	99,196.89	102,172.78	105,237.97	108,395.08	111,646.94	114,996.34	118,446.24	121,999.63	125,659.62	129,429.42	133,312.28
(6Z0)	H	43.64	44.96	46.30	47.69	49.12	50.59	52.12	53.68	55.30	56.97	58.69	60.45	62.25	64.12
	O	65.460	67.440	69.450	71.535	73.680	75.885	78.180	80.520	82.950	85.455	88.035	90.675	93.375	96.180
GRADE 28A	Ex	93,956.45	96,775.13	99,678.38	102,668.77	105,748.82	108,921.29	112,188.91	115,554.59	119,021.23	122,591.86	126,269.59	130,057.73	133,959.45	137,978.22
(6ZA)	H	45.17	46.55	47.93	49.36	50.84	52.38	53.94	55.56	57.22	58.93	60.71	62.52	64.41	66.34
	O	67.755	69.825	71.895	74.040	76.260	78.570	80.910	83.340	85.830	88.395	91.065	93.780	96.615	99.510
GRADE 29	Ex	97,133.71	100,047.73	103,049.18	106,140.65	109,324.86	112,604.60	115,982.75	119,462.21	123,046.09	126,737.48	130,539.61	134,455.78	138,489.47	142,644.16
(600)	H	46.72	48.12	49.56	51.06	52.57	54.16	55.79	57.46	59.20	60.96	62.80	64.65	66.61	68.60
	O	70.080	72.180	74.340	76.590	78.855	81.240	83.685	86.190	88.800	91.440	94.200	96.975	99.915	102.900
GRADE 29A	Ex	100,533.39	103,549.39	106,655.89	109,855.58	113,151.23	116,545.77	120,042.16	123,643.40	127,352.70	131,173.31	135,108.48	139,161.75	143,336.60	147,636.71
(60A)	H	48.33	49.79	51.28	52.82	54.42	56.04	57.74	59.47	61.25	63.07	64.98	66.92	68.93	70.99
	O	72.495	74.685	76.920	79.230	81.630	84.060	86.610	89.205	91.875	94.605	97.470	100.380	103.395	106.485
GRADE 30	Ex	103,933.05	107,051.08	110,262.60	113,570.50	116,977.58	120,486.92	124,101.53	127,824.58	131,659.31	135,609.11	139,677.36	143,867.69	148,183.71	152,629.25
(610)	H	49.94	51.46	52.99	54.62	56.25	57.93	59.65	61.48	63.30	65.23	67.18	69.17	71.27	73.40
	O	74.910	77.190	79.485	81.930	84.375	86.895	89.475	92.220	94.950	97.845	100.770	103.755	106.905	110.100
GRADE 30A	Ex	107,570.72	110,797.87	114,121.79	117,545.46	121,071.83	124,703.97	128,445.08	132,298.45	136,267.40	140,355.42	144,566.08	148,903.06	153,370.15	157,971.25
(61A)	H	51.72	53.29	54.89	56.53	58.25	59.98	61.78	63.64	65.53	67.51	69.53	71.61	73.77	75.96
	O	77.580	79.935	82.335	84.795	87.375	89.970	92.670	95.460	98.295	101.265	104.295	107.415	110.655	113.940

CITY OF MANCHESTER, NEW HAMPSHIRE PA EDULE - (FY2017) - 1%

GRADE		2016 STEP 1	2016 STEP 2	2016 STEP 3	2016 STEP 4	2016 STEP 5	2016 STEP 6	2016 STEP 7	2016 STEP 8	2016 STEP 9	2016 STEP 10	2016 STEP 11	2016 STEP 12	2016 STEP 13	2016 STEP AL1
GRADE 31	Ex	111,208.40	114,544.67	117,981.00	121,520.43	125,166.04	128,921.03	132,788.65	136,772.30	140,875.49	145,101.74	149,454.78	153,938.30	158,556.59	163,313.27
(620)	H	53.48	55.06	56.72	58.42	60.17	61.97	63.83	65.75	67.72	69.77	71.88	74.03	76.23	78.53
	O	80.220	82.590	85.080	87.630	90.255	92.955	95.745	98.625	101.580	104.655	107.820	111.045	114.345	117.795
GRADE 31A	Ex	115,100.70	118,553.71	122,110.31	125,773.63	129,546.83	133,433.24	137,436.22	141,559.33	145,806.10	150,180.31	154,685.69	159,326.28	164,106.08	169,029.26
(62A)	H	55.34	57.00	58.72	60.49	62.29	64.17	66.09	68.05	70.11	72.20	74.39	76.61	78.92	81.28
	O	83.010	85.500	88.080	90.735	93.435	96.255	99.135	102.075	105.165	108.300	111.585	114.915	118.380	121.920
GRADE 32	Ex	118,993.00	122,562.77	126,239.65	130,026.85	133,927.65	137,945.49	142,083.83	146,346.35	150,736.75	155,258.87	159,916.60	164,714.11	169,655.54	174,745.22
(630)	H	57.20	58.91	60.70	62.51	64.40	66.33	68.32	70.37	72.48	74.64	76.89	79.21	81.57	84.04
	O	85.800	88.365	91.050	93.765	96.600	99.495	102.480	105.555	108.720	111.960	115.335	118.815	122.355	126.060
GRADE 32A	Ex	123,157.72	126,852.48	130,658.06	134,577.79	138,615.14	142,773.58	147,056.80	151,468.49	156,012.53	160,692.91	165,513.69	170,479.10	175,593.49	180,861.31
(63A)	H	59.22	61.00	62.85	64.71	66.65	68.66	70.73	72.82	75.02	77.27	79.59	81.97	84.44	86.98
	O	88.830	91.500	94.275	97.065	99.975	102.990	106.095	109.230	112.530	115.905	119.385	122.955	126.660	130.470
GRADE 33	Ex	127,322.48	131,142.18	135,076.44	139,128.71	143,302.59	147,601.65	152,029.71	156,590.58	161,288.31	166,126.95	171,110.81	176,244.08	181,531.45	186,977.37
(640)	H	61.21	63.04	64.96	66.90	68.91	70.97	73.11	75.30	77.55	79.87	82.28	84.76	87.29	89.90
	O	91.815	94.560	97.440	100.350	103.365	106.455	109.665	112.950	116.325	119.805	123.420	127.140	130.935	134.850
GRADE 33A	Ex	131,778.77	135,732.15	139,804.12	143,998.24	148,318.19	152,767.72	157,350.73	162,071.25	166,933.41	171,941.44	177,099.66	182,412.66	187,885.04	193,521.58
(64A)	H	63.34	65.27	67.22	69.24	71.32	73.45	75.65	77.91	80.26	82.66	85.15	87.73	90.34	93.03
	O	95.010	97.905	100.830	103.860	106.980	110.175	113.475	116.865	120.390	123.990	127.725	131.595	135.510	139.545
GRADE 34	Ex	136,235.04	140,322.14	144,531.79	148,867.74	153,333.76	157,933.80	162,671.79	167,551.95	172,578.50	177,755.86	183,088.55	188,581.17	194,238.64	200,065.80
(650)	H	65.49	67.46	69.50	71.56	73.73	75.93	78.22	80.56	82.98	85.47	88.02	90.69	93.41	96.20
	O	98.235	101.190	104.250	107.340	110.595	113.895	117.330	120.840	124.470	128.205	132.030	136.035	140.115	144.300
GRADE 34A	Ex	141,003.28	145,233.40	149,590.39	154,078.13	158,700.44	163,461.46	168,365.30	173,416.25	178,618.75	183,977.31	189,496.64	195,181.52	201,037.03	207,068.11
(65A)	H	67.80	69.81	71.94	74.08	76.30	78.59	80.95	83.38	85.87	88.45	91.09	93.86	96.66	99.56
	O	101.700	104.715	107.910	111.120	114.450	117.885	121.425	125.070	128.805	132.675	136.635	140.790	144.990	149.340
GRADE 35	Ex	145,771.50	150,144.65	154,649.01	159,288.48	164,067.13	168,989.15	174,058.81	179,280.58	184,658.99	190,198.77	195,904.76	201,781.83	207,835.35	214,070.38
(660)	H	70.09	72.19	74.37	76.59	78.90	81.26	83.69	86.21	88.78	91.47	94.20	97.02	99.95	102.95
	O	105.135	108.285	111.555	114.885	118.350	121.890	125.535	129.315	133.170	137.205	141.300	145.530	149.925	154.425
GRADE 35A	Ex	150,873.52	155,399.75	160,061.71	164,863.57	169,809.48	174,903.76	180,150.87	185,555.39	191,122.06	196,855.72	202,761.44	208,844.21	215,109.58	221,562.86
(66A)	H	72.54	74.72	76.95	79.26	81.63	84.09	86.62	89.22	91.90	94.65	97.50	100.40	103.41	106.50
	O	108.810	112.080	115.425	118.890	122.445	126.135	129.930	133.830	137.850	141.975	146.250	150.600	155.115	159.750
GRADE 36	Ex	155,975.52	160,654.80	165,474.45	170,438.65	175,551.84	180,818.40	186,242.95	191,830.22	197,585.14	203,512.68	209,618.09	215,906.60	222,383.84	229,055.33
(670)	H	75.00	77.23	79.56	81.94	84.41	86.94	89.56	92.23	95.02	97.87	100.81	103.83	106.93	110.13
	O	112.500	115.845	119.340	122.910	126.615	130.410	134.340	138.345	142.530	146.805	151.215	155.745	160.395	165.195
GRADE 36A	Ex	161,434.65	166,277.73	171,266.04	176,404.01	181,696.16	187,147.02	192,761.43	198,544.26	204,500.59	210,635.61	216,954.71	223,463.33	230,167.25	237,072.26
(67A)	H	77.63	79.95	82.36	84.83	87.38	89.98	92.70	95.46	98.30	101.25	104.28	107.42	110.65	114.00
	O	116.445	119.925	123.540	127.245	131.070	134.970	139.050	143.190	147.450	151.875	156.420	161.130	165.975	171.000

GRADE		2016 STEP AL2	2016 STEP AL3	2016 STEP AL4	2016 STEP AL5	2016 STEP AL6	2016 STEP AL7
GRADE 1	Ex	22,097.62	22,765.51	23,443.36	24,146.68	24,871.06	25,617.19
	H	10.74	11.03	11.38	11.72	12.08	12.43
	O	16.110	16.545	17.070	17.580	18.120	18.645
GRADE 1A	Ex	22,871.03	23,562.31	24,263.88	24,991.79	25,741.58	26,513.80
	H	11.00	11.32	11.67	12.02	12.38	12.74
	O	16.500	16.980	17.505	18.030	18.570	19.110
GRADE 2	Ex	23,644.45	24,359.11	25,084.40	25,836.94	26,612.05	27,410.38
	H	11.38	11.74	12.07	12.44	12.81	13.19
	O	17.070	17.610	18.105	18.660	19.215	19.785
GRADE 2A	Ex	24,472.01	25,211.68	25,962.34	26,741.20	27,543.49	28,369.77
	H	11.76	12.12	12.50	12.87	13.25	13.67
	O	17.640	18.180	18.750	19.305	19.875	20.505
GRADE 3	Ex	25,299.58	26,064.25	26,840.30	27,645.51	28,474.84	29,329.13
(6A0)	H	12.16	12.53	12.92	13.28	13.70	14.10
	O	18.240	18.795	19.380	19.920	20.550	21.150
GRADE 3A	Ex	26,185.04	26,976.47	27,779.72	28,613.12	29,471.51	30,355.65
(6AA)	H	12.59	12.98	13.35	13.79	14.19	14.61
	O	18.885	19.470	20.025	20.685	21.285	21.915
GRADE 4	Ex	27,070.51	27,888.73	28,719.13	29,580.70	30,468.12	31,382.16
(6B0)	H	13.04	13.42	13.83	14.23	14.66	15.10
	O	19.560	20.130	20.745	21.345	21.990	22.650
GRADE 4A	Ex	28,018.02	28,864.86	29,724.28	30,616.03	31,534.51	32,480.54
(6BA)	H	13.47	13.88	14.30	14.73	15.18	15.60
	O	20.205	20.820	21.450	22.095	22.770	23.400
GRADE 5	Ex	28,965.47	29,840.92	30,729.46	31,651.33	32,600.89	33,578.89
(6C0)	H	13.94	14.35	14.77	15.22	15.67	16.16
	O	20.910	21.525	22.155	22.830	23.505	24.240
GRADE 5A	Ex	29,979.26	30,885.37	31,805.00	32,759.16	33,741.91	34,754.16
(6CA)	H	14.44	14.90	15.34	15.82	16.28	16.76
	O	21.660	22.350	23.010	23.730	24.420	25.140
GRADE 6	Ex	30,993.05	31,929.82	32,880.54	33,866.96	34,882.95	35,929.46
(6D0)	H	14.95	15.38	15.86	16.31	16.80	17.32
	O	22.425	23.070	23.790	24.465	25.200	25.980
GRADE 6A	Ex	32,077.81	33,047.36	34,031.34	35,052.27	36,103.85	37,186.97
(6DA)	H	15.44	15.92	16.37	16.87	17.38	17.89
	O	23.160	23.880	24.555	25.305	26.070	26.835

GRADE		2016 STEP AL2	2016 STEP AL3	2016 STEP AL4	2016 STEP AL5	2016 STEP AL6	2016 STEP AL7
GRADE 7	Ex	33,162.56	34,164.90	35,182.17	36,237.63	37,324.74	38,444.51
(6E0)	H	15.96	16.42	16.92	17.42	17.96	18.48
	O	23.940	24.630	25.380	26.130	26.940	27.720
GRADE 7A	Ex	34,323.24	35,360.67	36,413.57	37,505.94	38,631.12	39,790.08
(6EA)	H	16.51	17.01	17.49	18.05	18.57	19.14
	O	24.765	25.515	26.235	27.075	27.855	28.710
GRADE 8	Ex	35,483.95	36,556.45	37,644.92	38,774.26	39,937.49	41,135.62
(6F0)	H	17.08	17.59	18.12	18.63	19.20	19.79
	O	25.620	26.385	27.180	27.945	28.800	29.685
GRADE 8A	Ex	36,725.88	37,835.92	38,962.50	40,131.36	41,335.31	42,575.34
(6FA)	H	17.68	18.22	18.76	19.31	19.88	20.49
	O	26.520	27.330	28.140	28.965	29.820	30.735
GRADE 9	Ex	37,967.83	39,115.40	40,280.07	41,488.47	42,733.12	44,015.11
(6G0)	H	18.31	18.86	19.44	20.00	20.61	21.22
	O	27.465	28.290	29.160	30.000	30.915	31.830
GRADE 9A	Ex	39,296.71	40,484.47	41,689.87	42,940.56	44,228.75	45,555.65
(6GA)	H	18.92	19.49	20.05	20.67	21.28	21.94
	O	28.380	29.235	30.075	31.005	31.920	32.910
GRADE 10	Ex	40,625.59	41,853.51	43,099.66	44,392.65	45,724.41	47,096.16
(6H0)	H	19.54	20.12	20.73	21.35	21.99	22.64
	O	29.310	30.180	31.095	32.025	32.985	33.960
GRADE 10A	Ex	42,047.45	43,318.33	44,608.14	45,946.39	47,324.77	48,744.54
(6HA)	H	20.23	20.81	21.45	22.09	22.77	23.45
	O	30.345	31.215	32.175	33.135	34.155	35.175
GRADE 11	Ex	43,469.36	44,783.21	46,116.64	47,500.13	48,925.15	50,392.89
(6I0)	H	20.89	21.53	22.19	22.86	23.53	24.24
	O	31.335	32.295	33.285	34.290	35.295	36.360
GRADE 11A	Ex	44,990.77	46,350.60	47,730.71	49,162.64	50,637.53	52,156.66
(6IA)	H	21.66	22.33	22.98	23.66	24.38	25.11
	O	32.490	33.495	34.470	35.490	36.570	37.665
GRADE 12	Ex	46,512.21	47,918.04	49,344.82	50,825.13	52,349.90	53,920.41
(6J0)	H	22.39	23.05	23.72	24.44	25.19	25.93
	O	33.585	34.575	35.580	36.660	37.785	38.895
GRADE 12A	Ex	48,140.12	49,595.16	51,071.85	52,604.02	54,182.16	55,807.61
(6JA)	H	23.15	23.84	24.58	25.34	26.08	26.86
	O	34.725	35.760	36.870	38.010	39.120	40.290

GRADE		2016 STEP AL2	2016 STEP AL3	2016 STEP AL4	2016 STEP AL5	2016 STEP AL6	2016 STEP AL7
GRADE 13	Ex	49,768.06	51,261.10	52,798.94	54,382.87	56,014.39	57,694.83
(6K0)	H	23.98	24.67	25.42	26.16	26.95	27.79
	O	35.970	37.005	38.130	39.240	40.425	41.685
GRADE 13A	Ex	51,509.95	53,066.84	54,646.90	56,286.30	57,974.90	59,714.16
(6KA)	H	24.80	25.53	26.31	27.10	27.89	28.72
	O	37.200	38.295	39.465	40.650	41.835	43.080
GRADE 14	Ex	53,251.84	54,861.36	56,494.88	58,189.72	59,935.41	61,733.46
(6L0)	H	25.62	26.41	27.18	27.99	28.84	29.69
	O	38.430	39.615	40.770	41.985	43.260	44.535
GRADE 14A	Ex	55,115.66	56,781.53	58,472.20	60,226.34	62,033.17	63,894.15
(6LA)	H	26.52	27.31	28.14	29.00	29.87	30.76
	O	39.780	40.965	42.210	43.500	44.805	46.140
GRADE 15	Ex	56,979.44	58,701.64	60,449.50	62,263.00	64,130.89	66,054.81
(6M0)	H	27.42	28.25	29.09	29.95	30.85	31.75
	O	41.130	42.375	43.635	44.925	46.275	47.625
GRADE 15A	Ex	58,973.73	60,756.22	62,565.23	64,442.20	66,375.45	68,366.74
(6MA)	H	28.38	29.21	30.11	30.99	31.94	32.88
	O	42.570	43.815	45.165	46.485	47.910	49.320
GRADE 16	Ex	60,968.02	62,797.06	64,680.96	66,621.41	68,620.06	70,678.65
(6N0)	H	29.31	30.21	31.10	32.05	32.99	33.99
	O	43.965	45.315	46.650	48.075	49.485	50.985
GRADE 16A	Ex	63,101.89	65,009.13	66,944.81	68,953.13	71,021.75	73,152.39
(6NA)	H	30.38	31.30	32.22	33.21	34.20	35.21
	O	45.570	46.950	48.330	49.815	51.300	52.815
GRADE 17	Ex	65,235.77	67,207.51	69,208.63	71,284.89	73,423.44	75,626.15
(6O0)	H	31.37	32.33	33.30	34.29	35.32	36.37
	O	47.055	48.495	49.950	51.435	52.980	54.555
GRADE 17A	Ex	67,519.03	69,559.78	71,630.94	73,779.87	75,993.25	78,273.05
(6OA)	H	32.49	33.45	34.47	35.49	36.54	37.64
	O	48.735	50.175	51.705	53.235	54.810	56.460
GRADE 18	Ex	69,802.26	71,912.04	74,053.27	76,274.86	78,563.09	80,919.96
(6P0)	H	33.61	34.61	35.66	36.73	37.82	38.96
	O	50.415	51.915	53.490	55.095	56.730	58.440
GRADE 18A	Ex	72,245.37	74,428.97	76,645.09	78,944.47	81,312.78	83,752.15
(6PA)	H	34.72	35.79	36.85	37.98	39.10	40.27
	O	52.080	53.685	55.275	56.970	58.650	60.405

GRADE		2016 STEP AL2	2016 STEP AL3	2016 STEP AL4	2016 STEP AL5	2016 STEP AL6	2016 STEP AL7
GRADE 19	Ex	74,688.46	76,945.93	79,237.00	81,614.06	84,062.50	86,584.37
(6Q0)	H	35.92	37.01	38.12	39.28	40.44	41.65
	O	53.880	55.515	57.180	58.920	60.660	62.475
GRADE 19A	Ex	77,302.53	79,639.02	82,010.25	84,470.58	87,004.69	89,614.85
(6QA)	H	37.19	38.30	39.45	40.63	41.86	43.12
	O	55.785	57.450	59.175	60.945	62.790	64.680
GRADE 20	Ex	79,916.63	82,314.14	84,783.56	87,327.08	89,946.88	92,645.30
(6R0)	H	38.46	39.60	40.80	42.01	43.27	44.58
	O	57.690	59.400	61.200	63.015	64.905	66.870
GRADE 20A	Ex	82,713.71	85,213.73	87,750.97	90,383.52	93,095.02	95,887.87
(6RA)	H	39.80	41.00	42.22	43.46	44.76	46.13
	O	59.700	61.500	63.330	65.190	67.140	69.195
GRADE 21	Ex	85,510.79	88,095.36	90,718.41	93,439.95	96,243.14	99,130.44
(6S0)	H	41.12	42.36	43.64	44.96	46.30	47.68
	O	61.680	63.540	65.460	67.440	69.450	71.520
GRADE 21A	Ex	88,503.66	91,178.68	93,893.56	96,710.37	99,611.67	102,600.01
(6SA)	H	42.59	43.86	45.17	46.53	47.92	49.35
	O	63.885	65.790	67.755	69.795	71.880	74.025
GRADE 22	Ex	91,496.57	94,262.06	97,068.69	99,980.75	102,980.17	106,069.57
(6T0)	H	44.03	45.34	46.71	48.09	49.53	51.03
	O	66.045	68.010	70.065	72.135	74.295	76.545
GRADE 22A	Ex	94,698.94	97,561.22	100,466.09	103,480.08	106,584.49	109,781.99
(6TA)	H	45.54	46.89	48.31	49.76	51.25	52.78
	O	68.310	70.335	72.465	74.640	76.875	79.170
GRADE 23	Ex	97,901.30	100,860.38	103,863.49	106,979.42	110,188.79	113,494.45
(6U0)	H	47.08	48.50	49.92	51.44	52.96	54.60
	O	70.620	72.750	74.880	77.160	79.440	81.900
GRADE 23A	Ex	101,327.87	104,390.51	107,498.74	110,723.66	114,045.37	117,466.76
(6UA)	H	48.72	50.19	51.69	53.26	54.84	56.49
	O	73.080	75.285	77.535	79.890	82.260	84.735
GRADE 24	Ex	104,754.40	107,920.62	111,133.96	114,467.96	117,902.02	121,439.06
(6V0)	H	50.37	51.90	53.45	55.03	56.68	58.39
	O	75.555	77.850	80.175	82.545	85.020	87.585
GRADE 24A	Ex	108,420.82	111,697.84	115,023.63	118,474.35	122,028.58	125,689.46
(6VA)	H	52.13	53.69	55.32	56.98	58.70	60.46
	O	78.195	80.535	82.980	85.470	88.050	90.690

GRADE		2016 STEP AL2	2016 STEP AL3	2016 STEP AL4	2016 STEP AL5	2016 STEP AL6	2016 STEP AL7
GRADE 25	Ex	112,087.20	115,475.05	118,913.34	122,480.73	126,155.15	129,939.80
(6W0)	H	53.89	55.51	57.17	58.88	60.66	62.48
	O	80.835	83.265	85.755	88.320	90.990	93.720
GRADE 25A	Ex	116,010.26	119,516.68	123,075.28	126,767.55	130,570.60	134,487.69
(6WA)	H	55.80	57.47	59.21	60.97	62.82	64.66
	O	83.700	86.205	88.815	91.455	94.230	96.990
GRADE 26	Ex	119,933.30	123,558.29	127,237.24	131,054.36	134,985.98	139,035.57
(6X0)	H	57.67	59.40	61.18	63.01	64.92	66.85
	O	86.505	89.100	91.770	94.515	97.380	100.275
GRADE 26A	Ex	124,130.97	127,882.84	131,690.58	135,641.28	139,710.50	143,901.84
(6XA)	H	59.68	61.50	63.33	65.25	67.20	69.20
	O	89.520	92.250	94.995	97.875	100.800	103.800
GRADE 27	Ex	128,328.65	132,207.37	136,143.88	140,228.18	144,435.03	148,768.08
(6Y0)	H	61.73	63.59	65.47	67.44	69.46	71.54
	O	92.595	95.385	98.205	101.160	104.190	107.310
GRADE 27A	Ex	132,820.14	136,834.63	140,908.89	145,136.16	149,490.25	153,974.96
(6YA)	H	63.85	65.77	67.76	69.78	71.90	74.05
	O	95.775	98.655	101.640	104.670	107.850	111.075
GRADE 28	Ex	137,311.65	141,461.90	145,673.94	150,044.14	154,545.47	159,181.85
(6Z0)	H	66.04	68.01	70.07	72.16	74.33	76.56
	O	99.060	102.015	105.105	108.240	111.495	114.840
GRADE 28A	Ex	142,117.56	146,413.07	150,772.52	155,295.71	159,954.57	164,753.21
(6ZA)	H	68.33	70.38	72.50	74.66	76.91	79.22
	O	102.495	105.570	108.750	111.990	115.365	118.830
GRADE 29	Ex	146,923.46	151,364.25	155,871.14	160,547.26	165,363.64	170,324.55
(600)	H	70.66	72.77	74.96	77.21	79.54	81.92
	O	105.990	109.155	112.440	115.815	119.310	122.880
GRADE 29A	Ex	152,065.77	156,661.96	161,326.60	166,166.38	171,151.38	176,285.92
(60A)	H	73.14	75.34	77.58	79.91	82.32	84.80
	O	109.710	113.010	116.370	119.865	123.480	127.200
GRADE 30	Ex	157,208.13	161,959.72	166,782.09	171,785.55	176,939.09	182,247.29
(610)	H	75.60	77.86	80.22	82.62	85.08	87.63
	O	113.400	116.790	120.330	123.930	127.620	131.445
GRADE 30A	Ex	162,710.38	167,628.31	172,619.45	177,798.05	183,131.99	188,625.93
(61A)	H	78.25	80.60	83.01	85.49	88.03	90.70
	O	117.375	120.900	124.515	128.235	132.045	136.050

GRADE		2016 STEP AL2	2016 STEP AL3	2016 STEP AL4	2016 STEP AL5	2016 STEP AL6	2016 STEP AL7
GRADE 31	Ex	168,212.68	173,296.91	178,456.84	183,810.54	189,324.84	195,004.61
(620)	H	80.86	83.30	85.82	88.40	91.03	93.78
	O	121.290	124.950	128.730	132.600	136.545	140.670
GRADE 31A	Ex	174,100.13	179,362.29	184,702.83	190,243.91	195,951.22	201,829.76
(62A)	H	83.71	86.23	88.79	91.50	94.21	97.03
	O	125.565	129.345	133.185	137.250	141.315	145.545
GRADE 32	Ex	179,987.56	185,427.69	190,948.81	196,677.28	202,577.61	208,654.93
(630)	H	86.56	89.14	91.80	94.58	97.43	100.33
	O	129.840	133.710	137.700	141.870	146.145	150.495
GRADE 32A	Ex	186,287.12	191,917.63	197,632.02	203,560.97	209,667.83	215,957.86
(63A)	H	89.60	92.26	95.05	97.90	100.83	103.85
	O	134.400	138.390	142.575	146.850	151.245	155.775
GRADE 33	Ex	192,586.69	198,407.62	204,315.22	210,444.67	216,758.01	223,260.76
(640)	H	92.60	95.38	98.23	101.19	104.22	107.36
	O	138.900	143.070	147.345	151.785	156.330	161.040
GRADE 33A	Ex	199,327.23	205,351.89	211,466.25	217,810.24	224,344.54	231,074.88
(64A)	H	95.83	98.73	101.69	104.73	107.87	111.12
	O	143.745	148.095	152.535	157.095	161.805	166.680
GRADE 34	Ex	206,067.78	212,296.18	218,617.32	225,175.80	231,931.08	238,889.01
(650)	H	99.09	102.07	105.12	108.27	111.52	114.87
	O	148.635	153.105	157.680	162.405	167.280	172.305
GRADE 34A	Ex	213,280.15	219,726.52	226,268.90	233,056.96	240,048.67	247,250.14
(65A)	H	102.56	105.64	108.79	112.05	115.42	118.88
	O	153.840	158.460	163.185	168.075	173.130	178.320
GRADE 35	Ex	220,492.49	227,156.89	233,920.50	240,938.13	248,166.24	255,611.25
(660)	H	106.04	109.22	112.47	115.86	119.34	122.91
	O	159.060	163.830	168.705	173.790	179.010	184.365
GRADE 35A	Ex	228,209.74	235,107.39	242,107.72	249,370.94	256,852.07	264,557.62
(66A)	H	109.72	113.02	116.41	119.92	123.50	127.20
	O	164.580	169.530	174.615	179.880	185.250	190.800
GRADE 36	Ex	235,926.97	243,057.88	250,294.93	257,803.79	265,537.88	273,504.03
(670)	H	113.44	116.86	120.34	123.95	127.69	131.53
	O	170.160	175.290	180.510	185.925	191.535	197.295
GRADE 36A	Ex	244,184.43	251,564.90	259,055.25	266,826.90	274,831.71	283,076.65
(67A)	H	117.39	120.92	124.54	128.29	132.13	136.10
	O	176.085	181.380	186.810	192.435	198.195	204.150

JOINT 2

DrummondWoodsum
ATTORNEYS AT LAW

Mark T. Broth
Admitted in NH

207.771.9211
mbroth@dwmlaw.com

1001 Elm Street, Suite 303
Manchester, NH 03101-1845
603.716.2895 Main
603.716.2899 Fax

June 8, 2018

Via E-mail Only
John Krupski, Esquire
Milner & Krupski
100 Hall St #101
Concord, NH 03301

RE: Manchester Patrolman's Association v. City of Manchester
Gr. Aaron Brown

Dear John,

A pre-arbitration hearing was held in this matter on May 2, 2018 and the Union was afforded the opportunity to present any additional information and arguments to Chief Willard. The information and arguments presented did not change the Manchester Police Department's position that it had just cause to terminate Officer Brown's employment. The Union may, if it so chooses, submit this matter to binding arbitration.

Very truly yours,

Mark T. Broth

MTB/dmf
cc: Jane Gile *via e-mail only*
Chief Nick Willard *via e-mail only*

Form P-8

State of New Hampshire
Public Employee Labor Relations Board

Request for Appointment of Grievance Arbitrator

The undersigned parties request and consent to the appointment of an arbitrator from the PELRB list of neutrals according to the procedures outlined on the information sheet appended to this form.

First Party: Manchester Police Patrolman's Association

Representative Name: John S. Krupski, Esq.

Address: Milner & Krupski, PLLC, 109 North State Street, Suite 9, Concord, NH 03301

E-Mail Address: jake@milnerkrupski.com Telephone: (603) 410-6011

Date: 6/14/18 Signature:

Second Party: City of Manchester

Representative Name: Mark T. Broth, Esq.

Address: Drummond Woodsum, 1001 Elm Street, Suite 303, Manchester, NH 03301

E-Mail Address: mbroth@dwmlaw.com Telephone: (603) 716-2895

Date: 6/13/18 Signature:

List of Issue(s) & CBA provision(s) in dispute: The unjust termination of Aaron Brown

Important:

1. The filing party shall simultaneously provide the other party to this request with an electronic copy of this filing or a copy by mail or hand delivery if electronic service is not available.

2. Do not file unless the request is signed and dated by both parties.

Reset Form

Manchester Police Patrolman's Association v. City of Manchester, Case No. G-0103-12 (Arbitration)

From: Gerlack, Rebecca (Rebecca.Gerlack@pelrb.nh.gov)

To: jake@milnerkrupski.com; mbroth@dwmlaw.com

Cc: renee@milnerkrupski.com; dfilleul@dwmlaw.com

Date: Thursday, June 14, 2018, 03:10 PM EDT

Gr: unjust termination of Aaron Brown

Pursuant to a request for appointment of arbitrator filed June 14, 2018, I enclose resumes for the following neutrals:

Gary D. Altman

Laurence M. Evans

Patricia G. Hechavarria

Ira B. Lobel

Marilyn Zuckerman

Strike no more than 2 names and rank numerically those who remain from most favorable (1) to least favorable (3, 4, or 5) and return your selection within ten (10) days of the date of this email. Do not provide a copy of your rankings to the other party. Please refer to the Information Sheet: Requests for Appointment of Grievance Arbitrator (see attached).

Respectfully,

Rebecca Gerlack *for*

Douglas L. Ingersoll, Esq.

Executive Director

Visit www.nh.gov/pelrb to access and search agency decisions, rules, RSA 273-A as well as collective bargaining agreements, certifications, and general information about agency operations.

CONFIDENTIALITY NOTICE

JOINT 3

Date of hire: July 16, 2007

Name	Class Seniority	Badge Number	Extension	Mailbox
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Brown, Aaron	5 (E)	84	697	39
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

JOINT 4

City of Manchester
New Hampshire

POLICE DEPARTMENT

PERSONNEL ORDER

DEFINITION: A Personnel Order announces the change in assignment or status of personnel, such as a transfer from one division to the other or a change in rank.

Aaron Brown
NAME

Special Enf. Div.
Street Crime Unit
PROMOTED OR ASSIGNED TO

10/28/13
EFFECTIVE DATE

AUTHORIZED BY

7/31/13
NOTIFICATION DATE

WHITE - Personnel Jacket YELLOW - Budgets PINK - Employee GOLD - Division Head

MPD FORM 140

JOINT 5

LETTER OF DISCIPLINARY INTENT

To: Chief Enoch F. Willard

From: Assistant Carlo Capano

Date: April 11, 2018

RE: Recommendation for Formal Discipline
Detective Aaron Brown

On Wednesday, April 11, 2018, Captain Mark Sanclemente, Captain Ryan Grant and I (Asst. Chief Capano) met to review and discuss the disciplinary matters involving Detective Aaron Brown. All concurred that Detective Brown had violated the Department's Standard Operating Procedures that pertain to **Unlawful Conduct; Conduct Unbecoming an Officer** and **Truthfulness.** The following recommendations were made:

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] **VIII:** [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Charge # 5:

Violation of Standard Operating Procedure, **MPD Rules and Regulations, Section IX: Prohibited Conduct, Paragraph B: Conduct Unbecoming an Officer** (See charge and specification of the charge attached).

Recommendation:

- Termination

Charge # 6:

Violation of Standard Operating Procedure, **MPD Rules and Regulations, Section IX: Prohibited Conduct, Paragraph B: Conduct Unbecoming an Officer** (See charge and specification of the charge attached).

Recommendation:

- Termination

Charge # 7:

Violation of Standard Operating Procedure, **MPD Rules and Regulations, Section IX: Prohibited Conduct, Paragraph B: Conduct Unbecoming an Officer** (See charge and specification of the charge attached).

Recommendation:

- Termination

Charge # 8:

Violation of Standard Operating Procedure, **MPD Rules and Regulations, Section IX: Prohibited Conduct, Paragraph B: Conduct Unbecoming an Officer** (See charge and specification of the charge attached).

Recommendation:

- Termination

I, Det. Aaron Brown, do hereby accept the discipline as recommended in this letter of disciplinary intent, dated April 11, 2018, to Chief Enoch F. Willard from Assistant Chief Capano as may be amended.

_____
Employee Signature

_____
Chief's Designee

Date: _____ _____

Witness

I HEREBY REQUEST TO APPEAR BEFORE THE CHIEF OF POLICE FOR THE FOLLOWING:

1. _____ TO ADMIT THE CHARGE(S) AND ACCEPT SUMMARY PUNISHMENT

2. _____ TO ADMIT THE CHARGE(S) AND DISPUTE THE PUNISHMENT

3. ABB DISCIPLINARY MEETING WITH THE CHIEF OF POLICE. (I UNDERSTAND THAT I AM ENTITLED TO UNION REPRESENTATION DURING THE MEETING).

SPECIAL INSTRUCTIONS:

PENDING YOUR APPEARANCE BEFORE THE CHIEF OF POLICE, YOU WILL ADHERE TO THE FOLLOWING SPECIAL INSTRUCTIONS AS IMPOSED BY THE CHIEF OF POLICE.

( ) YOU ARE SUSPENDED WITH PAY

( ) YOU ARE SUSPENDED WITHOUT PAY

( ) YOUR ARREST POWERS ARE SUSPENDED

( ) YOUR BADGE AND SHIELD ARE SUSPENDED

( ) YOU ARE RELIEVED OF YOUR FIREARM

(X) YOUR EMPLOYMENT WITH THE CITY OF MANCHESTER POLICE DEPARTMENT IS TERMINATED

Enoch F. Willard

ENOCH F. WILLARD, CHIEF OF POLICE

I FULLY UNDERSTAND THE OPTIONS AVAILABLE TO ME:

A.B.

EMPLOYEE'S SIGNATURE

CTCol A-2

CHIEF'S DESIGNEE

DATE: April 11, 2018

WITNESS

CHARGES AND SPECIFICATIONS

[redacted]

[redacted] # 2[redacted]

[redacted]

0064

[redacted]

[redacted]

[redacted]

[redacted]

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[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Charge # 7:

Violation of Standard Operating Procedure, **MPD Rules and Regulations, Section IX: Prohibited Conduct, Paragraph B: Conduct Unbecoming an Officer** which reads (in whole or in part):

> *B. **Conduct Unbecoming an Officer/Employee**: Conduct unbecoming an officer/employee shall include on or off-duty conduct which brings the Department into disrepute or reflects discredit upon the officer/employee as a member of the Department, or that which impairs the operation or efficiency of the Department or the officer/employee.*

Specification:

On May 10, 2017, while on-duty, Det. Brown exchanged several text messages with his wife, Julia Brown. In those text messages he explains that he may not be able to go to baseball that evening because he is involved in a joint case with the FBI that will involve travel to Dorchester, MA. When Julia Brown expresses concern over Det. Brown's safety, he replies via text, *"Yes, I know. It's all good. Besides I got this new fancy gun. Take out parking tickets no problem."* Det. Brown explains in an additional text, *"FYI "parking tickets"=black fella."*

Det. Brown was on-duty at the time he exchanged these text messages with Julia Brown and he utilized an official, department owned and issued cell phone, paid for entirely by the Manchester Police Department, to exchange these text messages with his wife.

In his March 16, 2018 interview, Det. Brown denied he is a racist but conceded that he does have prejudices.

Charge # 8:

Violation of Standard Operating Procedure, **MPD Rules and Regulations, Section IX: Prohibited Conduct, Paragraph B: Conduct Unbecoming an Officer** which reads (in whole or in part):

> *B. **Conduct Unbecoming an Officer/Employee**: Conduct unbecoming an officer/employee shall include on or off-duty conduct which brings the Department into disrepute or reflects discredit upon the officer/employee as a member of the Department, or that which impairs the operation or efficiency of the Department or the officer/employee.*

Specification:

On August 22, 2017, while on-duty, Det. Brown exchanged several text messages with his wife, Julia Brown.

When Julia Brown inquires about what Det Brown is doing at work that evening, Det. Brown texts her, *"The usual. Currently putting the stall on a parking ticket...like the big jungle cat that I am."* When Julia texts back asking for clarification, Det. Brown responds, *"Parking ticket = black feller"*. He follows with another text stating, *"And I'm stalking him like a jungle cat."*

Det. Brown was on-duty at the time he exchanged these text messages with Julia Brown and he utilized an official, department owned and issued cell phone, paid for entirely by the Manchester Police Department, to exchange these text messages with his wife.

In his March 16, 2018 interview, Det. Brown denied he is a racist but conceded that he does have prejudices.

Disposition Sheet

On April 11, 2018 a disciplinary meeting was held reference the above charge against Detective Aaron Brown. The following is the DECISION of the Chief of Police:

I CONCUR WITH THE STATED RECOMMENDATION, AS SUCH I AM TERMINATING AARON BROWN ON ALL EIGHT CHARGES.

[redacted]

CHARGE 1 - TERMINATED

CHARGE 8 - TERMINATED

SEE CHARGES AND SPECIFICATIONS.

ENOCH F. WILLARD, Chief of Police

Chief's Designee

Employee's Signature

Witness

Date: April 11, 2018

0070

JOINT 6

Chief of Police
Enoch F. Willard

Assistant Chief
Carlo T. Capano

CITY OF MANCHESTER
Police Department

Mr. Aaron Brown
30 Gantry Street
Deerfield, NH 03103

Dear Mr. Brown: April 16, 2018

Your employment with the Manchester Police Department has been terminated effective April 12, 2018.

The termination is due to an Internal Investigation conducted by this agency resulting in sustained charges against you for violations of the Manchester Police Department Standard Operating Procedures, as specified in your Letter of Disciplinary Intent.

As of the date of your employment termination, you are entitled to be paid for 161.61 hours of accrued vacation time, 3.0 hours of time coming, 8.0 hours of personal days and 16.0 hours of holiday pay. You are not entitled to be paid for accrued sick leave credits, pursuant to Manchester, NH Code of Ordinance 33.081, Sick Leave.

Questions regarding your termination from employment with the City of Manchester should be directed to the City of Manchester Human Resources Department at (603) 624-6543. Questions regarding the status of your retirement benefits should be directed to the N.H. Retirement System at (603) 410-3500.

Your personnel file will remain the property of the Manchester Police Department and will contain a notation regarding termination. That information will not be available for view outside this agency without written authorization from you.

Sincerely,

Enoch F. Willard
Chief of Police

Michael L. Briggs Public Safety Building
405 Valley Street • Manchester, New Hampshire • (603) 668-8711 • FAX: (603) 668-8941
E-mail: ManchesterPD@manchesternh.gov • Website: www.manchesterpd.com

JOINT 7

"REVERSE GARRITY" WARNING
INTERNAL INVESTIGATION (ADMINISTRATIVE)
PURPOSE

This "warning" is to be used only when a member/employee of the Manchester Police Department is about to be questioned about possible criminal matters and it has officially been determined that any self-incriminating statements made by the member/employee will not be used against him/her in a criminal prosecution.

This is to inform you that, as a member/employee of the Manchester Police Department, you are currently the subject of an internal investigation. I wish to question you regarding this investigation which concerns a matter of [redacted] This questioning will concern administrative matters relating to the official business of the Manchester Police Department. I am not about to question you for the purpose of instituting a criminal prosecution against you. During the course of this questioning, even if you do disclose information which indicates that you may be guilty of criminal conduct, neither your self-incriminating statements nor the fruits of any self-incriminating statements you make will be used against you in any criminal legal proceedings.

Since this is an administrative investigation and any self-incriminating information you may disclose will not be used against you in a court of law, you are required to answer our questions fully and truthfully. The questions will relate specifically and narrowly to the matter under investigation. If you refuse to answer our questions or if you attempt to provide false, untrue, or deliberately erroneous information, or attempt to hamper the investigation in any way, this, in itself, is a violation-of the rules and regulations of the Manchester Police Department and you will become subject to potential polygraphs, disciplinary penalties up to and including termination from employment.

You will be allowed union representation during this interview. Your union representative may act as your witness but, he/she may not represent you in a legal capacity or as counsel.

Do you understand what I just explained to you? (YES) AJB (NO) _____

Do you have any questions concerning what I just explained to you? (YES) _____ (NO) AJB

List questions and responses._____

_____

_____

TIME 1006 DATE 02/23/18 SIGNATURE _____

INVESTIGATOR _____ WITNESS _____

A copy of this form is to be provided to the Member or Employee involved in an Internal Investigation/Citizen Complaint.

"REVERSE GARRITY" WARNING
INTERNAL INVESTIGATION (ADMINISTRATIVE)
PURPOSE

This "warning" is to be used only when a member/employee of the Manchester Police Department is about to be questioned about possible criminal matters and it has officially been determined that any self-incriminating statements made by the member/employee will not be used against him/her in a criminal prosecution.

This is to inform you that, as a member/employee of the Manchester Police Department, you are currently the subject of an internal investigation. I wish to question you regarding this investigation which concerns a matter of ***Inappropriate content on your department issued and paid for cell phone .*** This questioning will concern administrative matters relating to the official business of the Manchester Police Department. I am not about to question you for the purpose of instituting a criminal prosecution against you. During the course of this questioning, even if you do disclose information which indicates that you may be guilty of criminal conduct, neither your self-incriminating statements nor the fruits of any self-incriminating statements you make will be used against you in any criminal legal proceedings.

Since this is an administrative investigation and any self-incriminating information you may disclose will not be used against you in a court of law, you are required to answer our questions fully and truthfully. The questions will relate specifically and narrowly to the matter under investigation. If you refuse to answer our questions or if you attempt to provide false, untrue, or deliberately erroneous information, or attempt to hamper the investigation in any way, this, in itself, is a violation-of the rules and regulations of the Manchester Police Department and you will become subject to potential polygraphs, disciplinary penalties up to and including termination from employment.

You will be allowed union representation during this interview. Your union representative may act as your witness but, he/she may not represent you in a legal capacity or as counsel.

Do you understand what I just explained to you? (YES) ✓ (NO) _____

Do you have any questions concerning what I just explained to you? (YES) _____ (NO) ✓

List questions and responses. _____

TIME 1115 DATE 03-16-18 SIGNATURE _____ BROWN

WITNESS _____ TEATHER

INVESTIGATOR _____ 216

A copy of this form is to be provided to the Member or Employee involved in an Internal Investigation/Citizen Complaint.

JOINT 8
CHANGED TO UNION 1

JOINT 9

JOINT 10

JOINT 11

Manchester Police Department
Standard Operating Procedure

Rules and Regulations	Effective Date: May 2013
Miscellaneous information:	Rescinds: Rules and Regulations January 2012

I. PURPOSE

A. Since a police department is quite often referred to as a department of public safety, it then becomes quite obvious that its prime functions are the protection of the lives and property of the citizens within its jurisdiction. To extend and categorize the foregoing terminology may be endless and repetitious, but it might suffice to say that duties include the preservation of the public peace, to see that all laws and ordinances are enforced by the detection and suppression of crime, and that the violators of said laws and ordinances are apprehended and prosecuted according to our judicial process.

B. Although police officers are primarily civilians, they are sworn into their positions by a formal oath in an organization that by its very nature becomes quasi military. As such, a police department then has prime requisites and therefore its employees must be guided by rules and regulations that are applicable to this type of an organization.

C. It must be remembered, however, that regardless of the effort and time involved in compiling a set of rules and regulations, it is obviously impossible to provide for every type of incident or occurrence and, therefore, this must be considered accordingly in any application.

D. Therefore, the Rules and Regulations contained herein have been approved by the Board of Police Commissioners and are the result of an intensive study in updating and revision.

E. They are designed to guide and assist the employees of the Manchester Police Department so that they will perform their sworn duties and tasks in a professional and efficient manner in the service of the City of Manchester.

II. POLICY

A. The primary mission of the police force is crime prevention and the protection of life and property. The laws and police procedures related to them are promulgated by police agencies for the purpose of maintaining order and continuity. The basis of all police action is the law, and the credibility of the law enforcement profession will be measured by its contribution to the welfare of man, its concern for excellence, and by the guidance it provides to its members toward a high level of ethical practice.

B. The purpose of this manual is to establish the principles for the management of the Manchester Police Department, and the standards of behavior to which every member of the department shall be held accountable. Its goals are to increase the quality of police service, to elevate the standards of the profession, and to strengthen the public confidence in law enforcement; to encourage officers individually and collectively, to fully appreciate the total responsibilities of their office; to earn the support and cooperation of the general public in these endeavors.

C. Police officers have a sworn obligation to respect and defend the rights guaranteed to the people in the Constitution. In the performance of those duties they may command obedience or prohibit behavior which tends to irritate and conflict with the expectations of free men in a free society, and particular attention must be given to its just and impartial application. Violations of law by those sworn to defend it will bring down the system more surely than all other forms of crime combined.

D. Positive police action, while intended to serve the department's peace keeping mission, must be administered without prejudice; always mindful that in the execution of their duties officers act not for themselves, but for the public. Consistent with that responsibility, officers should be constantly aware that it is not a proper police function to prohibit or stop dissent. Civil disturbance and dissent are not synonymous. While civil disobedience and disturbance are illegal, dissent is not. Only violations of law and actions inimical to public safety are within the purview of the police. Proper understanding of the relationships between the maintenance of order in the community as the principal objective, and the enforcement of the law as a tool to be used in achieving it, is a distinction well made.

E. The rules, regulations and job descriptions should serve as a guide to police officers and impress upon them the importance of their public service. The uniqueness of their role identifies them as members of a profession capable of performing that service with dedication and wisdom.

III. PROCEDURES

A. The regulations in this manual are adopted as a guide for the discipline and government of the police department.

B. It cannot be expected that any set of regulations will cover all situations or emergencies that arise. In a role as complex as that of a police officer, intelligence and discretion will often be the only available guidelines.

C. If any part of these regulations is rendered inoperable or declared illegal by any court or tribunal of competent jurisdiction, the balance of the entire manual will remain in full force and effect.

IV. DEFINITIONS

A. **Department**—The Police Department

B. **Chief**—The executive head of the Police Department

C. **Officer-in-Charge**—Commanding Officer of any given situation

D. **Relief Commander**—Commanding Officer of a shift

E. **Ranking Officer**—the officer having the highest rank or grade; officers of the same rank according to the date of their appointment. When two or more officers are on duty together the officer of the highest rank is in command and shall be held responsible for the operation.

For a special detail and for a specific period, an officer may be designated by the Relief Commander to take command without regard to rank.

F. **Member/Officer**—A duly appointed police officer in the Department

G. **Employee**—A civilian employee of the Department

H. **Manual**—The Police Manual of the Department

I. **General Orders**—Commands or instructions, oral or written, given by one member to a member of lesser rank

J. **Memorandum**—An informal record of any proceeding or an informal communication of any kind

K. **Shift**—A regular tour of duty, unless otherwise ordered by the Chief of Police

L. **Grammar**—wherever context permits, the use of the masculine will also include the feminine and the use of the singular will also include the plural.

M. **Division**—A unit under command of a Captain who reports directly to the Assistant Chief of Police or the Chief of Police.

N. **Post**—a fixed point or location to which an officer is assigned for duty.

O. **Route**—a length of street, street, or geographic area designated for patrol purposes. A route is used for the assignment of foot patrolmen, patrol cars, etc.

P. **Orders**—an instruction given by a superior officer to a subordinate. It may be either oral, written, or by hand signal.

Q. **Chain of Command**--The unbroken line of authority extending from the Chief of Police through a single subordinate at each level of command down to the level of execution.

R. **Daily Bulletin**—the official daily publication of the Department. All directives contained in the Daily Bulletin have the force and effect of departmental orders.

V. PROFESSIONAL RESPONSIBILITIES

A. Police officers are professionals, and as such are expected to maintain exceptionally high standards in the performance of their duties. Effective and efficient performance of his duty requires that a police officer maintain the respect and cooperation of his community. This requirement dictates that the conduct of all police officers be above reproach in all matters both within and outside the Department.

B. General professional responsibilities include taking appropriate action to:

1. protect life and property
2. preserve the peace
3. prevent crime
4. detect and arrest violators of the law
5. enforce all laws coming within the departmental jurisdiction
6. supervise public functions (such as parades or dances) where public order requires
7. police presence
8. respond to all public emergencies
9. endeavor to maintain good community relations

VI. CONFLICT OF INTEREST

Since the position of a police officer is a public trust, it is important to avoid all situations involving conflicts of interest whether in fact or only in appearance.

A. **Membership in Organizations:** A member or employee of this Department shall not affiliate with or become a member of any organization if such affiliation or membership would in any way interfere with or prevent him from performing his duty.

B. **Employment Outside of the Department:** A member or employee of this department shall not affiliate with or become a member of any organization if such affiliation or membership would in any way interfere with or prevent him from performing his duty.

1. Officers/employees may engage in off-duty employment subject to the following limitations:

   a. such employment shall not interfere with the officers/employees employment with the Department, or impair his/her independence of judgement in the exercise of official duties

   b. officers/employees shall submit a written request for off-duty employment to the Chief, whose approval must be granted prior to engaging in such employment. Said request will be submitted on a yearly basis as requested by Administration.

   c. officers/employees shall not engage in any employment or business involving the driving of taxicabs, the sale or distribution of alcoholic beverages, bail bond agencies, security or alarm services, or investigative work for insurance agencies, private guard services, collection agencies or attorneys.

2. In addition to the above restrictions, approval may be denied where it appears that the outside employment might:

   a. render the officer unavailable during an emergency

   b. physically or mentally exhaust the officers to the point that their performance may be affected (i.e....chronic absenteeism)

   c. require that any special consideration be given to scheduling of the officer's regular duty hours

   d. bring the Department into disrepute or impair the operation or efficiency of the Department or officer

C. **Political Activities**: Political activity by members and employees shall be restricted to voting and activities affecting working conditions of members and employees. Members and employees shall not solicit or make contributions in money or other things directly or indirectly on any pretext to any person, committee or association for political purposes not directly affecting working conditions of members and employees. They shall not use the influence of their office.

D. **Gifts and Gratuities**: Members and employees shall not under any circumstances solicit or accept any gift, gratuity, loan, service reward or fee where there is any direct or indirect connection between the solicitation and their departmental membership or employment, except as may be specifically authorized to the Chief.

Members and employees must pay for all meals and beverages. No member or employee of the department shall receive any gift or gratuity from other members or employees junior in

rank without the express permission of the Chief of Police.

E. **Unauthorized Transactions**: Members and employees are prohibited from entering into any transactions of material value at substantially lower than fair market value, or the value at which such goods or services are being offered to the general public, when such transaction takes place between themselves and any person involved in any matter or case which arose out of their employment with the Department, except as may be specifically authorized by the Chief. This section shall not preclude officers from taking advantage of standard police discounts available to all departmental members.

F. **Disposition of Unauthorized Gifts, Gratuities, Etc.**: Any unauthorized gift, gratuity, loan fee, reward or other thing falling into any of these categories coming into the possession of any member or employee shall be forwarded to the office of the Chief of Police together with a written report explaining the circumstances connected therewith.

G. **Use of Official Position:** Officers/employees shall not use their official position, official identification cards or badges:

1. for personal or financial gain;

2. for obtaining privileges not otherwise available to them except in the performance of duty

3. for avoiding consequences of illegal acts

Officers/employees shall not lend to another person their identification cards or badges or permit them to be photographed or reproduced without the approval of the Chief. Officers/employees shall not authorize the use of their names, photographs, or official titles which identify them as officers/employees, in connection with testimonials or advertisements of any person, commodity or commercial enterprise, without the approval of the Chief.

VII. ORDERS

An order is a command or instruction, written or oral given by a superior officer. All lawful orders, written or oral, shall be carried out fully and in the manner prescribed.

A. **Effectiveness of Orders**: All general orders, memorandums, special circulars or other orders printed upon authorized departmental forms that have been approved by the Chief of Police shall have the force and effect of a departmental regulation. All members and employees of the Department shall become familiar with the regulations and provisions thereof.

B. **General Orders:** General orders are permanent written orders issued by the Chief of Police outlining policy matters which affect the entire Department. A General Order is the most authoritative written order the Chief issues, and may be used to amend, supersede or cancel any previous order. General Orders remain in full effect until amended, superseded or canceled by the Chief. Arrangements shall be made to include General Orders in the Police Manual. Relief Commanders, and/or officers in charge as the case may be, will see to it that the following regulations pertaining to conduct within the police station are followed and they will be held to answer for violations during their duty tours under normal conditions.

C. **Special Orders**: Special Orders are temporary written orders issued by the Chief of Police outlining instructions covering particular situations. Special Orders are automatically canceled when their objective is achieved.

D. **Unlawful Orders:** No member/employee shall knowingly issue an order in violation of any law or any departmental regulation. Unlawful orders shall not be obeyed.

The officer/employee to whom the order was given shall notify the ordering member/employee of the illegality of his order. Responsibility for refusal to obey rests with the officer/employee to whom the order was given. He/she shall be strictly required to justify his/her action.

E. **Unjust or Improper Orders**: Lawful orders which appear to be unjust or improper shall be carried out. After carrying out the orders, the officer/employee to whom the order was given may file a written report to the Chief via the chain of command indicating the circumstances and reasons for questioning the orders, along with his/her request for clarification of departmental policy. An officer/employee who performs an order found to be unjust or improper by the Chief of Police may not be held responsible for performing such order.

F. **Conflicting Orders**: Should any order given by a supervisor conflict with any previous departmental order, the member/employee to whom such order is given will call attention to the conflict. If the supervisor does not change his/her order to avoid such conflict his/her order will be obeyed, but the member/employee obeying such order will not be held responsible for disobedience of the previous order. It should later be reported to the Chief in writing for clarification.

G. **Personnel Orders**: Orders pertaining to assignments, change-of-duty assignments, administrative matters related to conditions of employment, and employee rights and benefits.

H. **Complying with Instructions from Radio Dispatcher:** All messages transmitted over the police radio system by any member/employee of the force shall be direct and concise and shall conform with all departmental radio procedures and the rules and regulations of the Federal Communications Commission. No member/employee shall disobey or refuse to take cognizance of any communication transmitted by the Dispatcher, unless directed to do so by a supervisor. Neglect to comply with the instructions of the Dispatcher shall be regarded as a violation of these regulations.

I. **Memorandum Orders**: Written communications issued by the Chief of Police or other authorized command personnel for the following purposes:

1. to issue information or instructions which do not warrant a formal order
2. to direct the actions of subordinates in specific situations
3. to explain or emphasize portions of previously issued orders

J. **Relayed Order:** Any lawful order of a supervisor relayed from a supervisor by an employee of the same or lesser rank shall be carried out.

VIII. REQUIRED CONDUCT

A. **Roll Call / Roll Call Training**: Unless otherwise directed, members and employees shall report to daily roll call at the time and place specified, prior to the start of their relief, properly uniformed and equipped. They shall sign for equipment when needed or requested and shall give careful attention to orders and instructions while avoiding unnecessary talking and movement.

B. **Training:** All in-service training is considered mandatory. Any variation from the original in-service training schedule must be pre-approved by the Training Director.

C. **Awareness of Activities:** A member/employee, upon reporting for duty or upon returning to duty from any absence, shall inform him/herself about all new orders, regulations,

memoranda, previous shift activities and all other important matters governing his/her assignment.

D. **Submitting Reports**: A member/employee shall promptly and accurately complete and submit all reports and forms as required by the "Records" SOP - Section X.A.

E. **Identification**: At the time of employment, each member of the Manchester Police Department shall be issued an employee identification card. This card shall include the employee's name, photograph, rank and date of hire. All sworn members shall carry their badge and identification card at all times, except when impractical or dangerous to his/her safety or to an investigation. All sworn members shall furnish their name and badge number to any person requesting that information and shall allow any person requesting to view the identification to do so. These requirements will be followed when the member is on duty or while acting in an official capacity as a member of the Manchester Police Department. Exceptions apply when the withholding of such information is necessary for the performance of police duties or is authorized by proper authorities.

When on-duty all non-uniform and non-sworn personnel, unless explicitly exempted by the Chief of Police, shall have displayed upon their person, their Manchester Police Department identification card and shall allow anyone who requests to view the identification to do so.

F. **Address and Telephone:** A member or employee of the Department shall have a telephone in his residence or a telephone number at which he can be reached and shall promptly report any change of telephone number or address to their Division Head, the Executive Secretary, and the Payroll Coordinator within twenty-four (24) hours of any change.

G. **Truthfulness:** A member or employee of the Department shall speak the truth at all times and under all circumstances. In cases where he/she is not allowed by regulations of the Department to divulge facts within his knowledge, he/she shall decline to speak on the subject.

H. **Physical Fitness:** A member shall maintain good physical condition in accordance with a standard determined by the Chief of Police after consultation with a physician.

I. **Examination**: A member/employee shall submit to a physical or psychological examination at any time, at the expense of the Department, when so ordered by the Chief of Police.

J. **Civil Suits for Personal Injuries:** Any claims for damage to clothing or other personal property belonging to a member or employee caused by the members and employees shall not seek, in any way, nor accept from any person, money or compensation for damages sustained or for expenses incurred by them in the line-of-duty without first notifying the Chief of Police in writing.

1. Members or employees who have received municipal salaries for illness or for personal injuries sustained while off-duty shall notify the Chief of Police, in writing, of any intent to seek, sue, solicit, or accept compensation as damages for illness or injury.

2. Notice shall be filed before action is taken. It shall include the facts of the claim and the name of the defendant. The Chief of Police shall be informed of the status of the case and of the final Court decision.

3. This provision shall not apply to private insurance policies held by members or employees for which premiums are not paid for in part or in whole by the municipality.

K. **Line-of-duty Disability**: Any injury, illness or disability incurred in the line-of-duty, shall be reported in accordance with departmental procedure.

1. Final disposition as to line-of-duty injuries, illness or disabilities shall be made by the Chief of Police after consultation with a physician.

2. In each case of injury, illness or disability incurred in the line-of-duty, no member/employee shall be returned to duty until his ability to be placed on duty status is confirmed by his physician.

L. **Failure to Report for Duty**: No member or employee shall be absent from duty, except during annual vacation, regular day off or, on account of sickness. At least one (1)-hour prior notice shall be given to the Relief Commander, if a member or employee, for any reason, cannot report to assigned duty.

M. **Leaving the City**: Whenever a member/employee of this Department, during his/her tour of duty, is about to leave the City limits for purposes of investigation, pursuit, or any other reason, he/she shall inform his/her supervisor or Dispatcher prior to his/her leaving and on his/her return.

N. **Paid Details**: Paid police details shall be assigned through the Budgets Division according to current departmental policies and procedures.

O. **Hours of Duty**: The Chief of Police shall have the power and the authority to call to duty any member/employee when occasion requires such action.

P. **Duty Outside the City**: Members of the Department will not be detailed to perform duty beyond the limits of City of Manchester except to assist the authority of another city or town, to suppress disorder or preserve the peace under the direction of the Commanding Officer of such city or town involved. Members of this department shall have authority as a police officer within the limits of such city or town and shall have the same immunity and privileges as when acting in the City of Manchester.

Q. **Property Identification**: All personnel property, including all money, whether lost, stolen, confiscated, or given to the department, which comes under an officer's/employee's control, shall be tagged and turned over to the proper authority according to current departmental procedures.

R. **Public Defects**: Every member/employee shall observe and forthwith report any defect, obstruction, or nuisance in the streets, sidewalks, or other public areas, which may cause a hazard to the general public or create a civil liability upon the City. Appropriate notification shall be made to the radio dispatcher and a request for a supervisor when more immediate remedial action is necessary.

S. **Report of Use of Weapon**: A member/employee of the Department, who uses any weapon as outlined in the Standard Operating Procedure Titled "Authority" - Section X, shall immediately notify the Relief Commander and shall complete a "Use of Force Report". An immediate investigation may be conducted regarding the proper use of said weapon. A member/employee shall never brandish a weapon nor shall he/she remove his/her weapon from its holster other than in the proper performance of his/her duty.

T. **Duty to Obey:** Every member/employee of the department shall promptly obey, without reservation, the Regulations of the Department and all the lawful orders of a Supervisor.

U. **Duty to Cooperate**: Every member/employee of the Department shall fully cooperate in all Departmental investigations.

V. **Conduct**: Every member/employee shall conduct his/her personal and official lives so as to bring credit to this Police Department.

W. **Civility**: Every member/employee of the Department shall be civil, orderly, diligent, discreet, courteous and patient as a reasonable person is expected to be in any situation and shall not engage in any altercation, physical or otherwise, whether on duty or not, with any other member/employee of the Department. All members/employees will conduct themselves in accordance the "Professional Conduct" Standard Operating Procedure.

X. **Questions of Citizens**: Every member/employee of the Department shall answer questions from citizens in a courteous manner and, if unable to supply an answer, shall make every effort to obtain the answer for the citizen, avoiding argument and unnecessary conversation. If requested, a member/employee of this Department shall give his/her name and badge number in a courteous manner to any person whom so requests.

Y. **Duty Status:** Although certain workday hours are allotted to every member of the force for the performance of specific workday duties, a member of the force shall be in an "on-duty" status at all times, for the preservation of the peace and the protection of life, liberty, and property. A member shall be prepared at all times and under all circumstances, to perform immediately a police duty whether or not the member is in uniform or off workday duty, whenever the member is cognizant of a need for police service. A member of the force shall be fit for duty at all times except when carried on "sick" or "injured" report.

Z. **Equipment**: All equipment must be clean, in good working order, and must conform to Departmental specifications.

AA. **Accessories and Equipment:** Only issued or approved accessories or equipment shall be worn on the uniform or carried by officers on duty.

BB. **Knowledge of the City**: Every member/employee (employee as job function necessitates) shall familiarize him/herself with the geography of the city, including routes of public transportation, the location of streets, highways, bridges, public buildings and places, hospitals, courts, transportation offices and stations, prominent or important office buildings, large industrial plants or commercial establishments, and such other information as may be disseminated by supervisors from time to time.

CC. **Incurring Department Liability:** A member or employee shall not make any purchase for goods or services charged to the City of Manchester without the consent of the Chief of Police.

DD. **Radio Dispatcher**: All members/employees of the Department operating the Police radio either from a remote unit or in the communications center, shall strictly observe regulations for such operations as set forth in radio procedures and by the Federal Communications Commission.

EE. **Questions Regarding Assignment:** Members/employees in doubt as to the nature or detail of their assignment shall seek such information from their supervisors by going through the chain of command.

FF. **Reporting Violations of Laws, Ordinances, Rules or Order:** Members/ employees knowing of other members or employees violating laws, ordinances, or Rules of the Department, or disobeying orders, shall report same in writing to the Chief of Police, through official channels. If the member or employee believes the information is of such gravity that it must be brought to the immediate personal attention of the Chief of Police, official channels may be bypassed.

GG. **Relief**: All members/employees are to remain at their assignment and on duty until five (5) minutes before the end of tour or until relieved by proper authority.

HH. **National Colors and Anthem:**

1. All members of the department shall stand at attention and salute the official National Colors and the National Anthem:

   a. As they pass in public parades, ceremonies or other occasions.

   b. At any detail indoors when the officer is in uniform.

   c. When carried in ceremony, into any building room or place.

2. If in uniform, seated at a banquet function or if not in uniform and on official duty, members shall stand and hold their right hand over their heart.

3. Said salute shall be held until the end of the anthem or until the colors have passed or been posted.

4. Salutes shall face the flag if posted or being carried in. If no flag is present during the playing of the National Anthem, said salute shall face the music, the stage or where attention is being directed.

IX. PROHIBITED CONDUCT

The following acts by a member or employee of the Manchester Police Department are prohibited or restricted:

A. **Unlawful Conduct**: Infractions of any law of the United States, the State of New Hampshire or of any State or local jurisdiction in which a member or employee is present. A conviction for the violation of any law shall be prima facie evidence of a violation of this section.

B. **Conduct Unbecoming an Officer/Employee**: Conduct unbecoming an officer/employee shall include on or off-duty conduct which brings the Department into disrepute or reflects discredit upon the officer/employee as a member of the Department, or that which impairs the operation or efficiency of the Department or the officer/employee.

C. **Neglect of Duty**: A member/employee being absent from assigned duty without leave, or failure to take suitable and appropriate action when any crime, public disorder or other incident requires attention.

D. **Insubordination**: Failure or deliberate refusal of a member/employee to obey a lawful order issued by a supervisor.

E. **Unnecessary Force:** The use of more physical force than that which is necessary to accomplish a proper police purpose. Members shall use force in accordance with law and with departmental procedures.

F. **Discourtesy**: Discourtesy, rudeness or insolence to a member of the public by any member/employee is expressly prohibited. A member/employee shall be courteous and tactful in the performance of his duties. He/she shall control his temper, exercising the utmost patience and discretion, even in the face of extreme provocation.

   All members/employees shall conduct themselves according to the Standard Operating Procedure "Professional Conduct Policy".

G. **Use of Alcohol and Drugs:** A member or employee of the Department shall not bring, place, or permit to be brought or placed, or allow to be kept in any building location, or vehicle within the Department, any exhilarant, hypnotic, hallucinogen or narcotic, except in strict performance of police duty as required by regulations or orders or when it is needed for prompt administration by a licensed physician. A member or civilian employee of the Department shall not drink intoxicating beverages or use intoxicants in any manner while on duty or in uniform, unless authorized by the Chief or his designee. A member or employee of the Department shall not use or render himself unfit for duty through the use of intoxicants, narcotics, exhilarants, hypnotics, hallucinogens, or other toxic drugs unlawfully or lawfully administered.

H. **Drug-Free Workplace:** The Manchester Police Department recognizes that substance abuse is a workplace problem because it affects members/employee health and safety, productivity and health care costs. Studies show that compared to alcohol/drug free workers, substance abusers are far less productive, miss more workdays, are more likely to injure themselves or others, file more insurance and Workers' Compensation claims, cause friction among coworkers and cause damage to equipment. Accordingly, it is the purpose of the department to establish a drug-free workplace, which reflects the department's strong commitment to a workplace free of illegal drugs and the use of alcohol and the abuse of prescription drugs.

The department will protect the right of all members/employees to work in an environment free from the problems and risks associated with substance abuse. Drug and alcohol abuse in the workplace is inconsistent with the behavior expected of members/employees of the Manchester Police Department and it may subject the City of Manchester, its members/employees and the general public to unacceptable risks or workplace incidents, accidents or other failures that undermine the Department's ability to operate safely, effectively and efficiently. Each member/employee of our workforce - from Chief to the most recently hired, has the responsibility and will play a role in achieving a drug-free workplace.

MANCHESTER POLICE DEPARTMENT DRUG-FREE STATEMENT

1. The Manchester Police Department will maintain a workplace free from alcohol or other drug abuse and its effects. The Manchester Police Department will not tolerate or condone substance abuse.

2. It is strictly forbidden for members/employees to unlawfully manufacture, distribute, dispense, possess or use illegal drugs or other controlled substances or abuse prescription drugs while on duty or while within the police station, substations or other official work facilities under the control of the Manchester Police Department.

3. The use of alcoholic beverages while on-duty or in uniform is forbidden. This shall not be construed as applying to officers on special assignment who, because of their assignment, have been authorized by the Chief to consume alcoholic beverages while on-duty.

4. The use of alcoholic beverages within the police station, sub-stations or other official work facilities under the control of the Manchester Police Department is forbidden.

5. Members/employees are prohibited from arriving at work under the influence or effects of alcohol or any drug that adversely affects the members/employees job performance, including the use of prescribed drugs under medical direction. Where physician directed use of prescription drugs adversely affects job performance, it is in the best interest of the member/employee, co-workers and the Police Department, that sick leave is used.

6. A member/employee who is in violation of paragraph 2, 3, 4 or 5 or who is convicted of an alcohol or drug-related offense that occurred while on-duty will be subject to the disciplinary process. The discipline may include options such as mandatory counseling, treatment, and testing; they may also include reprimands, suspensions and termination.

7. Based on work performance, a member/employee determined to be alcohol or drug involved shall be subject to referrals to treatment and/or the disciplinary process. Such members/employees may also be suspended until such time as it is determined that the member/employee is capable of performing his/her job without posing a risk to others or him/herself. A member/employee, who is suspended under these conditions and demonstrates that he/she is unwilling or unable to successfully and capably return to the workplace, may be subject to additional disciplinary measures up to and including termination.

8. Any member/employee convicted of any violation of any criminal drug or alcohol statute, including City, State or Federal laws or laws of any other state or municipality, is required to notify the Chief of Police in writing no later than five (5) days after such conviction.

9. The Police Department realizes that early recognition and treatment of chemical dependency problems is important for successful rehabilitation, service to the public and reduced personal, family and social disruption. Participation in the Employee Assistance Program or other rehabilitative program is encouraged but does not, in and of itself, protect the member/employee from other appropriate discipline that the Department may impose, but active participation in such a program shall be considered by the Department.

10. Constructive disciplinary measures may be used to provide motivation for members/employees to seek assistance. This is not to be construed as barring the Department from taking other disciplinary action, including termination if appropriate, when drug/alcohol abuse or dependency results in unacceptable job performance, violations of Rules, Regulations, Standard Operating Procedures or the law.

DRUG-FREE AWARENESS PROGRAM

In order to maintain a drug and alcohol free workplace, the Police Department has established a drug/alcohol free awareness program to educate employees about:

1. The dangers of drug/alcohol in the workplace

2. The Manchester Police Department's Drug Free Workplace directive

3. The availability of services to assist employees with problems related to the use and abuse of drugs and alcohol

Specific steps include:

1. Every employee receives a copy of the Drug Free Workplace directive.

2. Every employee receives a presentation by the City of Manchester Employee Assistance Program Coordinator.

3. The Police Department provides periodic training and the distribution of educational materials regarding the dangers of drug and alcohol abuse.

4. The Police Department provides periodic training sessions for supervisors, command staff and administrators, on recognizing substance abuse in the workplace and methods of handling problems.

I. **Improper Associations:** A member /employee shall not maintain or establish relationships with persons engaged in unlawful activities, nor shall a member/ employee establish relationships with persons who may tarnish the reputation of the Department as determined by the Chief of Police except in the discharge of official duty, and with prior knowledge of the Chief of Police.

J. **Personal Preferment**: No member/employee shall seek the influence or intervention of any person for purposes of personal preferment, advantage, transfer, or advancement.

Members/employees are forbidden to solicit petitions for their promotions or change in the line of duty, or for the promotion or change of duty of any other member/employee, or for the appointment of any person to the Department, or to promote any political influence to affect such an end.

K. **Recommending Private Services**: No member/employee shall recommend or suggest in any manner the employment or purchase of any particular professional or commercial service or product, such as lawyers, bondsmen, undertakers, towing services, or burglar alarm companies, except in the transaction of personal business.

L. **Personal Business**: No member/employee shall conduct personal business while on duty unless authorized by the Chief of Police.

M. **Departmental Letterhead:** No member/employee shall use the departmental letterhead for private correspondence or sending official correspondence out of the Department without the permission of the Chief of Police.

N. **Mailing Address**: No member/employee shall use the Department as a mailing address for private purposes, especially for the purpose of a motor vehicle license or registration.

O. **Possessing Keys to Private Buildings**: No member/employee shall have keys to private buildings or dwellings.

P. **Sleeping:** No member/employee shall sleep while on duty.

Q. **Reading**: No member/employee shall read for recreational purpose while on duty, except during meals.

R. **Smoking**: No member/employee shall conspicuously smoke while on duty.

S. **Notices**: No member/employee shall alter, deface or remove any posted notice of the Department. No notice shall be posted on the Department Bulletin Board without the permission of the Chief of Police or the Relief Commander.

T. **Report of Loss or Damaged Property:** In the event that Departmental property is lost, or found bearing evidence of damage which has not been reported, the last member/employee using the property may be charged with failure to report and may be held responsible for damages.

U. **Unsatisfactory Performance**: A member/employee shall maintain sufficient competency to perform his/her duty and to assume the responsibilities of his/her position.

Unsatisfactory Performance may be demonstrated by any one or more of the following:

1. a lack of knowledge of the application of laws required to be enforced
2. an unwillingness or inability to perform assigned tasks
3. the failure to conform to work standards established for the officer's/employee's rank, grade or position
4. repeated poor evaluations or repeated infractions of the rules and regulations
5. a lack of knowledge of the application of the Standard Operating Procedures or Rules and Regulations of the department.

V. **Assisting Criminals:** Members/employees shall not communicate in any manner, either directly or indirectly, any information which might assist persons guilty of criminal or quasi criminal acts to escape arrest or punishment of which may enable them to dispose of secret evidence of unlawful activity or money, merchandise or other property unlawfully obtained.

W. **Dissemination of Information**: A member/employee of the Department shall not divulge to any unauthorized person, in or out of the Department (i.e., one who does not have an official "need to know"), any information concerning the business of the Department and shall not talk for publication, be interviewed, make public speeches on police business, or impart information relating to the official business of the Department unless authorized by the Chief.

1. Officers / Employee accessing the STATE POLICE TELECOMMUNICATIONS SYSTEM (SPOTS) are reminded that the system is designed exclusively for use by law enforcement and criminal justice agencies in conducting their official, lawfully authorized duties. Use of the system, solicitation of another officer/employee to use the system or release of information obtained from the system for any other purpose is prohibited
2. Officers / Employees are prohibited from using or soliciting another officer / employee to use the ILEADS system or any other source of information they are authorized to access by virtue of their position with this agency to access or release information for any reason outside of their official and lawfully authorized duties.

X. **Public Statements**: A member/employee shall not make public derogatory or disrespectful statements, which tend to undermine the efficiency or the morale of the Department, or statements, which may subvert public confidence in the Department.

Y. **Removal of Records**: A member/employee shall not remove or copy any official records or reports, except in accordance with established Departmental procedures.

Z. **Feigning Illness**: A member/employee shall not feign illness or injury, falsely report him/herself ill or injured, or otherwise deceive or attempt to deceive any official of the Department as to the condition of his/her health.

AA. **Towing Service**: No member/employee shall solicit or assist in any way for a towing service. All requests for towing shall be in accordance with the Standard Operating Procedure "Traffic Division" Section XVII (Towing or Removal of Motor Vehicles)

BB. **Use of Telephone**: Local private calls are authorized for immediate family business only. Calls shall be minimal in frequency and duration, so as not to impede or interfere with the efficiency of the department. No member/employee shall use Departmental phones for any private long distance calls unless authorized by a ranking supervisor. No member/employee shall use another member/employees issued long distance pin number.

Calls outside of the continental United States shall be approved by a ranking supervisor prior to such call being made.

CC. **False Information on Records**: A member/employee of the Department shall not make false official reports or knowingly or willingly enter or cause to be entered into any departmental books, records, or reports, any inaccurate, false, altered or improper police information or material matter.

DD. **Withholding Evidence:** A member/employee of the department shall not fabricate, withhold, or destroy any evidence of any kind.

EE. **Testimony in Civil Cases:** A member/employee of the department shall not testify in any civil case in court unless legally summonsed to do so or unless he/she shall have received permission or order from the Chief of Police. When summonsed to testify, he/she shall notify the Chief of Police in writing.

FF. **Use of Private Vehicles**: While a member/employee of the department is on duty, he/she shall not drive a private vehicle to his/her post, assignment, patrol area, or cover his assignment with a private vehicle unless authorized by a supervisor.

GG. **Use of Departmental Vehicles**: Members/employees shall not use any Departmental vehicle without the permission of a supervisor. Departmental vehicles shall never be used for personal business or pleasure. Vehicles can be used only with the permission of the Chief of police or his designee for conveying officers to and from home.

HH. **Public Appearance Requests:** All requests for public speeches, demonstrations and the like will be routed to the Chief of Police for approval and processing.

Members/employees directly approached for this purpose shall suggest that the party submit his request to the Chief of Police in writing.

II. **Debts**: Members/employees shall not undertake any financial obligations which they know or should know they will not be able to meet, and shall pay all just debts when due. Repeated instances of financial difficulty may be cause for disciplinary action.

Members/employees shall not co-sign a note for any supervisor.

JJ. **Punishable Offenses:** Specifically, but not exclusively, the offenses for which a member/employee of the Department may be subject to discipline and punishment are the following:

1. violation of any statute, law or ordinance
2. disobedience or violation of any departmental regulation, rule, order, instruction or memorandum
3. insubordination
4. disobedience of a lawful order
5. neglect of duty
6. gross inefficiency
7. any malfeasance, or misfeasance

8. gross incompetence
9. failure to keep as physically fit as duty status requires
10. disrespect towards a superior officer
11. arrogance, oppression or tyranny in discharging of duty
12. unnecessary violence or indignity to a citizen or detainee
13. indecent, profane or unnecessarily harsh language
14. absence from duty, post or station without proper leave
15. sleeping or loafing while on post
16. failure to discover a detectable crime in an area of responsibility
17. negligence in the care of public property (i.e., its abuse, misuse, waste or willful destruction)
18. false official statement, oral or written
19. failure to pay a just debt
20. contracting a debt under false or fraudulent pretenses
21. communicating information relating to police business to unauthorized persons
22. intoxication or consumption of alcoholic beverages while on duty
23. immorality of any kind
24. conduct unbecoming an officer/employee
25. conduct prejudicial to the public peace or welfare
26. conduct tending to case disrepute on the Department
27. any other act or omission contrary to good order or discipline
28. unlawful use of narcotic, exhilarant, hypnotic or other drug
29. making recommendation for the disposition of any case pending in court without proper authorization of the Chief of Police Departmental

KK. **Investigations**: A member/employee may be discharged or otherwise disciplined for refusing to answer questions, if the questions are specifically, narrowly and directly related to the officer's/employee's performance of official duties. The questions do not have to be limited to on-duty conduct, but can inquire into an officer's/employee's private affairs and off-duty conduct if that inquiry is reasonably related to the officer's/employee's ability and fitness to perform his/her duties as a member/employee. The member/employee is not required to waive his/her immunity with respect to the use of his answers.

As long as the answers or the fruits thereof cannot be used against him/her in any criminal proceedings, he/she will have to answer.

LL. **Use of the Polygraph:** If the Chief or his designee so orders, a member/employee shall submit to polygraph examinations provided the examinations are conducted in accordance with Section KK.

MM. **Examinations Lineups**: If the Chief or his designee so orders, a member/employee shall submit to any medical, ballistics, chemical or other tests, photographs or lineups provided that the examination is specifically, directly and narrowly related to the member's/employee's performance of his/her official duties.

NN. **Radio and Communications Protocol**: Members/employees, when transmitting radio communications must conform to Federal Communications Commission Regulations. All transmissions will be broadcast in a clear, concise, courteous, and professional manner. Radio transmissions that are sarcastic, rude, argumentative, or otherwise unprofessional are strictly prohibited.

OO. **Damage to City or Department Property/Department Vehicle Accidents:** Members and employees operating city owned or department vehicles are required to contact a supervisor immediately if involved in any incident resulting in damage, however slight, to any department/city owned vehicle. Loss or damage of issued equipment or property will be reported to a supervisor immediately. In all instances, an administrative note will be typed explaining the circumstances in detail

PP. **Non Compliance with Court Cancellation Procedure:** Every officer/employee will familiarize themselves and comply with the Court Cancellation Procedure (Legal Process Policy - Section V.) utilizing the Department's voice mailbox system.

JOINT 12

Manchester Police Department Standard Operating Procedure	
Organized Crime and Vice Control	Effective Date: July 2017
Miscellaneous information:	Rescinds: Organized Crime and Vice Control October 2013

I. PURPOSE

The purpose of this standard operating procedure is to establish a procedure for the collection, correlation, analysis, and dissemination of criminal intelligence information and to outline its relationship to the suppression of organized crime and vice activity within the City of Manchester. Duties, procedures, and guidelines are set forth to ensure compliance with department policy as well as state and federal laws.

II. POLICY

It shall be the responsibility of every officer within the department to investigate and suppress organized crime and vice activity. This activity must be pursued with the same enthusiasm as any other violation of the law regardless of public sentiment or apathy.

III. DEFINITION

Organized crime is a type of conspiratorial crime, sometimes involving the coordination of a number of persons in the planning and execution of illegal acts, or in pursuit of a legitimate objective by unlawful means.

IV. TRAINING

All agency personnel shall receive training related to the investigation and suppression of organized crime and vice activity.

V. GOALS AND OBJECTIVES OF ORGANIZED CRIME AND VICE CONTROL

A. The Manchester Police Department is committed to using the resources necessary to ensure an aggressive and effective effort is made to suppress organized crime and vice activities in this community.

B. The general goals and objectives of the Manchester Police Department's organized crime and vice functions are as follows:

1. establish an effective information-gathering network through the use of informants, public contacts, Department employees, and other agencies to detect organized crime and vice activity within the community

2. investigate and successfully prosecute vice offenses taking place in the City of Manchester

3. investigation and prosecution of any instance of organized crime occurring in the City of Manchester

4. purchase or maintain access to advanced or sophisticated investigative electronic equipment that will support organized crime and vice investigations in the field

5. provide advanced training to investigative personnel in the investigation and prosecution of organized crime and vice offenses

6. establish an attitude within the community that the Manchester Police Department will aggressively pursue organized crime and vice activity

7. create the perception within the criminal element that the City of Manchester is an unattractive and risky place to conduct criminal activity, through aggressive enforcement of organized crime and vice laws

VI. THE SPECIAL INVESTIGATIONS UNIT (SIU) SHALL BE ORGANIZED AS FOLLOWS

A. General Investigations:

Officers assigned to SIU will be responsible for the detection of organized criminal activity, maintenance of Law Enforcement Intelligence Unit (LEIU) records, intelligence gathering, vice, and narcotics. Officers must be adaptable to conducting special investigations, working in an undercover capacity, and maintaining a working knowledge of the above described duties as necessary to complete an investigation.

B. Special Operations:

Officers will be responsible for assigned activities in infiltrating the criminal community, identifying offenders, gathering evidence, and recovering stolen property.

C. Special Investigative Units:

The department recognizes the value of special investigative units concentrating on organized crime and vice activities. The department will provide information to other agencies upon request and exchange information through attendance at the various law enforcement meetings held.

Further involvement will be on a case-by-case basis and may include physical assistance in surveillance, execution of warrants, or assignment of officers to work full time with an investigative unit.

All SIU personnel will be under the direct supervision of the unit sergeant. SIU personnel assigned outside the unit will also be responsible to the designated supervisors and will respect the rules and procedures dictated by the special assignment.

In the sergeant's absence, SIU personnel will be under the supervision of the investigator in charge. The unit sergeant will report to the Investigation Division Captain or designee.

VII. SIU PROCEDURES

A. As vice and organized crime complaints are received, they will be assigned to an investigator who will evaluate the initial information and determine its accuracy and reliability. After determining this, the investigator will decide what action needs to be taken in order to sufficiently investigate the complaint. The investigator shall consider:

1. What is the magnitude of the problem?

2. What investigative techniques need to be used and are the proper resources available?

3. How much time will be used in following up on the complaint?

B. Investigative findings will be documented on an intelligence report or complaint report, subject to supervisory review. The report will be placed in the intelligence files.

C. Intelligence information will be gathered on organized or individual criminal activity on the local, state, and national levels. Random surveillance or random intelligence gathering on individuals or groups is prohibited. The SIU Sergeant will review all active intelligence operations to ensure that the group or individual is likely involved in criminal activities.

Intelligence gathering on political, religious, or special interest groups, not suspected of criminal activity, is prohibited. Information may be gathered through any lawful means including informants, court ordered wire tap or electronic surveillance, physical surveillance, and record searches.

Information sources are critical to effective intelligence and are not to be divulged without prior approval of the Captain of the Special Enforcement Division. Informants are to be documented and verified pursuant to rules and procedures regarding informants.

D. Vice includes illegal activities designated by law. SIU will investigate vice activities in an attempt to regulate or control offenders participating in prostitution, bookmaking, gambling, serious liquor violations, and all other illegal acts.

E. Narcotics include the identification of suppliers and sources and the seizure of narcotics through undercover activity or other investigative methods. SIU will enforce all laws and statutes which relate to controlled substances or prescription offenses.

F. Background investigations will be undertaken for purposes of background information, criminal investigations, and licensing of an individual or business. Information will be obtained only through legally accepted means, which includes public records, surveillance, search warrants, informants, and other law enforcement agencies.

Information collected is to be used in conjunction with criminal investigations or presentation to controlling authorities for substantiation of decisions pertaining to the issuance or denial of regulated license.

G. The Captain of the Special Enforcement Division shall be responsible for coordinating and overseeing the investigation of all vice and organized crime activities. The SIU Sergeant shall operate under the direct authority of the Captain of the Special Enforcement Division or designee and shall at all times ensure that the Captain of the Special Enforcement Division is informed of all major investigations.

H. The Captain of the Special Enforcement Division or a Special Enforcement Supervisor shall determine the necessary manpower and will submit a request for additional help if it is needed.

1. The following activities will be identified, controlled, and suppressed:

a. corruption

b. extortion and/or bribery

c. firearms violations

1. How credible is the original information?

2. What crime has been committed or is about to be committed?

3. How serious is the crime?

4. What information exists concerning the activity?

5. How is the investigation to be approached?

6. Is the department capable of conducting the investigation with its current manpower finances and equipment?

7. What special tactical problems exist?

IX. RECORDS

A. Investigative files and records containing vice and organized crime information should be considered sensitive and confidential. Active vice and organized crime investigative reports will be maintained separately from the Central Records System. These records shall be maintained by the SIU Sergeant with access limited to those designated by the Chief of Police.

B. When vice or organized crime cases are closed by arrest or otherwise, they should be sent to Central Records for entry into the records system. Care must be taken to avoid including information that may serve to identify undercover operators.

X. LIAISON

The department will maintain a working relationship with the Federal Bureau of Investigation, Drug Enforcement Agency, New Hampshire State Police, New Hampshire Drug Task Force, and other criminal justice agencies concerning vice and organized crime activity within the jurisdictional boundaries of Manchester, as well as activity which may extend outside its borders.

A. Individuals who are the subject of organized crime or vice investigations will be checked through the New England State Police Information Network (NESPIN) and their names placed on file with NESPIN.

B. Information received or requested by other law enforcement agencies regarding vice or organized crime shall be handled by the SIU officer, who shall maintain a record or file containing the date, external law enforcement agency name, individual officer name, and a brief summary of the information exchanged.

C. Funds for support of covert operations will be maintained in the Special Investigations Unit and supervised by the Captain of the Special Enforcement Division. All expenditures are required to be documented in appropriate ledgers with the date, amount, and reason for the expenditure. Expenditures must be supported by cancelled check, receipt, crime report, or informant documentation.

1. Operatives are authorized to expend up to $300 without prior approval of the unit supervisors. Expenditures over $300 must be approved prior to being expended except in emergency situations, after which the supervisor is to be notified as soon as possible.

2. Monthly reports of all expenditures will be prepared and submitted to the Business Service Officer by the SIU Sergeant. At least quarterly, an audit of all covert funds is to be performed by the Business Services Officer.

3. A cash account will be maintained and used for the purchase of narcotics and contraband, payment of informants, reimbursement of operative expenses for undercover officers, and other necessary expenditures that may arise. Informant payoffs shall be made in the presence of two officers.

4. An expenditure form will be filled out in full and signed by the informant and both police officers. The expenditure form must be approved by the SIU Supervisor, who will also sign the form. The payments will be logged in the expenditure ledger and the defendant activity ledger. A copy will be placed in the Informants File Folder.

5. The SIU shall have a cash account for daily operations. The cash on hand will be kept in a bank bag and locked in a secure file cabinet. Access to this account will be limited to those designated by the Captain of the Special Enforcement Division. The Captain of the Special Enforcement Division will be responsible for this account.

6. Anytime money is removed from this account, the following information will be indicated on the log:

   a. date of removal

   b. by whom the funds were removed

   c. the name of the defendant

   d. the case number

   e. the amount of money spent and or returned

   f. the reason for the expenditure

   A buy expenditure form will also be filled out whenever money is expended. It will be signed by two officers and the SIU Sergeant.

D. Surveillance equipment used for undercover purpose shall be inventoried by the supervisor of SIU with permanent or temporary assignment of equipment made at his discretion.

E. When receiving requests of intelligence information from other agency components, the SIU Sergeant or designee will research the request and contact the individual directly who requested the information and report his/her findings.

F. Intelligence information developed by other agency components will be brought to the attention of the SIU.

G. SIU will maintain a working relationship with all criminal justice agencies. The department will assign a member to the NH Drug Task Force for a one-year term, done on a yearly basis. Outside agencies conducting vice and organized crime investigations in this city shall have an SIU member to assist them if requested and manpower permits.

XI. SPECIAL VICE AND ORGANIZED CRIME INVESTIGATIONS

A. When involved in a vice or organized crime investigation, the investigator will complete a background check of the individual(s) under investigation. This should include a complete identity of subject, known locations of frequency, vehicles driven, known associates, and any other pertinent information. This type of information can be found by checking existing files, criminal histories, and surveillance of individuals, information obtained from confidential informants, and information gained from a police undercover operation.

B. When performing surveillance, the case investigator shall determine how many investigators will be needed to ensure that ample vehicle and foot surveillance can be maintained. All members in the surveillance team will be issued department vehicles and radios.

C. When an undercover operative is involved in a vice or organized crime investigation, the operative will be issued false identity and other necessary credentials, with only SIU and supervisors to be aware of the false identity. Contacts with suspects will be made through the use of confidential informants, unwitting informants, or by self-introduction. Ample surveillance will be placed on all undercover operatives to ensure their safety. The undercover operative will, whenever possible, use a concealed voice transmitter so the surveillance can maintain communications to ensure added safety. Before going undercover with a subject, the undercover operative will establish with the surveillance team routine and emergency verbal and visible communication signals.

   The case investigator or undercover operative will determine when an arrest will be made after ensuring all probable cause for the arrest has been met. A supervisor or designee will be present on all undercover operations. If a search and/or arrest warrants are obtained, the supervisor will designate a person to coordinate the execution of the warrants.

   The coordinator will develop strategies and tactics for approaching, entering, securing, and leaving the targeted area. The search and seizure of evidence and/or contraband will be executed according to department procedures and will be supervised by the coordinator.

D. Equipment to be used (e.g., weapons and radios) will be determined by the supervisor. Uniformed officers will be used whenever possible to make entries into dwellings and executing arrest warrants. The case investigator will ensure that all necessary documentation is complete concerning the arrest and/or search warrants.

XII. SURVEILLANCE

Once a vice or organized crime complaint has been investigated and surveillance is indicated, the Captain of the Special Enforcement Division will initiate investigative surveillance by the department.

A. Procedures for Surveillance:

1. A full analysis of the crime and its victims will be completed prior to the start of surveillance.

2. Habits, associates, vehicles used, methods of operation, and other pertinent information about the suspect(s) will be disseminated to the surveillance team.

3. Surveillance officer(s) will make themselves familiar with the target area and surrounding neighborhood.

4. Observation of surveillance subjects will be in accordance with procedures as required by the supervisor in charge of the investigation.

   One officer can handle surveillance, while tailing subjects should involve at least two officers and two vehicles. Generally, warrant less arrest while on surveillance will not be attempted without the consent of the supervisor in charge.

5. Communication on surveillance will be conducted via frequencies other than the department's main frequency.

6. No officer will work longer than 12 hours on a surveillance, unless:

   a. an emergency situation exists

   b. approval from Captain of the Special Enforcement Division is obtained

7. All surveillance will be conducted within the legal limits of state and federal law. All subjects' constitutional rights will be upheld and not violated during any surveillance conducted by this department. Prior to such operations, when planning is completed, legal ramifications of this type of operation shall be checked with the Office of the State's Attorney General, the Office of the U.S. Attorney, City Prosecutor, or the County Attorney if applicable.

B. Surveillance Vehicles:

1. All surveillance will be conducted in unmarked vehicles. If possible, rented vehicles will be used for stationary surveillance with a portable used to facilitate communication.

XIII. SEARCHES

A raid involving vice or organized crime connections will be conducted in the following manner:

1. The raid will only be justified via use of an approved search and seizure warrant unless mitigating circumstances exist and only then with the direct approval of the Captain of the Special Enforcement Division or designee.

2. The supervisor and/or coordinator of the raid will be an officer with the rank of sergeant or above.

3. A pre-raid meeting will be held to develop strategies and tactics for approaching, entering, securing and leaving the target.

4. Officers will be designated to gather evidence with one officer designated as the recorder and evidence officer.

5. Photos will be taken of the target immediately upon entry after the scene is secured and upon leaving, thus showing the condition of the target before and after the raid was completed.

6. Bulletproof vests will be worn by all participants.

   If upon analysis during the pre-raid meeting it is deemed necessary, then shotguns will be issued by the supervisor as needed.

7. Support units will be chosen by the supervisor as it is deemed necessary.

8. Communications will be on a frequency other than the main department frequency.

9. Arrest at the scene of any search will be made in accordance to RSA 594:10.

10. Utilization of force shall be governed by N.H. State Statute RSA 627. The use of force during drug raids will be determined by the tactical commander of S.W.A.T. The tactical commander will be in overall charge of all high risk situations under the direction of the Chief of Police.

11. If medical attention is needed at the scene, Communications will be notified and a

separate supplement completed by the supervisor and/or officer who witnessed the reason for the medical attention.

12. All searches will be conducted within the legal limits of state and federal law. All subjects' constitutional rights will be upheld and not violated during any search conducted by this department.

    Prior to such raid operation, when planning is completed, legal ramifications shall be checked with the Office of the State's Attorney General, with the Office of the U.S. Attorney, City Prosecutor or the County Attorney, if applicable.

XIV. VICE, ORGANIZED CRIME AND NARCOTICS DECOY OPERATIONS

A. Such types of decoy operations conducted by the Manchester Police Department shall be conducted by the SIU Unit with the approval of the Captain of the Special Enforcement Division.

B. Such decoy operations shall include the following:

1. analyzing victims, crimes, and crime locations
2. disguising officers to resemble victims
3. determining backup officers for security
4. developing and planning observation, arrest, and surveillance procedures
5. providing proper and necessary communications
6. preparing identifications by designation
7. providing close supervision by the appointment of an officer in charge

C. All decoy operations will be conducted within the legal limits of state and federal law. All subjects' constitutional rights will be upheld and not violated during any decoy operation conducted by this department.

Prior to such operation when planning is completed, legal ramifications of this type of operation shall be checked with the Office of the State's Attorney General, the Office of the U.S. Attorney, City Prosecutor or the County Attorney, if applicable.

XV. VICE, ORGANIZED CRIME, NARCOTICS UNDERCOVER OPERATIONS

A. Such types of undercover operations conducted by the Manchester Police Department shall be conducted by SIU with the approval of the Captain of the Special Enforcement Division.

B. Such undercover operations shall include the following:

1. identifying and analyzing suspects
2. making contact with suspects
3. analyzing neighborhood and target areas
4. supplying officers with undercover credentials and identification, with records of such information being retained solely by the SIU Sergeant

5. supplying officers with expense moneys when necessary from the SIU expense fund

6. establishing means of both routine and emergency communications as set forth in this standard operating procedure

7. specific operational procedures for assignments to include post assignments, surveillance for backups of undercover officers, and an officer in charge to be appointed by the Captain of the Special Enforcement Division

B. All undercover operations will be conducted within the legal limits of state and federal law. All subjects' constitutional rights will be upheld and not violated during any undercover operation conducted by this department.

Prior to such operation, when planning is completed, legal ramifications of this type of operation shall be checked with the Office of the State's Attorney General, the Office of the U.S. Attorney, City Prosecutor, or the County Attorney if applicable.

XVI. POLICIES AND PROCEDURES FOR THE USE OF INFORMANTS

A. All informants will be identified fully and documented prior to the completion of any deal involving informants. Documentation shall include a photo, name, date of birth, code name or number, biography and background data, and other pertinent information (i.e., current address, criminal history, reliability, motivation, payments made, and involvement in operation, etc.)

B. All informant files will be maintained and controlled by the Special Investigation Unit and/or Special Enforcement Division Supervisor.

1. Records will be maintained on informants as long as the informant is active.

2. Informant files will be maintained separately and shall be referred to by number in all reports. See attached Special Investigative Unit Personal History report (Attachment #2).

3. Release of informant information is prohibited except on court order or with the express permission of the SIU Sergeant or Special Enforcement Division Supervisor.

C. Establishing reliability of an informant is essential before using information imparted by that individual.

1. Officers must be aware that informants may not be loyal to police operations. The potential for misinforming or compromising investigative efforts always exists and must be guarded against.

2. Upon an informant being established as reliable, information relative to his reliability shall be documented and maintained in the informant's folder.

D. When meeting with an informant becomes necessary, the task shall be completed by two officers. One of the officers may observe from a distance if the situation warrants.

E. Informants will be paid when it is the only method of obtaining information that is instrumental in the solution of a major crime or circumstances of an investigation requiring rapid obtainment of information.

1. Prior to payment the informant must be documented according to department rules and procedures.

2. The Captain of the Special Enforcement Division or the supervisor of SIU must give approval for payment of up to $500. The decision for payment will be based on the followng:

   a. reliability of the informant

   b. magnitude of the crime

   c. probability that the information will be reliable, pertinent, and is not obtainable through other means.

3. Payment of over $500 must be approved by the Chief.

4. Funds for payment of informants who provide information in a criminal matter will be maintained and disbursed from the SIU Cash Operations Account. All payments will be recorded as expenditure in the ledger with the informant's identification number for audit purposes.

F. Officers are not discouraged from using juvenile informants, but must use caution in documenting information provided by them. Officers should recognize that the potential for abuse of the process is possible for a variety of reasons, some of which may be:

   1. revenge on the part of another juvenile

   2. immaturity on the part of the informing juvenile

   3. improper motivation on the part of the reporting juvenile

   4. improper perceptions on the part of the juvenile due to his or her immaturity or age

G. Special precautions to be taken with juvenile informants:

   1. the safety of the informant must be assured

   2. expressed written permission of the parent(s) is obtained

   3. all parties concerned are fully apprised of any potential risks involved

   4. no payment for information shall be made to a juvenile unless the juvenile is accompanied by a parent at the time of the payment.

XVII. INFORMATION TO OFFICER IN CHARGE

It is recognized that organized crime, vice, decoy and narcotics investigations conducted by the Special Investigative Unit are confidential by nature, however it remains the obligation of the ranking Special Enforcement Division/Special Investigative Unit Member to inform the Officer in Charge of all incidents in which it is likely there will be an arrest, danger to the police personnel involved, public alarm or immediate inquiry from the general public. The information provided during the briefing shall not be released to other police personnel.

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UNION 1

Union
JOINT EXHIBIT 1

Chief of Police
Enoch F. Willard

Assistant Chief
Carlo T. Capano

CITY OF MANCHESTER

Police Department

Press Release
April 11, 2018

Contact: Lt. Brian N. O'Keefe
Facebook: @ManchesterNH Police
www.manchesternh.gov

BOKEEFE@manchesternh.gov
Twitter: @mht_nh_police
(603)-792-5430

Chief Willard Terminates Two Police Officers

The Manchester Police Department takes every accusation seriously while investigating all allegations made against our officers, and will hold those accountable who commit wrongdoing, as such, Chief Willard terminated two Manchester Police Officers today, Mr. Aaron Brown and Mr. Steven Cornacchia.

Mr. Brown, who had been employed by the City of Manchester Police Department since July of 2007, had been placed on paid Administrative leave beginning February 20, 2018 until his termination today. A criminal investigation will be initiated into Mr. Brown's actions. The department has consulted with both the Attorney General and County Attorney on this matter and will continue to do so.

Mr. Cornacchia has been employed by the City of Manchester Police Department since April, 2013. Mr. Cornacchia was on paid Administrative from May 14, 2017 to May 16, 2017 until he was arrested for Conduct After an Accident, after which he was on unpaid Administrative leave pending his court case.

The Manchester Police Department continues to strive for excellence while serving the citizens of Manchester each and every day. The men and women of the Manchester Police Department possess honor and integrity while upholding the laws of the State of New Hampshire. If any officer breaches the trust of our agency and more importantly, our community, we will always seek swift and immediate remedies.

Although the public has an understandable interest into their conduct, the agency is not at liberty to release any personnel information from the Internal Affairs investigation. I can assure the community, however, we will continue to serve the citizens of the City of Manchester while providing the highest level of service by the most professional police officers in the Country.

UNION 2

EXHIBIT
tabbies
UNION 2

MANCHESTER
POLICE
N.H.

Presented to

Aaron Brown

Officer of the Month

March 2010

 00116

OFFICER OF THE MONTH SUBMISSION FORM

For the Month of (month/ year):

Last Name: Brown	First Name: Aaron
Date of Hire: 7/16/97	Assignment (Division/Shift): Patrol-Days
Sick Time Usage: Month of Submission: 0	*Year to date:* 1

Synopsis supporting Sergeant's submission of officer for consideration as Officer of the Month *(considerations being – overall attitude, community involvement, agency involvement, relationships with peers and supervisors and specific examples of the officer's work performance for the month that warrants consideration):*

Officer Brown was hired by the Manchester Police Department July 16, 2007. He has spent all of his time assigned to the Patrol Division mainly on the 4-12. Several months ago he came to the day shift.

Officer Brown is consistently not only one of the highest producing officers on his shift but also without question one of the most active police officers employed by the Manchester Police Department. March a of 2010 was once again an exceptional month for Officer Brown. An ILEADS inquiry indicates that he made 35 arrests for month, 31 of which he was the primary officer. I have researched these arrests and found that a majority of them are for Electronic Bench Warrants, Arrest Warrants as well as Operating After Suspension/Revocation charges. The numbers indicate very cleary that Officer Brown is paying attention to the residents on his route, especially those that commit crimes and/or do not fulfill there obligations with the court. When he is not checking warrant lists or conducting residential wanted checks he is making motor vehicle inquiries and motor vehicle stops. The inquiries are consistently leading to quality arrests. As stated above, several of the arrests he made this month were for operating after suspension or revocation. These arrest were made because officer Brown has the keen ability to meet someone, get to know them and remember exactly who they are when he sees them at a later date.

One incident of note began in the area of the Rite Aid Pharmacy on North Elm Street. Officer Brown saw a car leaving the parking lot commit several motor vehicle violations. When he stopped the car he noticed that the occupants were very nervous and evasive in their answers. He questioned them further and realized that one of the occupants was referring to another occupant by a different name than he had given officer Brown and their stories were very inconsistent. Ultimately it was determined that the subject had given a false name and was a wanted fugitive. This is just one arrest of 35 for the month of March.

March was a great month for Officer Brown but what makes him even more deserving of the Officer of the Month Award is the quantity and quality of work he is producing each and every month. This is the third consecutive month I have submitted officer Brown. In February of this year he had 22 arrests ALL of which he was the primary officer. In January he had 33 arrests, 27 of which he was the primary officer. Quick math will show that he had made 90 arrests year to date. It is my opinion that this is more arrests than many officers will make entire year.

For the above stated reasons I feel comfortable stating that there is no officer more deserving of

Synopsis *continued:*

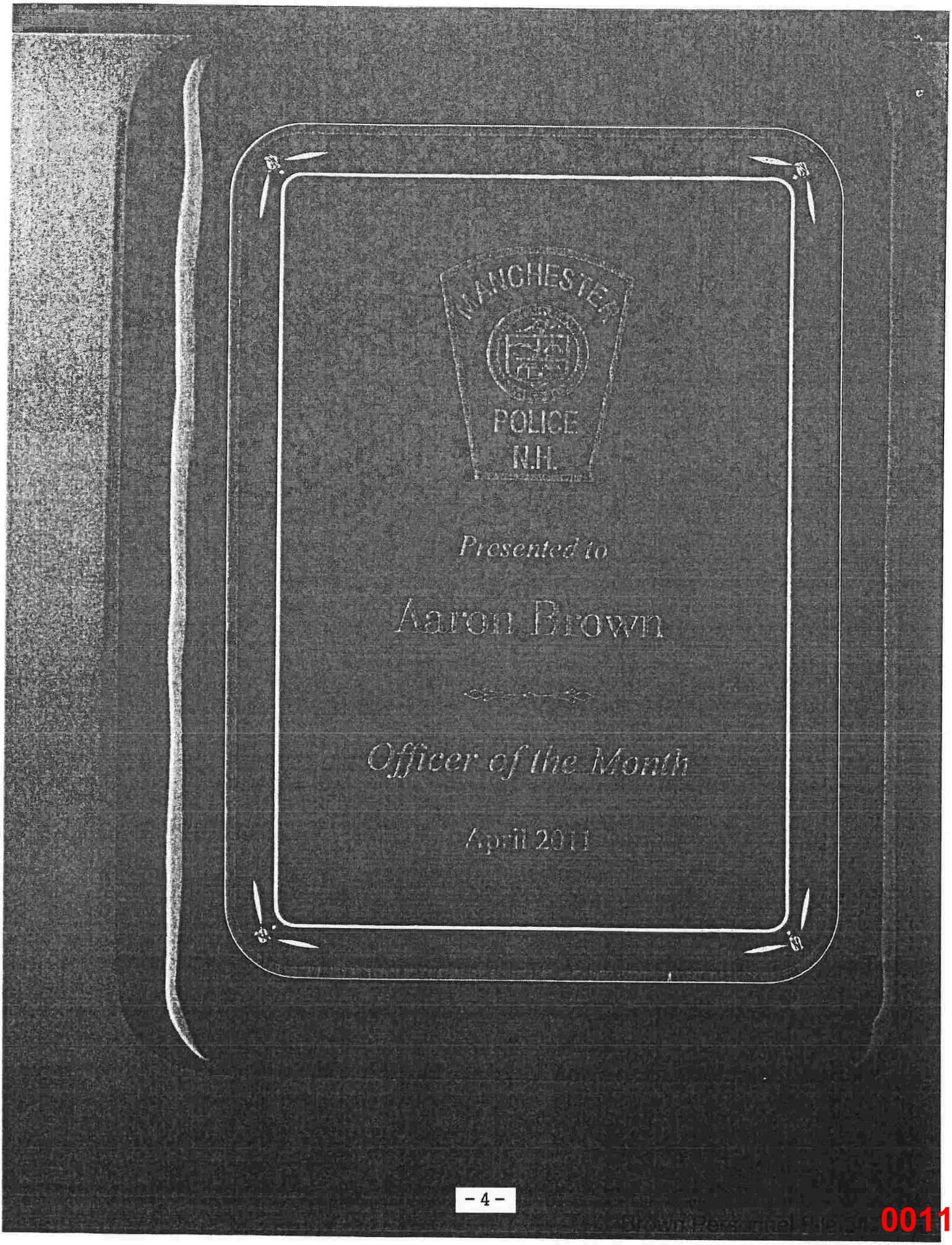
Sergeant Submitting Officer:	Ryan Grant	Date:	03-05-2010

Lieutenant Reviewing Submission: _____ Date: _____

Comment (if desired):

Captain Reviewing Submission: _____ Date: _____

Comment (if desired):



OFFICER OF THE MONTH SUBMISSION FORM

For the Month of (month/ year):

Last Name: Brown	First Name: Aaron
Date of Hire: 7/16/97	Assignment (Division/Shift): Patrol-Days
Sick Time Usage: Month of Submission: 0	*Year to date:* 5

Synopsis supporting Sergeant's submission of officer for consideration as Officer of the Month *(considerations being – overall attitude, community involvement, agency involvement, relationships with peers and supervisors and specific examples of the officer's work performance for the month that warrants consideration):*

Officer Brown was hired by the Manchester Police Department July 16, 2007. He has spent all of his time assigned to the Patrol Division. I have been Officer Brown's immediate supervisor for nearly a year. I have found him to be the most active Police Officer I have ever worked with and to have the ability to get to know the criminal element in his assigned patrol area and remember them like no other.

On April 13, 2011 a robbery was reported at the Elliot Hospital. Investigation revealed that a female nurse had parked in the parking garage before her shift. As she exited her car she was accosted by a black male that violently assaulted her and robbed her of her belongings. I, along with several other officers, responded to the scene to interview the victim, witnesses and obtain any video footage that may be available. Upon viewing the video we were able to obtain a picture of the suspect vehicle. An image of this vehicle was sent out department wide and Officer Brown quickly recognized it as a Acura Legend belonging to a female known to him as [redacted]. Officer Brown was familiar with [redacted] and knew that she lived at [redacted] Officer Brown made his way to the address and located the suspect vehicle parked behind the residence.

Once other officers were in place and the vehicle was secured Officer Brown made contact with [redacted]. [redacted] cooperated with Office Brown and told him that her boyfriend, [redacted] had her vehicle earlier in the morning. Officer Brown garnered enough information from [redacted] to establish that [redacted] was responsibel for the robbery and he was arrested.

I was later contacted by Director of Security, [redacted] and Security Manager, [redacted] who both commended members of the MPD the swift and professional investigation and eventual arrest of the subject responsible for this crime. They told me that they could not be happier with our response and especially thhe actions of Officer Brown.

This is just one example of the professional work that Officer Brown is conducting every month. In fact, Officer Brown made 34 arrests during the month of April. This is more than the rest of the officers in sector 2 combined. April was not a fluke month with many arrests for Officer Brown, in January 2011 he made 31 arrests, in February 2011 he made 40 arrests, in March he made 44 arrests and in April he made 34 arrests for a total of 149 arrests in 2011!

For all of the above reasons I respectfully request that Officer Brown be chosen as the Officer of the Month for April 2011.

Synopsis *continued:*

UNION 3

MANCHESTER POLICE DEPARTMEN

OFFICER PERFORMANCE EVALUATION FORM

Check Evaluation Type: Annual X Probationary ☐ mm.dd.yy mm.dd.yy

Employee Name: Brown, Aaron **Evaluation Period:** 07/16/16 **To** 07/16/17

Assignment: SED / SCU **Time in Assignment:** 3 years, 8 Months **Years of Service:** 10 Years

A	B	C	D	E	FACTORS TO BE EVALUATED	Comments
Not Satisfactory	*Some Improvement Needed*	*Meets Standards*	*Exceeds Standards*	*Does Not Apply*		
			X		*Reliability*	No sick days used.
				X	*Grooming & Dress*	
		X			*Care of Equipment*	
		X			*Public Relations*	Establishes rapport, able to illicit information and brings credit to the dept.
			X		*Conduct*	Strives to improve, accepts criticism
			X		*Dependability*	Requires no supervision, takes proper action.
					Cooperation	Displays professional cooperative spirit when interacting with supervisors and peers. Consistently goes out of his way to assist and cooperate in furtherance of unit goals and objectives.
			X		*Supervisors*	
			X		*Peers*	
		X			*Compliance with rules*	
		X			*Attitude*	
			X		*Initiative Motivation*	Strong achievement drive, seeks responsibility, positive impact to dept.
			X		*Productivity*	Outstanding knowledge of what is expected needs no motivation. Assignments carried out with precision.
			X		*Leadership*	Leads by example, seeks responsibility.
					Skills	
		X			*Reports*	
		X			*Firearms*	
		X			*Driving Ability*	Valid NH License Status Emergency contact info up to date.
		X			*SPOTS License status:*	
			X		*Work Performance*	Carries out instructions / assignments precisely. Follows through.
			X		*Ability to develop in occupation*	Expresses active interest towards job performance. Has long range goals.

MPDFORM 161B
Effective Date – September 2002

COMMENTS OF RATER: General comments as to the employee's performance during the evaluation period should be made in this space. Comments are required in areas where the rater marked the employee in columns A. B or D. Special emphasis must be added in this area when the employee is a probationary employee. Permanent status must be addressed.

Detective Aaron Brown is completing ten years with the Manchester Police Department and his thirteenth year of service as a police officer. For almost four years years. Detective Brown has been assigned to the Special Enforcement Division's Street Crime Unit. Detective Brown continues to be a highly motivated and effective investigator whose knowledge of known criminals and experience make him an invaluable asset to the entire division. Detective Brown fosters excellent relationships with his supervisors as well as his peers and is willing to assist in any capacity needed. Detective Brown's reports are always extremely thorough, well written and complete with all necessary information. Over the course of his career. Detective Brown has established himself as a competent, skillful, and professional investigator. Detective Brown has not only proven to be highly effective in affecting arrests but has also cultivated several confidential sources of information due to his ability to communicate and establish a report with individuals who possess valuable information. During the past year. Detective Brown has affected numerous arrests and participated in several SED operations resulting in the sizeable seizures of narcotics, weapons and currency. [redacted] Of note over the past year, In March of 2017. Detective Brown initiated a narcotics trafficking investigation into a well known drug target that had been operating within the city for an extended period of time. Detective Brown was able to cultivate a confidential source of information, utilize that source to facilitate a controlled purchase of heroin and then obtain search and arrest warrants on the target location and suspect. As a result of this investigation and Detective Brown's initiative and motivation, the main target was arrested without incident and over one kilo of heroin all destined for distribution in Manchester was seized. All of this was achieved in a short period of time which is also a testament to his tenacity and work ethic.

[redacted] Detective Brown was completely exonerated from any wrongdoing. In January of 2017. Detective Brown attended and successfully completed DEA Basic Drug Investigation, held in New Britain Connecticut.

PLANNED IMPROVEMENT/CAREER COUNSELING FOR THE FOLLOWING EVALUATION PERIOD: The rater must outline the areas in which he/she wishes the employee to improve, and with the employee, he/she must develop a plan, which the employee will use as a guide for improvement. Career counseling will be discussed and documented in this section.

Detective Brown should continue his current assignment as a detective within the Street Crime Unit. I have encouraged Detective Brown to seek out training as it relates to his job description and duties from NHPSTC or other reputable sources. Detective Brown has also taken and successfully passed the Sergeant's promotional exam. Detective Brown is currently eligible for promotion to the rank of sergeant. I believe that Detective Brown's vast knowledge, experience and high level of motivation make him an extremely viable candidate for promotion.

Sick days used for rating period (excluding FMLA): 0

Rater's Signature: 6/29/17 Raters Printed Name: Sergeant Christopher Sanders

EMPLOYEE COMMENTS:

Employee's Signature: 6-28-17

I certify that this report has been discussed with me. I understand that my signature does not necessarily indicate agreement.

☐ I wish to discuss this report with the reviewer ☐ I request that this evaluation be reviewed by the Training Officer

Reviewed by (supervisors): (initial & date)

Capt. Sanclemente 7/6/17

Lt. Vincent 7/6/17 7/10/17

☒ Copy given to employee

DEPARTMENT HEAD

Reviewed and Approved Merit: Date: 11 Jul 17

_____Reviewed and **NOT** Approved Merit: _____ Date: _____

MANCHESTER POLICE DEPARTMENT
OFFICER PERFORMANCE EVALUATION FORM

Check Evaluation Type: Annual X Probationary ☐ mm/dd/yy mm/dd/yy

Employee Name: Brown, Aaron **Evaluation Period:** 07/16/15 **To** 07/16/16

Assignment: SED / SCU **Time in Assignment:** 2 years, 8 Months **Years of Service:** 9 Years

A	B	C	D		E	FACTORS TO BE EVALUATED	Comments
Not Satisfactory	*Some Improvement Needed*	*Meets Standards*	*Exceeds Standards*		*Does Not Apply*		
		X				*Reliability*	1 sick day used.
					X	*Grooming & Dress*	
		X				*Care of Equipment*	
		X				*Public Relations*	Establishes rapport, able to illicit information and brings credit to the
			X			*Conduct*	Strives to improve, accepts criticism
			X			*Dependability*	Requires no supervision, takes proper action.
						Cooperation	Displays professional cooperative spirit when interacting with supervisors and peers. Consistently goes out of his way to assist and cooperate in furtherance of unit goals and objectives.
			X			*Supervisors*	
			X			*Peers*	
		X				*Compliance with rules*	
			X			*Attitude*	Accepts criticism and utilizes it to excel in both job performance and
			X			*Initiative/Motivation*	Strong achievement drive, seeks responsibility, positive impact to dept.
			X			*Productivity*	Outstanding knowledge of what is expected needs no motivation. Assignments carried out with precision.
			X			*Leadership*	Leads by example, seeks responsibility.
						Skills	
			X			*Reports*	A complete and detailed account of what transpired from beginning to end.
		X				*Firearms*	
		X				*Driving Ability*	Valid NH License Status
		X				*SPOTS License status:*	
			X			*Work Performance*	Carries out instructions / assignments precisely. Follows through.
			X			*Ability to develop in occupation*	Expresses active interest towards job performance. Has long range goals

COMMENTS OF RATER: General comments as to the employee's performance during the evaluation period should be made in this space. Comments are required in areas where the rater marked the employee in columns A, B or D. Special emphasis must be added in this area when the employee is a probationary employee. Permanent status must be addressed.

Detective Aaron Brown is completing nine years with the Manchester Police Department and his twelfth year of service as a police officer, having served previously with the Hooksett Police Department. For nearly three years, Detective Brown has been assigned to the Special Enforcement Division's Street Crime Unit. Detective Brown continues to be a highly effective and productive investigator whose knowledge of known criminals and experience make him a valuable asset to the entire division. Detective Brown fosters excellent relationships with his supervisors as well as his peers and is willing to assist in any capacity needed. Detective Brown's reports are always extremely thorough, well written and complete with all necessary information. Over the course of his career, Detective Brown has established himself as a competent, skillful, and professional investigator. Detective Brown has not only proven to be highly effective in affecting arrests but has also cultivated several confidential sources of information due to his ability to communicate and establish a report with individuals who possess valuable information. During the past year, Detective Brown has affected numerous arrests and participated in several SED operations resulting in the sizeable seizures of narcotics, weapons and currency. Of note, Detective Brown was instrumental in providing suspect information and affecting arrests during the ongoing operation, "Granite Hammer". Although this operation involved multiple agencies of state, local and federal authorities, much of the activity was generated from the members of the Special Enforcement Division, specifically the SCU. Additionally, Detective Brown participated in several surveillance / takedown operations evolving from a homicide that occurred in the city. SED was able to obtain information regarding the parties responsible and as to their whereabouts. SED was able to establish surveillance on the target location and eventually take all suspects wanted for murder into custody.

[redacted] Detective Brown remains in contact with the members of SED and hopes to return to full duty status as soon as he is able.

PLANNED IMPROVEMENT/CAREER COUNSELING FOR THE FOLLOWING EVALUATION PERIOD: The rater must outline the areas in which he/she wishes the employee to improve, and with the employee, he/she must develop a plan, which the employee will use as a guide for improvement. Career counseling will be discussed and documented in this section.

Detective Brown should continue his current assignment as a detective within the Street Crime Unit. I have encouraged Detective Brown to seek out training as it relates to his job description and duties from NHPSTC or other reputable sources. Detective Brown has also taken and successfully passed the Sergeant's promotional exam. Detective Brown is currently eligible for promotion to the rank of sergeant. I believe that Detective Brown's vast knowledge, experience and high level of motivation make him an extremely viable candidate for promotion.

Sick days used for rating period (excluding FMLA): 1

Rater's Signature: 6/15/16 Raters Printed Name: Sergeant Christopher Sanders

EMPLOYEE COMMENTS:

Employee's Signature: 6-31 6-15-16

I certify that this report has been discussed with me. I understand that my signature does not necessarily indicate agreement.

☐ I wish to discuss this report with the reviewer. ☐ I request that this evaluation be reviewed by the Training Officer.

Reviewed by (supervisors): (initial & date)

6/22/16

6/22/16

6/23/16

☑ Copy given to employee

DEPARTMENT HEAD

Reviewed and Approved Merit: Date: 6-24-16

Reviewed and NOT Approved Merit: Date:

MANCHESTER POLICE DEPARTMENT
OFFICER PERFORMANCE EVALUATION FORM

Check Evaluation Type: Annual X Probationary ☐ mm/dd/yy mm/dd/yy

Employee Name: Brown, Aaron **Evaluation Period:** 07/16/14 **To** 07/16/15

Assignment: SED / SCU **Time in Assignment:** 1 year 8 Months **Years of Service:** 8 Years

A	B	C	D	E	FACTORS TO BE EVALUATED	Comments
Not Satisfactory	*Some Improvement Needed*	*Meets Standards*	*Exceeds Standards*	*Does Not Apply*		
			X		*Reliability*	No sick time used.
				X	*Grooming & Dress*	
		X			*Care of Equipment*	
		X			*Public Relations*	Establishes rapport, able to illicit information and brings credit to the
			X		*Conduct*	Strives to improve, accepts criticism
			X		*Dependability*	Requires no supervision, takes proper action.
					Cooperation	Displays professional cooperative spirit when interacting with supervisors and peers. Consistently goes out of his way to assist and cooperate in furtherance of unit goals and objectives.
			X		*Supervisors*	
			X		*Peers*	
		X			*Compliance with rules*	
			X		*Attitude*	Accepts criticism and utilizes it to excel in both job performance and
			X		*Initiative/Motivation*	Strong achievement drive, seeks responsibility, positive impact to dept.
			X		*Productivity*	Outstanding knowledge of what is expected needs no motivation. Assignments carried out with precision.
			X		*Leadership*	Leads by example, seeks responsibility.
					Skills	
			X		*Reports*	A complete and detailed account of what transpired from beginning to end.
		X			*Firearms*	
		X			*Driving Ability*	Valid NH License Status
		X			*SPOTS License status:*	
			X		*Work Performance*	Carries out instructions / assignments precisely. Follows through.
			X		*Ability to develop in occupation*	Expresses active interest towards job performance. Has long range goals

MPDFORM 161B
Effective Date—September 2002

COMMENTS OF RATER: General comments as to the employee's performance during the evaluation period should be made in this space. Comments are required in areas where the rater marked the employee in columns A, B or D. Special emphasis must be added in this area when the employee is a probationary employee. Permanent status must be addressed.

Detective Aaron Brown is completing eight years with the Manchester Police Department and his eleventh as a police officer, having served previously with the Hooksett Police Department. For the past year and eight months, Detective Brown has been assigned to the Special enforcement Division's Street Crime. Detective Brown has proven to be an extremely valuable asset to the unit as well as the division and department as a whole. His knowledge of known criminals and high crime locations within the city is without peer. Detective Brown maintains a highly proactive approach in the performance of his duties and is very thorough in conducting his investigations. His reports are thorough, detailed and complete with all pertinent details. Detective Brown maintains excellent relationships with his supervisors and his peers. Detective Brown is always willing to assist other officers whenever needed. Throughout my interactions with Detective Brown he has demonstrated himself to be a competent, intelligent and highly proactive police officer who brings credit to the department by the manner with which he conducts himself.

During the past year Detective Brown was the recipient of the William Yout Memorial Award and a certificate of recognition, presented by the New England Narcotics Enforcement Officers Association. These were awarded to Detective Brown for his efforts while participating in operation "Twisted Sisters" and operation "Murphy's Law" respectively. During the past year Detective Brown attended training focusing on Drug Interdiction and Officer Survival.

PLANNED IMPROVEMENT/CAREER COUNSELING FOR THE FOLLOWING EVALUATION PERIOD: The rater must outline the areas in which he/she wishes the employee to improve, and with the employee, he/she must develop a plan, which the employee will use as a guide for improvement. Career counseling will be discussed and documented in this section.

Detective Brown should continue his current assignment as a detective within the Street Crime Unit. I have encouraged Detective Brown to seek out training as it relates to his job description and duties from NHPSTC or other reputable sources. Detective Brown has also taken and successfully passed the Sergeant's promotional exam. Detective Brown is currently eligible for promotion to the rank of sergeant. I believe that Detective Brown's vast knowledge, experience and high level of motivation make him an extremely viable candidate for promotion.

Sick days used for rating period (excluding FMLA): 0

Rater's Signature: 6/29/15 Raters Printed Name: Sergeant Christopher Sanders

EMPLOYEE COMMENTS:

Employee's Signature: 6/29/15

I certify that this report has been discussed with me. I understand that my signature does not necessarily indicate agreement.

☐ I wish to discuss this report with the reviewer. ☐ I request that this evaluation be reviewed by the Training Officer.

Reviewed by (supervisors): (initial & date)

LR 6/30/15

☑ Copy given to employee

CR 7-1-15

DEPARTMENT HEAD

Reviewed and Approved Merit: Date: 7-2-15

Reviewed and NOT Approved Merit: Date:

MANCHESTER POLICE DEPARTMENT
OFFICER PERFORMANCE EVALUATION FORM

Check Evaluation Type: Annual X Probationary ☐ mm/dd/yy mm/dd/yy

Employee Name: Brown, Aaron **Evaluation Period:** 07/16/13 **To** 07/16/14

Assignment: Special Investigations Unit **Time in Assignment:** 9 Months **Years of Service:** 7 Years

A	B	C	D		E	
Not Satisfactory	*Some Improvement Needed*	*Meets Standards*	*Exceeds Standards*		*Does Not Apply*	**FACTORS TO BE EVALUATED**
						Comments
	X					*Reliability* — 7 Sick days used.
		X				*Grooming & Dress*
		X				*Care of Equipment*
		X				*Public Relations* — Establishes rapport. able to illicit information and brings credit to the
			X			*Conduct* — Strives to improve, accepts criticism
			X			*Dependability* — Requires no supervision. takes proper action.
						Cooperation
			X			*Supervisors* — Displays professional cooperative spirit when interacting with supervisors and peers.
			X			*Peers*
		X				*Compliance with rules*
		X				*Attitude*
		X				*Initiative/Motivation* — Strong achievement drive, seeks responsibility, positive impact to dept.
			X			*Productivity* — Outstanding knowledge of what is expected needs no motivation. Assignments carried out with precision.
		X				*Leadership*
						Skills — Follows through with assignments.
		X				*Reports*
		X				*Firearms* — Valid NH License Status
		X				*Driving Ability*
		X				*SPOTS License status:*
			X			*Work Performance* — Carries out instructions precisely and follows through the fist time.
			X			*Ability to develop in occupation* — Expresses active interest toward job performance. Has [illegible]

IMPDFORM 161B
Effective Date – September 2002

COMMENTS OF RATER: General comments as to the employee's performance during the evaluation period should be made in this space. Comments are required in areas where the rater marked the employee in columns A, B or D. Special emphasis must be added in this area when the employee is a probationary employee. Permanent status must be addressed.

Detective Aaron Brown is completing his seventh year with the Manchester Police Department and his ninth month as a member of SED. Detective Brown has proven to be an extremely valuable asset to the unit. He is extremely knowledgeable in his familiarity of known criminals and high crime locations within the city and maintains a proactive approach in performing his duties as a detective within the unit. Detective Brown is very thorough in conducting his investigations and his reports are thorough, detailed and complete with all pertinent details. Detective Brown maintains excellent relationships with his supervisors and his peers and is always willing to assist other officers when needed. Throughout my interactions with Detective Brown he has demonstrated himself to be a competent, intelligent and highly proactive police officer who brings credit to the department by the manner with which he conducts himself. In March of 2014 Detective Brown was awarded the Manchester Police Department's Meritorious Service Medal for his actions during an officer involved shooting. Detective Brown was also given the "Officer of the Month" award for May 2014 affecting the arrest of an extremely dangerous subject who was wanted for a felonious assault and was subsequently found in possession of over ninety tablets of Oxycodone. It should be noted that Detective Brown's arrest record is among the highest in the department and that he has consistently maintained a high level of productivity throughout his career.

PLANNED IMPROVEMENT/CAREER COUNSELING FOR THE FOLLOWING EVALUATION PERIOD: The rater must outline the areas in which he/she wishes the employee to improve. and with the employee, he/she must develop a plan, which the employee will use as a guide for improvement. Career counseling will be discussed and documented in this section.

Detective Brown should continue his current assignment as a detective within the Street Crime Unit. The area which I would make any recommendations of improvement would be that of additional training. I have advised Detective Brown to seek out training as it relates to his job description and duties from NHPSTC or other reputable sources. I have also encouraged Detective Brown to consider taking the Sergeant's promotional exam at the next available opportunity. Although Detective Brown is still young in his career with the MPD, I believe that his vast knowledge and experience make him an extremely viable candidate for promotion.

Detective Brown was counseled as to his use of sick time. Detective Brown acknowledged that this is an area that needs improvement and that he will make a concerted effort to improve in this area of his performance.

Sick days used for rating period (excluding FMLA): 7

Rater's Signature: 7/14/14 Raters Printed Name: Sergeant Christopher Sanders

EMPLOYEE COMMENTS:

Employee's Signature: 8-31

I certify that this report has been discussed with me. I understand that my signature does not necessarily indicate agreement.

☐ I wish to discuss this report with the reviewer. ☐ I request that this evaluation be reviewed by the Training Officer.

Reviewed by (supervisors): (initial & date)

7/15/14

C-3 7/15/14

A-2 7/16/14

☒ Copy given to employee

DEPARTMENT HEAD

Reviewed and Approved Merit: Date: 7-17-14

Reviewed and NOT Approved Merit: Date:

MANCHESTER POLICE DEPARTMENT
OFFICER PERFORMANCE EVALUATION FORM

Check Evaluation Type: Annual X Probationary

Employee Name: **Brown, Aaron** | Evaluation Period: 07/16/12 To 07/16/13

Assignment: Patrol Officer | Time in Assignment: 6 Years | Years of Service: 6 Years

A	B	C	D	E	FACTORS TO BE EVALUATED	Comments
Not Satisfactory	*Some Improvement Needed*	*Meets Standards*	*Exceeds Standards*	*Does Not Apply*		
	X				*Reliability*	7 Sick Days Used
		X			*Grooming & Dress*	Well groomed, command presence.
		X			*Care of Equipment*	
		X			*Public Relations*	Does not hesitate to interact with the public.
		X			*Conduct*	
		X			*Dependability*	Can appropriately handle any call assigned to him.
					Cooperation	
			X		*Supervisors*	Very respectful and polite with both peers and supervisors. A team player.
			X		*Peers*	
			X		*Compliance with rules*	Exceptional knowledge and compliance of departmental rules SOP's.
		X			*Attitude*	
			X		*Initiative/Motivation*	Stays current on, and pursues wanted persons without being asked.
			X		*Productivity*	One of the most productive officers on the department. More arrests than any other officer.
		X			*Leadership*	
					Skills	Very well written reports.
		X			*Reports*	Qualified with firearm
		X			*Firearms*	Valid NH Drivers License
		X			*Driving Ability*	**Makes an arrest nearly every shift he works.**
		X			*SPOTS License status:*	
			X		*Work Performance*	
			X		*Ability to develop in occupation*	Unlimited potential.

MPDFORM 161B
Effective Date: September 2002

COMMENTS OF RATER: General comments as to the employee's performance during the evaluation period should be made in this space. Comments are required in areas where the rater marked the employee in columns A, B or D. Special emphasis must be added in this area when the employee is a probationary employee. Permanent status must be addressed.

Officer Aaron Brown is completing his sixth year of service with the Manchester Police Department. Aaron came to our agency with over 3 year's prior law enforcement experience with Hooksett PD. From the moment Aaron joined our agency he established a reputation as a productive, competent, intelligent and knowledgeable police officer. This rating period was no different. As an example, during this rating period, Aaron has surpassed every other police officer on the department in the statistical area of arrests. Meaning that in his 6 years of service he has made more arrests than any current Manchester Police Officer. This is obviously an astonishing accomplishment.

It is an understatement to say that Aaron knows the criminals that operate within our city. He possesses a tremendous knack at remembering names and faces. Whenever a crime occurs, Aaron can be counted upon and often times relied upon to identify the suspect. This talent is well known by his peers and supervisors.

As for his day to day job knowledge, Aaron can be relied upon to handle any call for service appropriately. He completes well written, concise reports and is well versed in the NH Criminal Code and department SOP's, which he can recite from memory.

In April, Off. Brown was involved in a shooting. Aaron stopped a motor vehicle for possible drug activity. During the stop, Off. Brown was researching the passenger of the vehicle due to him providing a false name. The passenger, a [redacted], ran from the vehicle which resulted in a foot pursuit. Off. Brown clearly radioed in that shots were fired and the direction of the foot pursuit. Off. Brown returned fire at [redacted] and subsequently apprehended him. Off. Brown's safety skills and communications skills were evident. Thankfully Off. Brown was not injured.

Off. Brown was submitted for officer of the month on two occasions during this yearly evaluation. Off. Brown was awarded officer of the month for the month of May. Also, Aaron received multiple submissions on his monthly evaluations for his work ethic. Numerous supervisors have commented on the quality of work that Off. Brown produces. Overall, Officer Aaron Brown is one of the most effective, productive police officers on our department and is a tremendous asset in terms of the service that he provides the community that we serve.

Off. Brown used seven sick days during this evaluation period. Off. Brown understands that some improvement is needed.

PLANNED IMPROVEMENT/CAREER COUNSELING FOR THE FOLLOWING EVALUATION PERIOD: The rater must outline the areas in which he/she wishes the employee to improve, and with the employee, he/she must develop a plan, which the employee will use as a guide for improvement. Career counseling will be discussed and documented in this section.

Aaron has expressed an interest in a permanent assignment in the Street Crime Unit or detectives. His knowledge and skill set would be a tremendous asset to this unit. He is planning on taking the next sergeants exam. It should also be noted that Aaron has submitted requests to attend numerous schools. I encourage Aaron to continue to submit requests for training courses.

Sick days used for rating period (excluding FMLA): 7 days

Rater's Signature: **Sergeant Jamie Gallant Z-23** Date: 6-27-13

EMPLOYEE COMMENTS:

Employee's Signature: **Officer Aaron Brown** Date: 7-1-13

I certify that this report has been discussed with me. I understand that my signature does not necessarily indicate agreement.

☐ I wish to discuss this report with the reviewer.

☐ I request that this evaluation be reviewed by the Training Officer.

Reviewed by (supervisors): (initial & date)

Captain Jonathan Hopkins 7/1/13

Lieutenant Michael Hurley 7/3/13

☒ Copy given to employee

DEPARTMENT HEAD

Reviewed and Approved Merit: Date: 7-8-13

Reviewed and **NOT** Approved Merit: Date:

MANCHESTER POLICE DEPARTMENT
OFFICER PERFORMANCE EVALUATION FORM

Check Evaluation Type: Annual X Probationary

Employee Name: Brown, Aaron | **Evaluation Period:** 07/16/11 To 07/16/12

Assignment: Patrol Officer | **Time in Assignment:** 5 Years | **Years of Service:** 5 Years

A	B	C	D		E		
Not Satisfactory	*Some Improvement Needed*	*Meets Standards*	*Exceeds Standards*		*Does Not Apply*	**FACTORS TO BE EVALUATED**	***Comments***
		X				*Reliability*	**3 Sick Days Used**
		X				*Grooming & Dress*	Well groomed, command presence.
		X				*Care of Equipment*	
		X				*Public Relations*	Does not hesitate to interact with the public.
		X				*Conduct*	
		X				*Dependability*	Can appropriately handle any call assigned to him.
						Cooperation	
			X			*Supervisors*	Very respectful and polite with both peers and supervisors. A team player.
			X			*Peers*	
		X				*Compliance with rules*	
		X				*Attitude*	
			X			*Initiative/Motivation*	Stays current on, and pursues wanted persons without being asked.
			X			*Productivity*	One of the most productive officers on the department. More arrests than any other officer.
		X				*Leadership*	
						Skills	
		X				*Reports*	Very well written reports.
		X				*Firearms*	
		X				*Driving Ability*	
		X				*SPOTS License status:*	Valid NH Drivers License
			X			*Work Performance*	****Makes an arrest nearly every shift he works.****
		X				*Ability to develop in occupation*	Unlimited potential.

MPDFORM 161B
Effective Date – September 2002

COMMENTS OF RATER: General comments as to the employee's performance during the evaluation period should be made in this space. Comments are required in areas where the rater marked the employee in columns A, B or D. Special emphasis must be added in this area when the employee is a probationary employee. Permanent status must be addressed.

Officer Aaron Brown is completing his fifth year of service with the Manchester Police Department. Aaron comes to our agency with over 3 years prior law enforcement experience with Hooksett PD. From the moment Aaron joined our agency he established a reputation as a productive, competent, intelligent and knowledgeable police officer. This rating period was no different. As an example, during this rating period, Aaron has surpassed every other police officer on the department in the statistical area of arrests. Meaning that in his 5 years of service he has made more arrests than any current Manchester Police Officer. This is obviously an astonishing accomplishment.

It is an understatement to say that Aaron knows the criminals that operate within our city. He possesses a tremendous knack at remembering names and faces. Whenever a crime occurs, Aaron can be counted upon and often times relied upon to identify the suspect. This talent is well known by his peers and supervisors.

As for his day to day job knowledge, Aaron can be relied upon to handle any call for service appropriately. He completes well written, concise reports and is well versed in the NH Criminal Code which he can recite from memory.

Aaron possesses a level of confidence that is sometimes misread by the public he serves, however necessary to operate at the extraordinary level that he does. [redacted]

Additionally, during this rating period he removed countless amounts of illegal drugs and weapons from our city streets. As a result of his efforts, knowledge and abilities, Aaron was hand selected for a position on the Street Crime Unit however had to return to patrol due scheduling conflicts related to child care issues.

Overall, Officer Aaron Brown is one of the most effective, productive police officers on our department and is a tremendous asset in terms of the service that he provides the community that we serve.

PLANNED IMPROVEMENT/CAREER COUNSELING FOR THE FOLLOWING EVALUATION PERIOD: The rater must outline the areas in which he/she wishes the employee to improve, and with the employee, he/she must develop a plan, which the employee will use as a guide for improvement. Career counseling will be discussed and documented in this section.

Aaron has expressed an interest in a permanent assignment in the Street Crime Unit now that he has secured child care. His knowledge and skill set would be a tremendous asset to this unit. He is planning on taking the next sergeants exam. It should also be noted that Aaron has submitted requests to attend numerous schools, including a street level narcotics schools. However, all of these requests were denied during this rating period.

Sick days used for rating period (excluding FMLA): Three days

Rater's Signature: **Sergeant Mark F. Sanclemente Z-21** Date: 7/1/12

EMPLOYEE COMMENTS:

Employee's Signature: **Officer Aaron Brown** Date: 7/11/12

I certify that this report has been discussed with me. I understand that my signature does not necessarily indicate agreement.

☐ I wish to discuss this report with the reviewer. ☐ I request that this evaluation be reviewed by the Training Officer.

Reviewed by (supervisors): (initial & date)

Captain Jonathan Hopkins

Lieutenant James Soucy 7-4-12

7-5-12

☑ Copy given to employee

DEPARTMENT HEAD

Reviewed and Approved Merit: Date: 7-11-12

Reviewed and NOT Approved Merit: Date:

MANCHESTER POLICE DEPARTMENT
OFFICER PERFORMANCE EVALUATION FORM

Check Evaluation Type: Annual X Probationary

Employee Name: Aaron Brown | **Evaluation Period:** 7-16-10 To 7-16-11

Assignment: Patrol Division | **Time in Assignment** 4 Year | **Years of Service:** 4 Year

A	B	C	D		E		
Not Satisfactory	*Some Improvement Needed*	*Meets Standards*	*Exceeds Standards*		*Does Not Apply*	**FACTORS TO BE EVALUATED**	***Comments***
		X				*Reliability*	Used only 4 sick days.
			X			*Grooming & Dress*	Has a professional appearance, and strong officer presence.
		X				*Care of Equipment*	
		X				*Public Relations*	
		X				*Conduct*	
			X			*Dependability*	Aaron makes proper decisions without the need of a supervisor, and completes all necessary paperwork.
						Cooperation	
			X			*Supervisors*	Gets along well with supervisors, and has the respect of his peers.
			X			*Peers*	
		X				*Compliance with rules*	
		X				*Attitude*	
			X			*Initiative/Motivation*	Has positive impact on dept.'s operational capabilities/highly motivated
			X			*Productivity*	Aaron consistently leads his shift with self-initiated activity and arrests.
		X				*Leadership*	
		X				*Skills*	Reports are well written, organized, and detailed. Any reader could follow and comprehend what occurred.
			X			*Reports*	
		X				*Firearms*	
		X				*Driving Ability*	
		X				*SPOTS License status: Valid*	
			X			*Work Performance*	Officer Brown was Officer of the Month in April.
			X			*Ability to develop in occupation*	Expressed active interest towards job performance/has broadened skills

MPDFORM 161B
Effective Date – September 2006

COMMENTS OF RATER: General comments as to the employee's performance during the evaluation period should be made in this space. Comments are required in areas where the rater marked the employee in columns A, B or D. Special emphasis must be added in this area when the employee is a probationary employee. Permanent status must be addressed.

Officer Brown is completing his 4th year with the Manchester Police Department. He previously worked at the Hooksett Police Department for four years. It is continually noted in his monthly evaluations that Officer Brown leads the day shift in arrests and has a very high level of self initiated activity. That self initiated activity was exemplified on August 5, 2010 when he observed a person known to him to be involved in drug activity conduct what appeared to be a drug transaction from a M/V. The ensuing M/V stop resulted in the subject being arrested for possession with intent and the recovery of 23.8 grams of heroin. His ability to conduct an investigation was shown on April 13, 2011 when he observed images of a violent robbery that occurred at the Elliot Hospital garage. Officer Brown recognized the suspect vehicle in the video and responded to their address. He located the vehicle at the address which led to further inquiries and the eventual arrest of the robber. The Elliot Security staff was very appreciative of Officer Brown's efforts. Officer Brown received the Officer of the Month Award in April based on his investigation of the Elliot robbery and his consistently high level of self initiated activity.

Officer Brown was chosen to be assigned to unit 2-5 on dayshift due to ability to handle incidents without supervisory assistance and his activity level. Unit 2-5 requires a competent and motivated Officer thus Officer Brown being assigned to it.

[redacted]

PLANNED IMPROVEMENT/CAREER COUNSELING FOR THE FOLLOWING EVALUATION PERIOD: The rater must outline the areas in which he/she wishes the employee to improve, and with the employee, he/she must develop a plan, which the employee will use as a guide for improvement. Career counseling will be discussed and documented in this section.

Officer Brown has expressed an interest in possibly being assigned to either the Detective or Community Policing Division in the future. I would recommend that he attend any advanced training that he can receive in his areas of interest. Officer Brown was selected to be a Field Training Officer in October 2010 and was certified at the New Hampshire Police Academy the first week of November. The FTO program is imperative to the success of the Department and Officer Brown's selection represents the Department's faith in his abilities to mold future Officers.

Officer Brown used four sick days during the year which falls into the *meets standards* level of use and is not indicative of abuse.

Sick days used for rating period (excluding FMLA): 4

Rater's Name: Sgt. Michael Begley Rater's Signature: 7-5-11

EMPLOYEE COMMENTS:

Employee's Signature: 7-24

I certify that this report has been discussed with me. I understand that my signature does not necessarily indicate agreement.

☐ I wish to discuss this report with the reviewer. ☐ I request that this evaluation be reviewed by the Training Officer.

Reviewed by (supervisors): (initial & date)

7-5-11

☐ Copy given to employee

DEPARTMENT HEAD

Reviewed and Approved Merit: Act Chief LJS Date: 7-5-11

Reviewed and NOT Approved Merit: _____ Date: _____

MANCHESTER POLICE DEPARTMENT
OFFICER PERFORMANCE EVALUATION FORM

RD

Check Evaluation Type: Annual X Probationary X

Employee Name: Aaron Brown | Evaluation Period: 7-16-09 To 7-16-10

Assignment: Patrol Division | Time in Assignment 3 Year | Years of Service: 3 Year

A	B	C	D	E	FACTORS TO BE EVALUATED	Comments
Not Satisfactory	*Some Improvement Needed*	*Meets Standards*	*Exceeds Standards*	*Does Not Apply*		
		X			*Reliability*	Used only 12 hrs of sick time.
		X			*Grooming & Dress*	Has a professional appearance, and strong officer presence.
		X			*Care of Equipment*	
		X			*Public Relations*	
		X			*Conduct*	
		X			*Dependability*	Aaron makes proper decisions on the street, and completes all necessary paperwork.
					Cooperation	
			X		*Supervisors*	Gets along well with supervisors, and has the respect of his peers.
			X		*Peers*	
		X			*Compliance with rules*	
		X			*Attitude*	
			X		*Initiative/Motivation*	Aaron initiative and motivation is unmatched at MPD.
			X		*Productivity*	Aaron consistently leads his shift with self-initiated activity and arrests.
		X			*Leadership*	
			X		*Skills*	
		X			*Reports*	Reports are well written.
		X			*Firearms*	
		X			*Driving Ability*	
		X			*SPOTS License status:*	Active NH License
			X		*Work Performance*	
			X		*Ability to develop in occupation*	

COMMENTS OF RATER: General comments as to the employee's performance during the evaluation period should be made in this space. Comments are required in areas where the rater marked the employee in columns A, B or D. Special emphasis must be added in this area when the employee is a probationary employee. Permanent status must be addressed.

Officer Brown came to the Manchester Police Dept. with prior experience as a law enforcement officer with the town of Hooksett. He has used his prior experience to his benefit, stepping right into the flow of our department, and establishing himself as a competent, knowledgeable, aggressive officer with a knack of finding criminal behavior. Officer Brown is without question the most active officer at the Manchester Police Department. He month after month not only leads his shift but the entire police department with arrests. He was nominated for officer of the month several times before he was finally chosen in March of 2010.

Officer Brown was chosen to be part of the 2-3/4 mountain bike unit on dayshift. Although it has been a nightmare getting he and his partners the equipment to ride the bikes they have remained positive and proved that they all work well together and can and will stay VERY active. Pairing Officer Brown up with other officers can only have a positive impact of his partners allowing them to learn from him.

In October of 2009 it was noted by Sergeant Sanclemente that Officer Brown needed to increase his field cards and business checks. As would be expected from Officer Brown, the following month he completed 6 field cards and 37 business checks. This is one example of his commitment to doing his job well and doing what is expected of him.

[redacted]

Aaron used only 12 hours of sick time this year. Needless to say, Officer Brown has been a terrific addition to our police department.

PLANNED IMPROVEMENT/CAREER COUNSELING FOR THE FOLLOWING EVALUATION PERIOD: The rater must outline the areas in which he/she wishes the employee to improve, and with the employee, he/she must develop a plan, which the employee will use as a guide for improvement. Career counseling will be discussed and documented in this section.

Officer Brown has expressed an interest in possible being assigned to a division in the future, but he has stated that he first wants to master the patrol aspect of the job. I would recommend that he attend any advanced training that he can both here at the MPD as well as at PSTC to the area he is most interested in. With his assignment in unit 2-3/4 he has shown that he can work alone, with a partner or in a special assignment and can succeed with very little to no supervision. This is an attribute that should be considered when he is considered for a division assignment.

Officer Brown should plainly keep doing what he is doing and he will undoubtedly have a very successful career here at the Manchester Police Department.

Sick days used for rating period (excluding FMLA): 1

Rater's Name: Sgt. Ryan A. Grant Rater's Signature: [signature] 25

EMPLOYEE COMMENTS:

Employee's Signature: [signature] #84

I certify that this report has been discussed with me. I understand that my signature does not necessarily indicate agreement.

☐ I wish to discuss this report with the reviewer. ☐ I request that this evaluation be reviewed by the Training Officer.

Reviewed By (supervisors): (initial & date)

[signature] 6/28/10

[signature] 6-30-10

☐ Copy given to employee

MANCHESTER POLICE DEPARTMENT
OFFICER PERFORMANCE EVALUATION FORM

B

Check Evaluation Type: Annual X Probationary

Employee Name: Brown, Aaron | Evaluation Period: 07/16/08 To 07/16/09

Assignment: Patrol Officer | Time in Assignment: 2 years | Years of Service: 2 years

A	B	C	D		E		
Not Satisfactory	*Some Improvement Needed*	*Meets Standards*	*Exceeds Standards*		*Does Not Apply*	**FACTORS TO BE EVALUATED**	*Comments*
		X				*Reliability*	3 sick days YTD
			X			*Grooming & Dress*	Well groomed, strong command presence.
		X				*Care of Equipment*	
		X				*Public Relations*	
		X				*Conduct*	
		X				*Dependability*	
						Cooperation	
			X			*Supervisors*	Very respectful and polite with both peers and supervisors. Team player.
			X			*Peers*	
		X				*Compliance with rules*	
		X				*Attitude*	
			X			*Initiative/Motivation*	Proactive, Self motivated
			X			*Productivity*	Displays self initiation. Is productive w/out supervision.
		X				*Leadership*	
						Skills	
		X				*Reports*	
		X				*Firearms*	
		X				*Driving Ability*	
						SPOTS License status:	Valid NH license.
			X			*Work Performance*	
		X				*Ability to develop in occupation*	

MPDFORM 161B
Effective Date – September 2002

COMMENTS OF RATER: General comments as to the employee's performance during the evaluation period should be made in this space. Comments are required in areas where the rater marked the employee in columns A, B or D. Special emphasis must be added in this area when the employee is a probationary employee. Permanent status must be addressed.

Officer Brown is completing his second (2nd) year of service with the MPD. He joined our agency after serving with the Hooksett Police Department where he was able to hone his skills as a patrol officer.

Officer Brown is consistently one of the top producers on the 4-12 Shift in the areas of motor vehicle stops and arrests. He makes more arrests than any other officer assigned to the patrol division. This is attributed to the fact that he is constantly searching for criminal behavior and conducting research on the MDT. This research will often result in motor vehicle related arrests or provide him with PC to dig deeper into an investigation.

In May, Officer Brown received the Looking Beyond the Ticket Award / Outstanding Arrest from a Motor Vehicle Stop. Officer Brown was only with our agency for a couple of months when he conducted a motor vehicle stop which resulted in the arrest of a subject who was illegally wearing a bullet proof vest while in possession three .45 cal pistols and over ten magazines of ammunition. Just recently Officer Brown arrested a subject who was illegally in possession of a pistol. These are just a few examples of the type of arrests that Officer Brown has been able to make during his short time with our agency.

Officer Brown is quiet and reserved yet displays confidence and command presence. He is articulate and intelligent. I have reviewed many of Officer Brown's reports and found them to be detailed and well written.

PLANNED IMPROVEMENT/CAREER COUNSELING FOR THE FOLLOWING EVALUATION PERIOD: The rater must outline the areas in which he/she wishes the employee to improve, and with the employee, he/she must develop a plan, which the employee will use as a guide for improvement. Career counseling will be discussed and documented in this section.

Officer Brown possesses a great deal of knowledge and a commendable work ethic. I believe these attributes would make him an excellent FTO. Officer Brown also has expressed a desire to become a detective. Officer Brown has displayed an uncanny ability to locate criminal activity. This attribute would make him an outstanding detective.

Sick days used for rating period (excluding FMLA): 3

Rater's Signature: Mark F. Sanclemente Z-21

EMPLOYEE COMMENTS:

Employee's Signature: #84

I certify that this report has been discussed with me. I understand that my signature does not necessarily indicate agreement.

☐ I wish to discuss this report with the reviewer. ☐ I request that this evaluation be reviewed by the Training Officer.

Reviewed by (supervisors): (initial & date)

7-4-09

7-6-09

☑ Copy given to employee

DEPARTMENT HEAD

Reviewed and Approved Merit: Date: 7-6-09

Reviewed and NOT Approved Merit: Date:

MANCHESTER POLICE DEPARTMENT
OFFICER PERFORMANCE EVALUATION FORM

D

Check Evaluation Type: Annual X Probationary X

Employee Name: Aaron Brown | Evaluation Period: 7-16-07 To 7-16-08

Assignment: Patrol Division | Time in Assignment 1 Year | Years of Service: 1 Year

A	B	C	D		E		
Not Satisfactory	*Some Improvement Needed*	*Meets Standards*	*Exceeds Standards*		*Does Not Apply*	**FACTORS TO BE EVALUATED**	***Comments***
		X				*Reliability*	Used only one sick day for the year. Great job!
			X			*Grooming & Dress*	Has a professional appearance, and strong officer presence.
		X				*Care of Equipment*	
		X				*Public Relations*	
		X				*Conduct*	
			X			*Dependability*	Aaron makes proper decisions on the street, and completes all necessary paperwork.
						Cooperation	
			X			*Supervisors*	Gets along well with supervisors, and has the respect of his peers.
			X			*Peers*	
		X				*Compliance with rules*	
		X				*Attitude*	
			X			*Initiative/Motivation*	Aaron is always proactive in his duties.
			X			*Productivity*	Aaron consistently leads his shift with self-initiated activity and arrests.
		X				*Leadership*	
					X	*Skills*	
		X				*Reports*	Reports are well written.
		X				*Firearms*	
		X				*Driving Ability*	
		X				*SPOTS License status:*	Active NH License
			X			*Work Performance*	
		X				*Ability to develop in occupation*	

COMMENTS OF RATER: General comments as to the employee's performance during the evaluation period should be made in this space. Comments are required in areas where the rater marked the employee in columns A, B or D. Special emphasis must be added in this area when the employee is a probationary employee. Permanent status must be addressed.

Officer Brown came to the Manchester Police Dept. with prior experience as a law enforcement officer with a neighboring town. He has used his prior experience to his benefit, stepping right into the flow of our department, and establishing himself as a competent, knowledgeable, aggressive officer with a knack of finding criminal behavior. Rather than going into his monthly highlights, Ofc. Brown consistently leads his shift with arrests, at times averaging almost one arrest per day, many of them resulting from a M.V. stop.

As an indication of his ability, Ofc. Brown, while still on probation was selected to participate as a plain-clothes officer with a newly created "sierra" unit.

Ofc. Brown was assigned to a VIP security detail in January this year, and did not have his uniform hat with him as instructed. This was noted on his monthly.

Aaron used only one sick day this year, and has been a terrific addition to our police department.

PLANNED IMPROVEMENT/CAREER COUNSELING FOR THE FOLLOWING EVALUATION PERIOD: The rater must outline the areas in which he/she wishes the employee to improve, and with the employee, he/she must develop a plan, which the employee will use as a guide for improvement. Career counseling will be discussed and documented in this section.

[redacted] Aaron should remember that although Manchester is a large city, it still maintains a small town feel and the citizens expect personal attention.

I would like to see Aaron begin to direct his attention towards specific training for a future assignment in his desired division.

I recommend that Ofc. Brown is granted permanent status with the police department.

Sick days used for rating period (excluding FMLA): 1

Rater's Name: Sgt. John Patti Rater's Signature: John Patti

EMPLOYEE COMMENTS:

Employee's Signature: A. J. R #84

I certify that this report has been discussed with me. I understand that my signature does not necessarily indicate agreement.

☐ I wish to discuss this report with the reviewer. ☐ I request that this evaluation be reviewed by the Training Officer.

Reviewed by (supervisors): (initial & date)

7-4-08

7-10-08

☐ Copy given to employee

DEPARTMENT HEAD

Reviewed and Approved Merit: Date: 7-11-08

Reviewed and NOT Approved Merit: Date:

MANCHESTER POLICE DEPARTMENT
OFFICER PERFORMANCE EVALUATION FORM

Check Evaluation Type: Annual Probationary ☒ mm/dd/yy mm/dd/yy

Employee Name: Brown, Aaron	Evaluation Period: 07-16-08 To 01-16-08
Assignment: Patrol Officer	Time in Assignment: 6 months / Years of Service: 6 Months

A	B	C	D		E		
Not Satisfactory	*Some Improvement Needed*	*Meets Standards*	*Exceeds Standards*		*Does Not Apply*	**FACTORS TO BE EVALUATED**	*Comments*
		X				*Reliability*	No sick time used (6Mo.).
		X				*Grooming & Dress*	Neat and Well Groomed.
		X				*Care of Equipment*	
		X				*Public Relations*	
		X				*Conduct*	
		X				*Dependability*	
						Cooperation	
		X				*Supervisors*	
		X				*Peers*	
		X				*Compliance with rules*	
		X				*Attitude*	
		X				*Initiative/Motivation*	
		X				*Productivity*	
		X				*Leadership*	
						Skills	
		X				*Reports*	
		X				*Firearms*	Valid NH Lic.
		X				*Driving Ability*	
		X				*Work Performance*	
		X				*Ability to develop in occupation*	

MPDFORM 161B
Effective Date – September 2002

COMMENTS OF RATER: General comments as to the employee's performance during the evaluation period should be made in this space. Comments are required in areas where the rater marked the employee in columns A, B or D. Special emphasis must be added in this area when the employee is a probationary employee. Permanent status must be addressed.

Officer Brown completed his FTO training and was assigned to the day shift on January 01, 2008. I have independently observed Officer Brown in limited situations. I conducted a ride-along with Officer Brown on 01/29/08. He appears to be conscientious, enthusiastic and motivated. His appearance is neat and clean. His reports are well written. Officer Brown has not posed any disciplinary issues nor has he used any sick time this month. In conclusion, I believe Officer Brown has performed as expected and that his probationary status should continue.

PLANNED IMPROVEMENT/CAREER COUNSELING FOR THE FOLLOWING EVALUATION PERIOD: The rater must outline the areas in which he/she wishes the employee to improve, and with the employee, he/she must develop a plan, which the employee will use as a guide for improvement. Career counseling will be discussed and documented in this section.

Officer Brown should continue to work within the patrol division in a manner that increases his job knowledge. He should strive to get a good working knowledge of the application of the Constitutional Issues, Statutory Laws, City Ordinances, and Manchester Police Procedures. He should continue to increase his familiarity with city geography. He should continue to maintain his good attitude in his quest for self-improvement of his job performance as he completes his probationary year.

Sick days used for rating period (excluding FMLA): 0

Rater's Signature: Sgt. Shawn Fournier

EMPLOYEE COMMENTS:

Employee's Signature: #84

I certify that this report has been discussed with me. I understand that my signature does not necessarily indicate agreement.

☐ I wish to discuss this report with the reviewer.

☐ I request that this evaluation be reviewed by the Training Officer.

Reviewed by (supervisors): (initial & date)

2/3/08

2-3-08

2.5.08

☒ Copy given to employee

DEPARTMENT HEAD

Reviewed and Approved Merit:

Date: 2/5/08

Reviewed and NOT Approved Merit:

Date:

UNION 4

State of New Hampshire
POLICE STANDARDS & TRAINING COUNCIL
ARTHUR D. KEHAS
LAW ENFORCEMENT TRAINING FACILITY & CAMPUS
17 Institute Drive — Concord, N.H. 03301-7413
603-271-2133 FAX 603-271-1785
TDD Access: Relay NH 1-800-735-2964

Sheriff Michael L. Prozzo, Jr.
Chairman

Donald L. Vittum
Director

April 20, 2009

Chief David J. Mara
Manchester Police Department
351 Chestnut Street
Manchester, NH 03101

Dear Chief Mara:

The selection panel for this year's Looking Beyond the Traffic Ticket event has chosen Officer Aaron Brown to receive the Outstanding Arrest from a Traffic Stop - City Award and Officer Mark Aquino to receive the Proactive Traffic Enforcement - City Award. The presentation of awards will be held on Wednesday, May 6, in the Tactical Center at Police Standards and Training in Concord, New Hampshire. A buffet luncheon will be served at noon. The program will begin at 1 p.m.

I have enclosed two forms for you to indicate who may want to attend the luncheon in honor of Officer Brown and Officer Aquino, including their police chief, their direct supervisor, and a family member. Please return the completed form to our agency by April 30 so that we can make adequate preparations. Our mailing address is printed on the reverse so that you can simply fold the form in half, secure it with a single piece of Scotch tape, and affix the correct postage. You can also reply by faxing the form to 271-1785.

Thank you for participating in the program this year. I look forward to seeing you in Concord on May 6.

Sincerely,

POLICE STANDARDS & TRAINING

Donald L. Vittum
Director

/kjd

Enclosures

EXHIBIT
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UNION 5

EXHIBIT
tabbies
UNION 5

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Backup (Windows (C...

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Messages
Phone
Safari
Calendar
Contacts
Notes
Voice Memos
Apps
File System

Conversation (by date)

[redacted]

Message

2/15/17

Feb 15, 2017 3:57 PM to Aaron Brown

What are you boys doing this evening?

Feb 15, 2017 3:58 PM from Aaron Brown

We are trying to set up a burglary. But we haven't quite figured out which apt. To go into

Feb 15, 2017 3:59 PM from Aaron Brown

Seriously. There's a stash apt downtown. Supposed to be kilos of shit and hundreds of thousands of dollars. If we can get the right apt we'll get a warrant and break in

Feb 15, 2017 4:00 PM to Aaron Brown

Jeepers. You fellas are like action figures this evening. Sounds so fancy and dangerous

Feb 15, 2017 4:00 PM from Aaron Brown

Def fancy lol

Feb 15, 2017 4:00 PM from Aaron Brown

High speed stuff

Feb 15, 2017 4:00 PM to Aaron Brown

Guess so

Feb 15, 2017 4:00 PM to Aaron Brown

Who knew my hubby was such a bad ass

Feb 15, 2017 4:01 PM from Aaron Brown

Right😉

- 1 -

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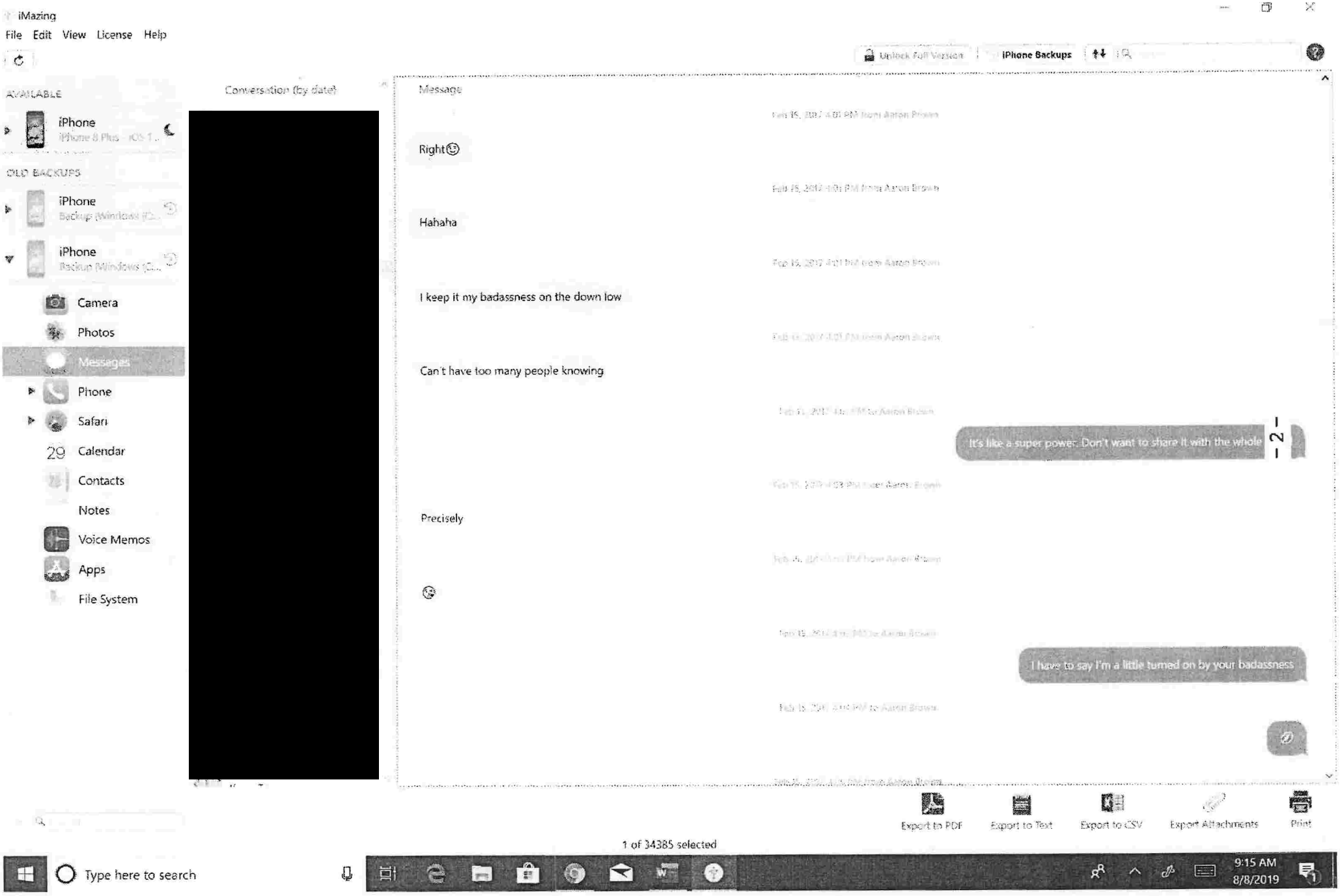
00148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Messages
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Safari
Calendar
Contacts
Notes
Voice Memos
Apps
File System
Conversation (by date)
Message
Right
Hahaha
I keep it my badassness on the down low
Can't have too many people knowing
It's like a super power. Don't want to share it with the whole
Precisely
I have to say I'm a little turned on by your badassness
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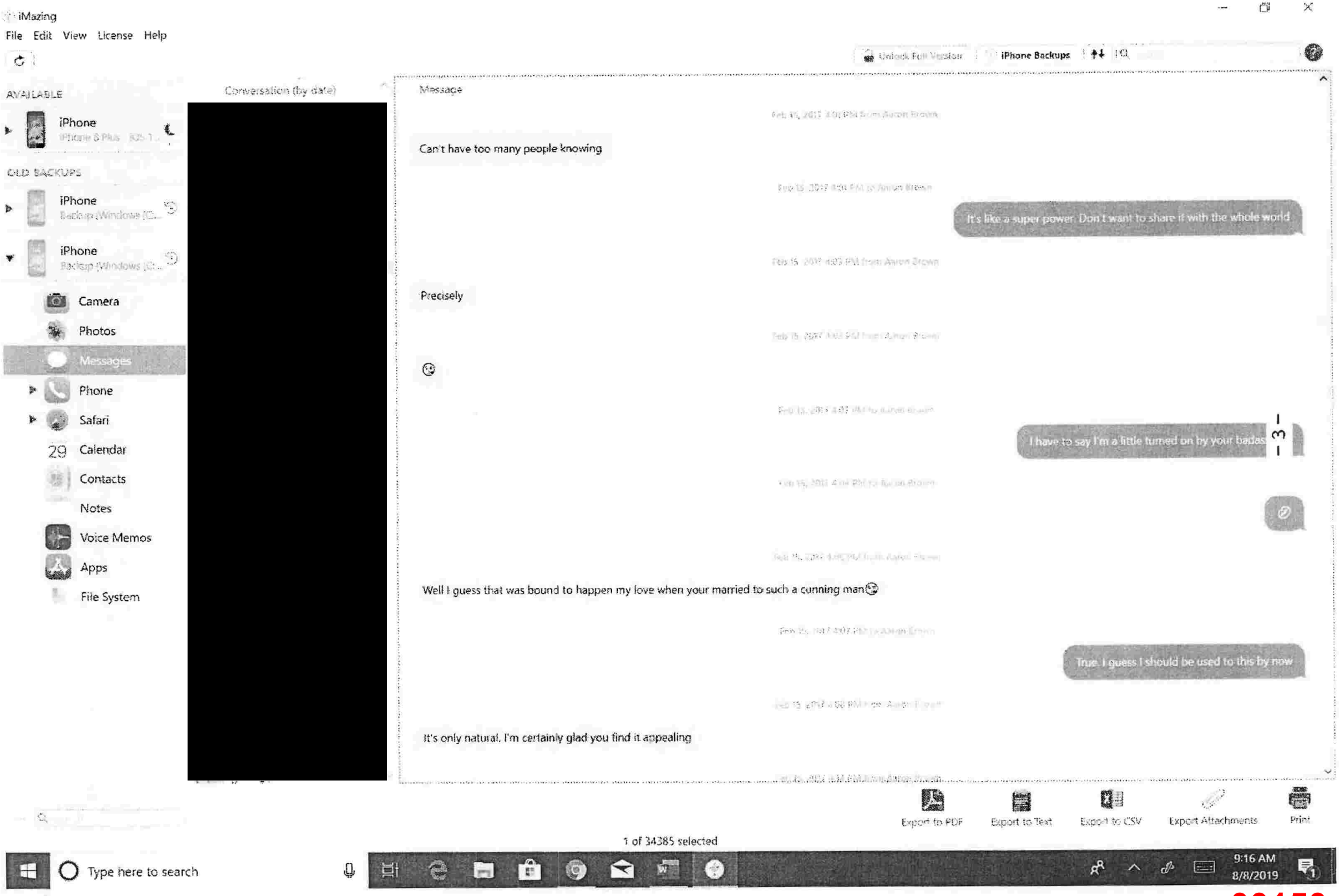
8/8/2019

00149


iMazing
File Edit View License Help
Unlock Full Version
iPhone Backups
AVAILABLE
iPhone
OLD BACKUPS
iPhone
iPhone
Camera
Photos
Messages
Phone
Safari
Calendar
Contacts
Notes
Voice Memos
Apps
File System
Conversation (by date)
Message
Can't have too many people knowing
It's like a super power. Don't want to share it with the whole world
Precisely
I have to say I'm a little turned on by your badass
Well I guess that was bound to happen my love when your married to such a cunning man
True. I guess I should be used to this by now
It's only natural. I'm certainly glad you find it appealing
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Export to Text
Export to CSV
Export Attachments
Print
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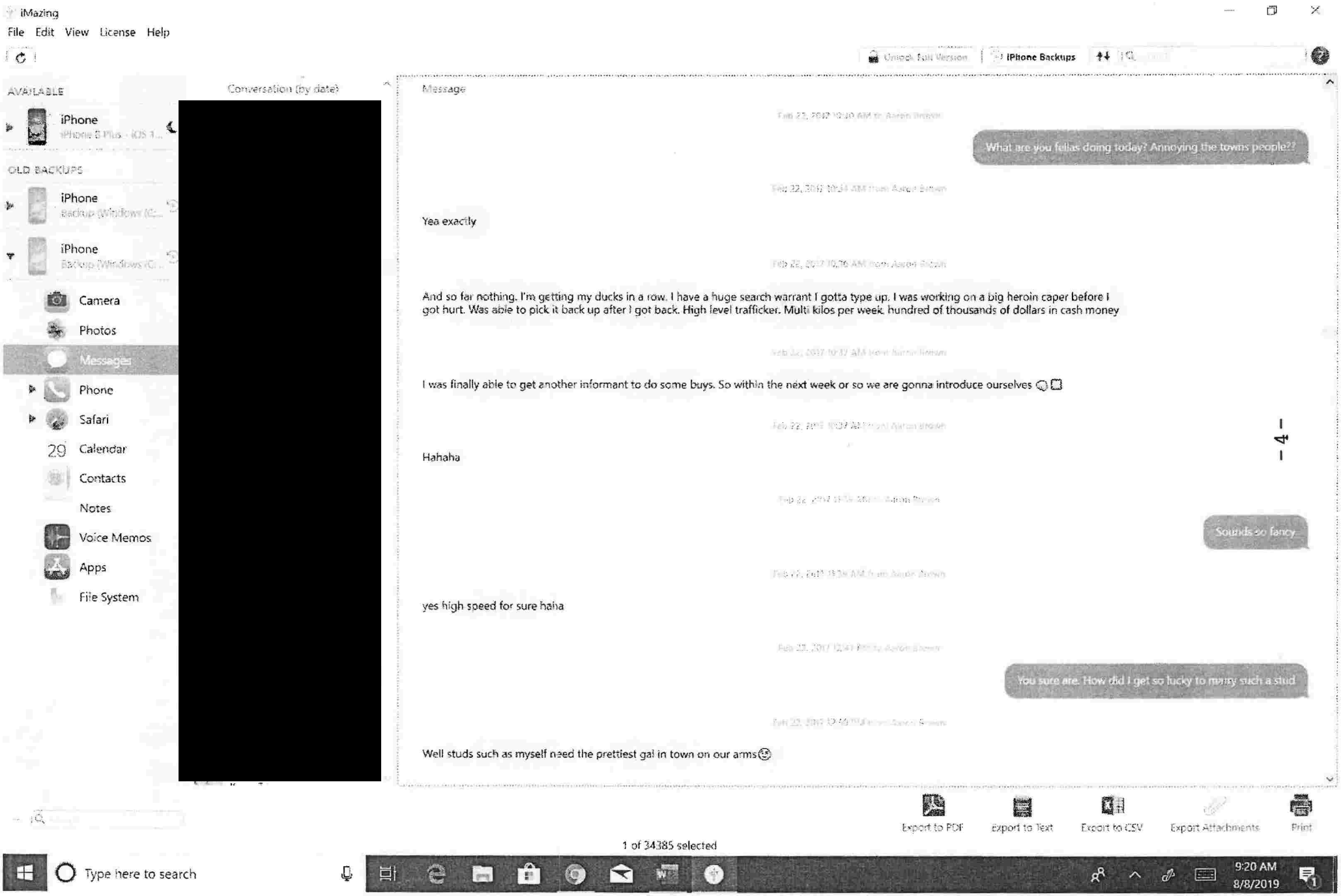
8/8/2019

00150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Unlock Full Version
iPhone Backups
AVAILABLE
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OLD BACKUPS
iPhone
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Camera
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Messages
Phone
Safari
Calendar
Contacts
Notes
Voice Memos
Apps
File System
Conversation (by date)
Message
What are you fellas doing today? Annoying the towns people??
Yea exactly
And so far nothing. I'm getting my ducks in a row. I have a huge search warrant I gotta type up. I was working on a big heroin caper before I got hurt. Was able to pick it back up after I got back. High level trafficker. Multi kilos per week, hundred of thousands of dollars in cash money
I was finally able to get another informant to do some buys. So within the next week or so we are gonna introduce ourselves
Hahaha
Sounds so fancy
yes high speed for sure haha
You sure are. How did I get so lucky to marry such a stud
Well studs such as myself need the prettiest gal in town on our arms
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00151

UNION 6(A)(B)

Vm 6A

Participants

Aaron Brown abrown@manchesternh.gov
+[redacted]
+[redacted]

Conversation - Instant Messages (18785)

+[redacted] 4/12/2017 9:11:50 PM(UTC-4)
Boys go to bed okay tonite?
Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x39433 (Table: message, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 9:12:03 PM(UTC-4)
Yeah they were good
Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3926A (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 9:12:35 PM(UTC-4)
Oh good
Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3AFF4 (Table: message, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 9:21:33 PM(UTC-4)
Yeah it was a good night over all
Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3AE53 (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 9:21:39 PM(UTC-4)
Perfect
Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3AC7E (Table: message, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 9:22:23 PM(UTC-4)
How were you feeling today? Did the headache / nausea go away
Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3AADB (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 9:26:08 PM(UTC-4)
Yea I was fit as a fiddle
Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3A5D3 (Table: message, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 9:28:42 PM(UTC-4)
Oh good
Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3A40E (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 9:30:42 PM(UTC-4)
I gotta lay off the booze. Gives me awful headaches for some reason
Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3A26B (Table: message, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 9:30:53 PM(UTC-4)
I literally had one shandy
Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3BFF4 (Table: message, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 9:31:09 PM(UTC-4)
Then the chicken. Which I think was poisoned haha
Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3BE2D (Table: message, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 9:36:14 PM(UTC-4)

Yes that, coupled with the crazy full moon, was destined to cause trouble

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3BC38 (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 9:41:21 PM(UTC-4)

Exactly

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3BA10 (Table: message, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 9:41:37 PM(UTC-4)

Whatever it was I got rid of it and I was all better hahaha

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3B86D (Table: message, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 9:59:04 PM(UTC-4)

Perfecto

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3B663 (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 9:59:18 PM(UTC-4)

I'm climbing into bed shortly

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3B4C0 (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 9:59:46 PM(UTC-4)

Alrighty. I'll give you a smooch when I get in. I promise not to barf tonite hahahaha

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3B2F1 (Table: message, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 10:00:28 PM(UTC-4)

Haha. It's ok. I just felt bad for you. You don't usually complain so when you do I know you're not well

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3CFF4 (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 10:01:26 PM(UTC-4)

Lol no I was a hurtin unit

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3CD90 (Table: message, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 10:01:47 PM(UTC-4)

You looked like it

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3CBC9 (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 10:02:35 PM(UTC-4)

Ok give me a smooch when you get in. I love you

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3CA12 (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 4/12/2017 10:02:44 PM(UTC-4)

Will do. Love you

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3C815 (Table: message, chat, Size: 17645568 bytes)

+[redacted] 4/13/2017 11:36:01 AM(UTC-4)

It's a good think I'm in Bedford. I'm in hannaford in yoga pants with messy hair drinking a Starbucks smoothing with my name brand coach bag and north face jacket t

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3C658 (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 4/13/2017 11:36:18 AM(UTC-4)

I'd get beat up if I were in Manch looking like a Bedford wife

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3DFF4 (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 4/13/2017 11:49:50 AM(UTC-4)

Oh for sure! Haha

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3DDE4 (Table: message, chat, Size: 17645568 bytes)

+[redacted] 4/13/2017 11:50:01 AM(UTC-4)

They wouldn't stand for that in manch

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x3DC2F (Table: message, chat, Size: 17645568 bytes)

63

+[redacted] 2/20/2018 2:19:43 PM(UTC-5)

Ok thanks love

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0xC1EFE8 (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 2/21/2018 11:10:44 AM(UTC-5)

Test...its Aaron

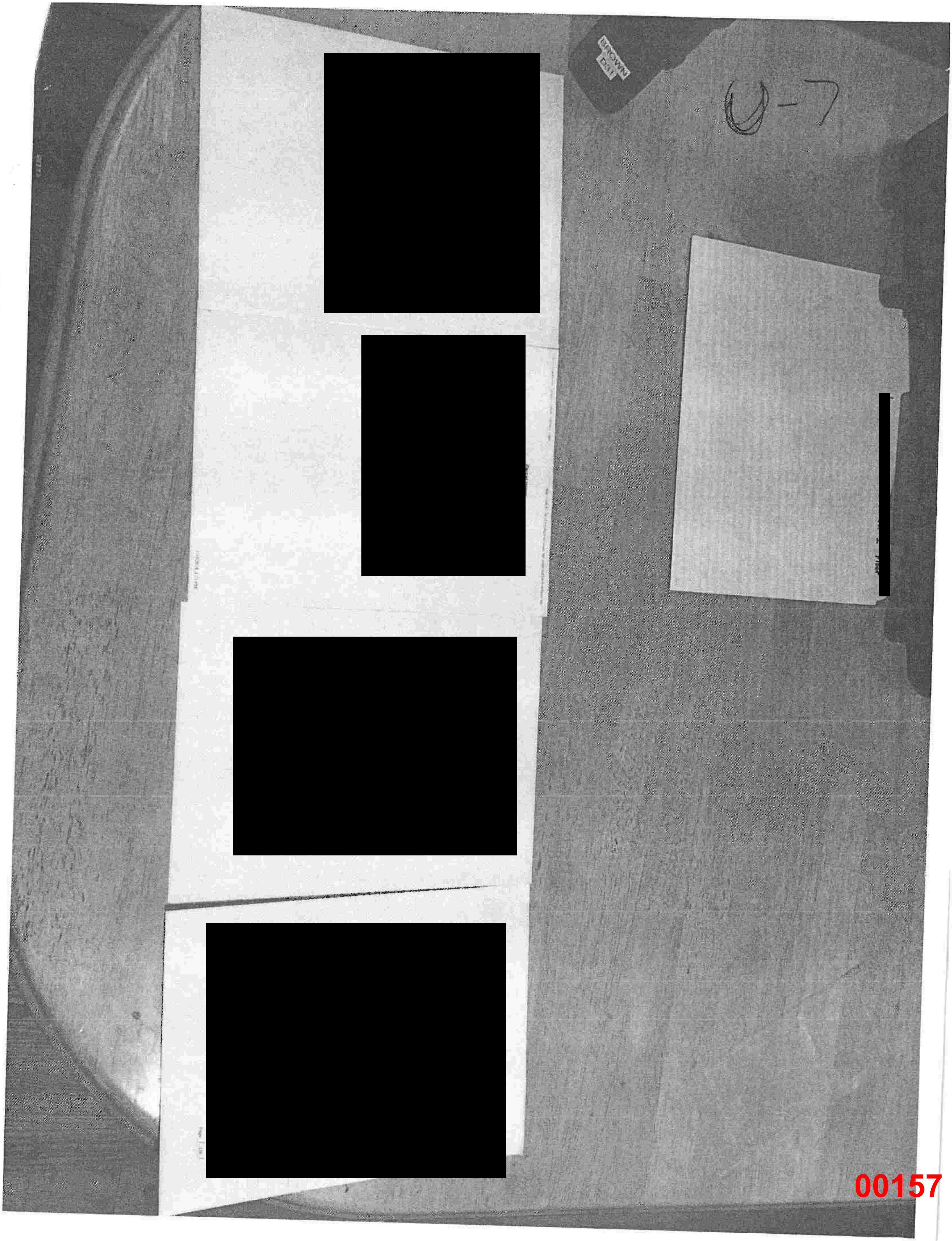
Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0xC1EA9F (Table: message, chat, Size: 17645568 bytes)

+[redacted] 2/21/2018 11:27:20 AM(UTC-5)

Hi love

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0xC1E8E2 (Table: message, handle, chat, Size: 17645568 bytes)

UNION 7


BROWN
DOJ
U-7

UNION 8

Thomas P. Velardi

From: Thomas P. Velardi
Sent: Monday, April 01, 2019 9:37 AM
To: Todd Feathers
Subject: Re: One last question

[redacted]

On Mar 29, 2019, at 1:36 PM, Todd Feathers <tfeathers@unionleader.com> wrote:

[redacted]

--
Todd Feathers
New Hampshire Union Leader
Office: 603-206-7682
Cell: 608-698-5806
@ToddFeathers

CITY 1

MANCHESTER POLICE DEPARTMENT

Professional Standards

REPORT OF INTERNAL INVESTIGATIOPN

File No. 18-IA-02

INDEX

City

MANCHESTER POLICE DEPARTMENT

Professional Standards

REPORT OF INTERNAL INVESTIGATIOPN

File No. 18-IA-02

Book (1-6)

Investigators:

Sergeant Shawn McCabe

Sergeant Timothy Patterson

MANCHESTER POLICE DEPARTMENT
PROFESSIONAL STANDARDS
REPORT OF INTERNAL INVESTIGATION
File No. 18-IA-07 65

COMPLAINANT: Internal Complaint

ABSTRACT OF ALLEGATION:

[redacted]

APPLICABLE RULES: [redacted]

DISCOVERY OF ADDITIONAL RULE(S) VIOLATIONS: [redacted]

[redacted]

SUBJECT OF COMPLAINT: **Detective Aaron Brown**

DATE/TIME OF INCIDENT: [redacted]

LOCATION OF INCIDENT: [redacted]

RELATED CASE ID #: Not Applicable

DATE COMPLAINT RECEIVED: [redacted]

ASSIGNED INVESTIGATOR(S): Sgt. McCabe
Sgt. Patterson

Note: All definitions, concepts, facts, conclusions, and recommendations contained herein are strictly administrative in nature without force of law and have no bearing on any legal body with competent authority. Summary statements have been written to reflect the individuals' recollection of the incident. No portions contained therein have been supplemented by Professional Standards.

BACKGROUND

[redacted]

[redacted]

[redacted]

COMPLAINANT STATEMENT

Interview of [redacted] Prepared by Sergeant Shawn McCabe

[redacted]

[redacted]

[redacted]

[redacted]

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Interview of [redacted] Prepared by Sergeant Timothy Patterson

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[redacted]

[redacted]

[redacted]

Interview of Detective [redacted] [redacted] Prepared By Sergeant Timothy Patterson

On the 20th of March at approximately 1520 hrs Sgt. McCabe and I interviewed Detective [redacted] in interview room 5. Present for the interview in addition to Det. [redacted] was Officer Ken Chamberlain and Detective Derek Feather both of MPPA. This interview was recorded and the following is a summary of the interview and not meant to be a verbatim transcript. We started the interview by reading him Reverse Garrity. The stated intent of the interview was "Information related to inappropriate activities of Aaron Brown while on duty". This form was signed and witnessed.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] We then asked him if he had ever heard Detective Brown say anything with racial overtones. He said that he had not. [redacted] We finished up the interview by asking if he had contact with Detective Brown since he has been placed on leave. He stated that he has not. We then thanked him for his cooperation and ordered him not to talk about what was discussed in the interview. He acknowledged the order and we ended the interview.

On Wednesday March 21, 2018 at approximately 1456 hours Sgt Patterson and I conducted the interview with Sgt. [redacted] at the Manchester Police Department Interview room #5. Also present for the interview was Attorney McKittrick, Representation for the Manchester Association of Patrolman Supervisors (MAPS). Reverse Garrity was read to Sgt. [redacted], which indicated that we wanted to speak with him regarding Aaron Brown.

The interview started off by just getting some background information regarding Sgt [redacted]'s hours when he was assigned to SIU, as well as if he knew what the hours were for the Street Crime side of the division. He was asked if he was involved in the Street Crime side of things and he indicated that his role was primarily the SIU side of things. Sgt. [redacted] was asked if he interacted with the detectives from Street Crime and he stated that it was minimal but that they would help out with Surveillance if it was needed as well as Search Warrants.

Sgt. [redacted] was asked about his contact with Aaron Brown and he stated that he'd see him at the off-site, acknowledge him, and that Brown would help out on operations but that his contact with Brown was minimal. Sgt. [redacted] stated that there were times that Brown had Child-care issues and couldn't make it in early to help out with search warrants.

We indicated to Sgt. [redacted] that Aarons MPD issued cell phone was "dumped", and that there was stuff on it that we had questions about. [redacted]

[redacted]

[redacted]

Sgt [redacted] was then asked what his impression was of Aaron. Sgt. [redacted] indicted that he thought that Aaron was arrogant. He was asked if he had a reputation and it was explained to him that other officers at Aaron's level gave the impression as though Aaron had a reputation. Sgt. [redacted] stated that all he was aware of is, since going back to patrol, officers would ask him how Aaron would always got consent to search a vehicle and would never need to do a search warrant. He stated that officers are curious because other officers are typing search warrants to search a car but never Aaron. [redacted]

Sgt. [redacted] was asked if he ever heard Aaron use the phrase parking ticket amongst the group and he stated that he has not. He also asked if he knew what the phrase meant and he had no idea. He was asked if he was aware of Aaron having any racial bias and he stated not that he was aware of.

[redacted]

[redacted]

[redacted]

Interview of Detective [redacted] Prepared By Sergeant Shawn McCabe

On Wednesday March 21, 2018 at approximately 1806 hours Sgt Patterson and I conducted the interview with Detective [redacted] at the Manchester Police Department Interview room #5. Also present for the interview was Attorney Krupski, Representation for the Manchester Police Patrolman's Union (MPPA), as well as Ken Chamberlain and Derek Feather. Reverse Garrity was read to Detective [redacted], which indicated that we wanted to speak with him regarding Aaron Brown.

The interview started off by just getting some background information regarding Detective [redacted] s hours and what facet of SED he was assigned to. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Detective [redacted] was asked what his relationship with Aaron Brown is and he stated that they both transferred to Manchester PD at the same time and knew him prior. He indicated that Brown worked in Hooksett and that he worked in Allenstown, so they knew each other prior to coming to MPD only in a professional friendship. [redacted] indicated that he really didn't start to know him until he started working in SED with him, which became more on a personal level.

[redacted]

Detective [redacted] was asked what Aaron's reputation is in the unit and he responded by saying that he's difficult to work with, very opinionated. [redacted] He indicated that there were two Aaron Brown's, one before his accident and the one after. Prior to the accident he was always out there trying to make arrest(s), after the accident seems like he checked out, disengaged.

[redacted]

Detective [redacted] was then asked if he knew what the phrase "Parking Tickets" meant and he stated no. He was asked if Aaron had any racial bias and he stated that he's heard him use racial slurs before. He indicated that Aaron has used the term "Negro" in general terms but that he didn't engage in that type of conversation and that he would walk away. He was asked if there were any other derogatory terms form Aaron and he stated that if Aaron did that he wasn't part of it.

We finished up by asking Detective [redacted] if he has spoken with Aaron since he's been placed on leave. He indicated that he has, and that it was right after he was suspended. He stated that he told Aaron that he was just reaching out to him to let him know that if he or his wife needed anything to let him know and that he wasn't prying for information as he didn't want to know anything but that it was to just throw out a help line if they needed anything.

Interview of Sergeant [redacted] Prepared By Sergeant Timothy Patterson

On the 23th of March at approximately 1005 hrs Sergeant McCabe and I interviewed Sergeant [redacted] in interview room 5. Present for the interview in addition to Sgt. [redacted] was MAPS Lawyer Joe McKittrick. Prior to starting the interview we agreed to record the interview. The following is a summary of the interview and not meant to be verbatim. We started the interview by reading him Reverse Garrity. The stated intent of the interview was "Information related to inappropriate activities of Aaron Brown while on duty". This form was signed and witnessed.

We started by discussing his assignment and hours of work. He advised that he is the sergeant of the Street Crime Unit and worked 1500 to 2330. His hours previously were 1330 to 2200 but couldn't recall exactly when that changed. He stated that the reason for the change was that Street Crime worked those hours so it made sense for the supervisor to work that as well. [redacted] Sgt. [redacted] had a question as to what we were looking into here as he thought he was a target. I reread him the reverse Garrity form and told him that we were looking at the activities of Det. Brown and were looking for his information relating to that.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

We then talked about the term parking ticket and if he had ever had that phrase before. He said that he had, that it was on the news and that it was a racial slur. I asked him if he ever heard Aaron use the term. He said no. I asked if he was aware of any racial bias that Aaron might have. He said not to his knowledge. I then read him the 2 texts that Aaron had sent his wife talking about parking tickets being black people and that his new gun would take care of them and also that he was stalking one like a jungle cat. I asked if he had ever heard him say anything like this previously. He then stated to us, "listen", you have to understand. This was a guy who cultivated informants, talked his way into vehicles, talked his way into people's pockets. You have to be nice to people to get consent. I never saw that side."

[redacted] I then asked him if he had spoken with Det. Brown since he had been placed on leave. He told me that he hadn't. I thanked him for his information and ordered him not to speak of the information we had discussed. We then concluded the interview.

Interview of Detective [redacted] Prepared By Sergeant Shawn McCabe

On Wednesday March 28, 2018 at approximately 0815 hours Sgt Patterson and I conducted the interview with Detective [redacted] at the Manchester Police Department Interview room #5. Also present for the interview was Attorney Krupski, Representation for the Manchester Police Patrolman's Union (MPPA), as well as Ken Chamberlain and Derek Feather. Reverse Garrity was read to Detective [redacted], which indicated that we wanted to speak with him regarding Aaron Brown.

The interview started off by just getting some background information regarding Detective [redacted]'s hours and what facet of SED he was assigned to. [redacted]

[redacted]

[redacted]

[redacted]

Detective [redacted] was asked what his relationship is with Aaron Brown and he stated just work, that he doesn't hang around with him outside of work. [redacted]

[redacted]

Detective [redacted] was asked if he knew what Parking Ticket meant in regards to a derogatory term and he stated that he's never heard of it. He was asked if he was aware of Aaron having any racial bias and he stated that he'd say stuff jokingly regarding black people in that he would refer to them as Negros. He stated that he didn't partake in those conversations and that he's not friends with him and if he heard him say things like that he'd ignore it and go do his own thing.

[redacted]

[redacted]

Interview of Detective [redacted] Prepared By Sergeant Shawn McCabe

On Wednesday March 28, 2018 at approximately 0954 hours Sgt Patterson and I conducted the interview with Detective [redacted] at the Manchester Police Department Interview room #5. Also present for the interview was Attorney Krupski, Representation for the Manchester Police Patrolman's Union (MPPA), as well as Ken Chamberlain and Derek Feather. Reverse Garrity was read to Detective [redacted], which indicated that we wanted to speak with him regarding Aaron Brown.

The interview started off by just getting some background information regarding Detective [redacted]'s hours and what facet of SED he was assigned to. [redacted]

[redacted]

[redacted] Detective [redacted] was asked what his relationship is with Aaron Brown and he stated just work, that he doesn't hang around with him outside of work.

Detective [redacted] was asked if he knew what Parking Ticket meant other than what is issued to vehicles. He indicated that he has no idea what it means and has never heard it before. He was asked if he was aware of Aaron having any racial bias and he stated not to his knowledge.

[redacted]

Interview of Detective [redacted] Prepared By Sergeant Timothy Patterson

On the 28th of March at approximately 0900 hrs Sergeant McCabe and I interviewed Detective [redacted] in interview room 5. Present for the interview in addition to Det. [redacted] was MPPA Lawyer Jake Krupski, Officer Ken Chamberlain, and Detective Derek Feather. Prior to starting the interview we agreed to record the interview. The following is a summary of the interview and not meant to be verbatim. We started the interview by reading him Reverse Garrity. The stated intent of the interview was "Information related to inappropriate activities of Aaron Brown while on duty". This form was signed and witnessed.

We then went over his assignment and hours of work. Det. [redacted] stated that he was assigned to the Special Enforcement Division (SED) in the Special Investigations Unit (SIU). The current hours of work are 1500-2330 but previously they were 1330 – 2200. This changed within the past couple of months. [redacted]

[redacted]

[redacted]

We then asked him if he had ever heard the phrase parking ticket. He was confused and asked if we meant actual parking tickets and we said no, more of a derogatory term. He said that he had never heard that phrase before. We asked him if he had ever heard Aaron use that term. He stated that he hadn't. We then asked if he had ever heard Aaron say anything that was racially biased. He said no, he couldn't think of a particular instance.

[redacted]

Interview of Detective [redacted] Prepared By Sergeant Timothy Patterson

On the 28th of March at approximately 1030 hrs Sergeant McCabe and I interviewed Detective [redacted] in interview room 5. Present for the interview in addition to Det. [redacted] was MPPA Lawyer Jake Krupski and Officer Ken Chamberlain. Prior to starting the interview we agreed to record the interview. The following is a summary of the interview and not meant to be verbatim. We started the interview by reading him Reverse Garrity. The stated intent of the interview was "Information related to inappropriate activities of Aaron Brown while on duty". This form was signed and witnessed.

We then went over his assignment and hours of work. Det. [redacted] stated that he was assigned to the Special Enforcement Division (SED) in the Street Crime Unit (SIU). His hours of work are 1500-2330 unless something changed that such as a search warrant. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

I then asked him if he would ever ride with him. He stated that he would occasionally, but usually it was Det. [redacted]. I asked him if there was anything that Aaron said that made him uncomfortable or struck him as strange. He said no. I then asked him, aside from what he learned during this investigation, if he had ever heard the phrase parking ticket used in a derogatory manner. He told us that he had not. He also stated that he never heard Aaron use that either. I asked him about the texts that Aaron had sent that were of a derogatory nature and asked if he was aware of Aaron saying something like that. He told us that he was not aware of it. I then asked him if he had ever heard Aaron say anything derogatory at all. He told us that he has heard him joke about it at the office. Det [redacted] stated that he would be there before Det Brown and when he came in he was usually in a good mood. He would walk in and say, "What's up my niggers" or "What's up homey's". He said that clearly this was a joke and there was no racial motivation to it. He also said that he never saw any racial motivation in his work. He would just joke with guys about it.

[redacted]

[redacted]

We then discussed if Det. Brown had reached out to him or vice versa. Det. [redacted] told us that there had been 3 phone calls. One was regarding dates and times of being at the station, one was about items left on his desk, and the other was regarding where this investigation was going and how long it was going to take. He stated that there was no conversation regarding interviews or what was being said. We concluded the interview by ordering him not to talk about the information except with people in the room. He agreed and we ended the interview at 1100 hrs.

Interview of Aaron Brown

THE MANCHESTER POLICE DEPARTMENT
MANCHESTER, NEW HAMPSHIRE
In Re: Internal Investigation of Detective Aaron Brown
INTERVIEW OF DETECTIVE AARON BROWN

February 23, 2018, 10:04 a.m.
This interview took place at the Manchester Police Department
Manchester, New Hampshire

DEPOSITION TRANSCRIPTION VERBATIM
Audio & Video Recording and Transcription Service
Paralegal, Notary Public, Medical Transcription
Jan-Robin Brown, CER-415, CET-415
Certified Electronic Court Reporter & Transcriber
86 Peaslee Hill Road
Weare, NH 03281
Telephone: 603.529.7212
E-mail: AudioDepos@GSINET.net
MEMBER: AMERICAN ASSOCIATION OF ELECTRONIC REPORTERS & TRANSCRIBERS, INC.

IN ATTENDANCE
INTERVIEWER(s): Sergeant Shawn McCabe
Sergeant Tim Patterson
Manchester Police Department
405 Valley Street
Manchester, NH 03103
603.624.6891
INTERVIEWEE: Detective Aaron Brown
3
DISCLAIMER/NOTES:
Deposition Transcription Verbatim was not present for and did not provide any of the recording equipment for the within recorded proceeding. All spelling related to proper names, whether individual or otherwise on the audio provided, has been accomplished by phonetic interpretation of the transcriber.
The use of "um," "uh," false starts, and stutters have been omitted for readability of the transcript.
4

1 SM Just document the time.

TP All right, it is February 23rd, 2018. It is approximately 10:04.
SM We're just going to go around the room, introduce ourselves: Sergeant Shawn McCabe.
AB Aaron Brown.
JK John Krupski, attorney for Manchester Police Patrolman's Association.
KC Ken Chamberlain, MPPA.
DF Derek Feather, MPPA.
TP And Sergeant Tim Patterson.
INTERVIEW BY SERGEANT MCCABE:
Q All right, Aaron, I'm just going to go over your reverse Garrity. This is just a copy to follow along.
A Sure.
Q All right. Reverse Garrity warning, internal investigation, administrative purpose. This warning is to be used only when a member/employee of the Manchester Police Department is about to be questioned about possible criminal matters, and it has officially been determined that any self-incriminating statements made by the member/employee will not be used against him or her in a criminal prosecution. This is to inform you that as a member/employee of the Manchester

5

Police Department, you are currently the subject of an internal investigation. [redacted]

This questioning will concern administrative matters relating to the official business of the Manchester Police Department. I'm not about to question you for the purpose of instituting a criminal prosecution against you. During the course of this questioning, even if you disclose information which indicates that you may be guilty of criminal conduct, neither your self-incriminating statements, nor the fruits of any self-incriminating statements you make will be used against you in any criminal legal preceding.
Since this is an administrative investigation, any self-incriminating information you may disclose will not be used against you in a court of law.
You're required to answer our questions fully and truthfully. The questions will relate specifically

and narrowly to the matter under investigation. If you refuse to answer our questions or if you attempt

to provide false, untrue or deliberately erroneous information, or attempt to hamper the investigation in any way, this in and of itself is a violation of the rules and regulations of the Manchester Police Department, and you will become subject to potential polygraphs, disciplinary penalties up to and including termination from employment. You will be allowed union representation during this interview. Your union representative may act as your witness but he or she may not represent you in any legal capacity or as counsel.

Do you understand what was just explained to you?

ATTORNEY KRUPSKI: If I might just ask one clarifying question. It'd be fair and accurate to say that if he refuses to answer any questions or if he attempts to provide false, untrue or deliberately erroneous information, or attempts to hamper this investigation in any way, he will be subject to termination?

SERGEANT MCCABE: Correct.

ATTORNEY KRUPSKI: Thank you.

SERGEANT PATTERSON: Yes.

INTERVIEW BY SERGEANT MCCABE:

Q Let me just have you initial that.

A Sure. Just right here?

Q Yeah. Just initial that you understand what was explained, and then if you have any questions concerning what you were just explained -- I don't know if you guys want to sign it.

ATTORNEY KRUPSKI: I'll have to see that.

SERGEANT MCCABE: Yeah, he's got to sign it as well.

THE WITNESS: What is the time?

ATTORNEY KRUPSKI: It's 10:06.

THE WITNESS: 23rd, right?

MR. FEATHER: Correct.

SERGEANT MCCABE: And I've got a copy of everything.

ATTORNEY KRUPSKI: Yeah.

BY SERGEANT MCCABE:

Q [redacted]

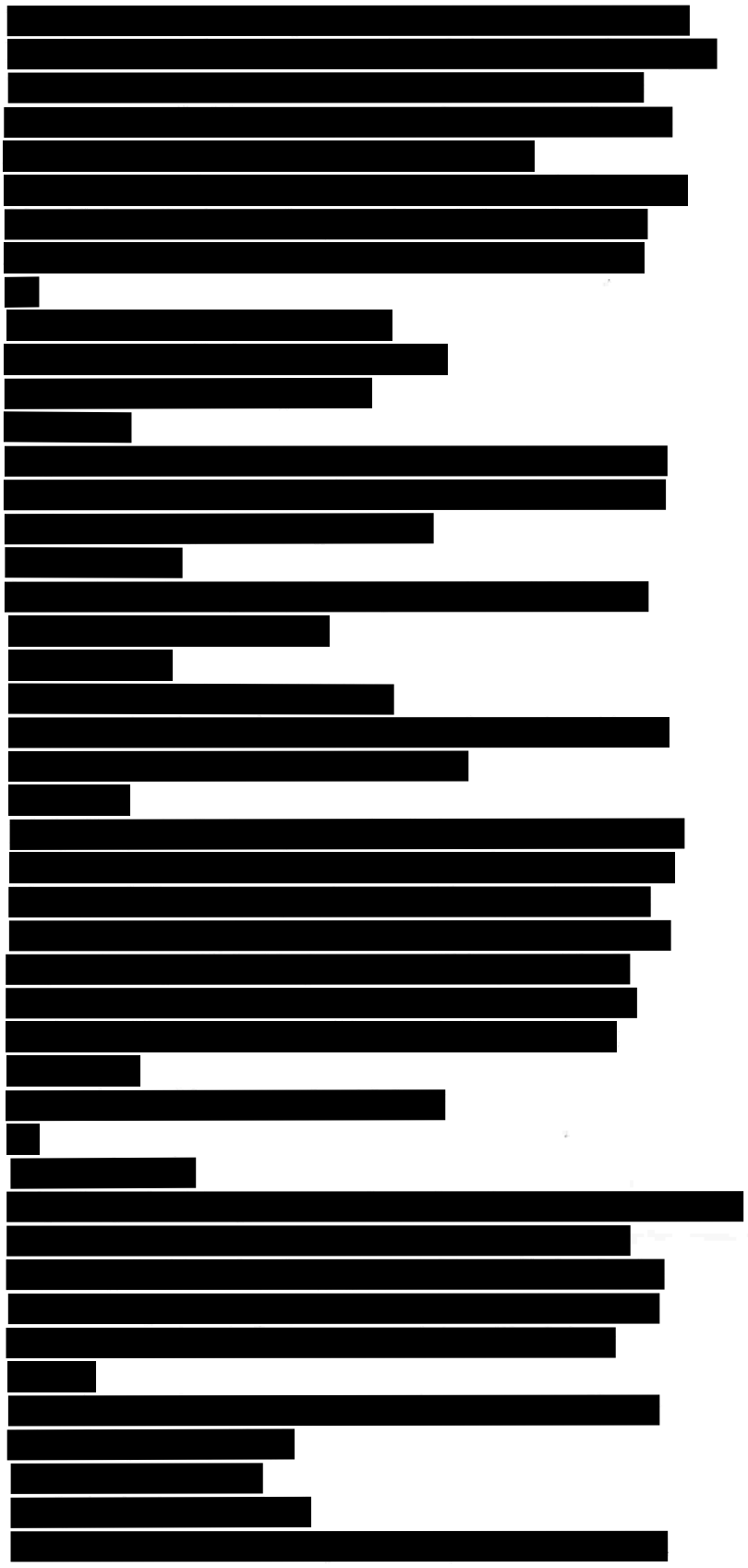
19 [redacted] So, with that
8
1 being said, you know that you must answer all the
2 questions honestly and truthfully?
3 A Yes.
4 Q [redacted]

[redacted]

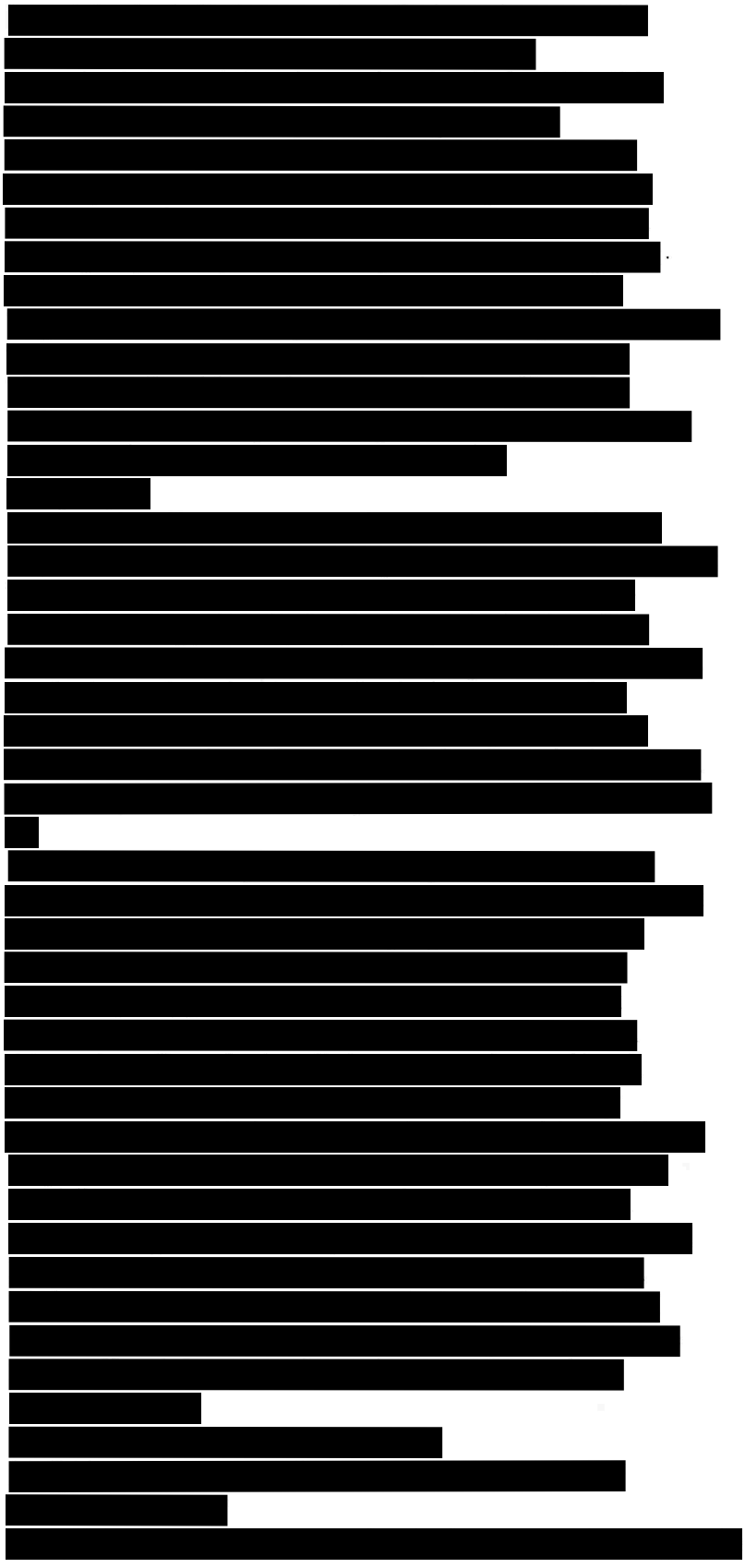
[redacted]

[redacted]

[redacted]



[redacted]



[redacted]

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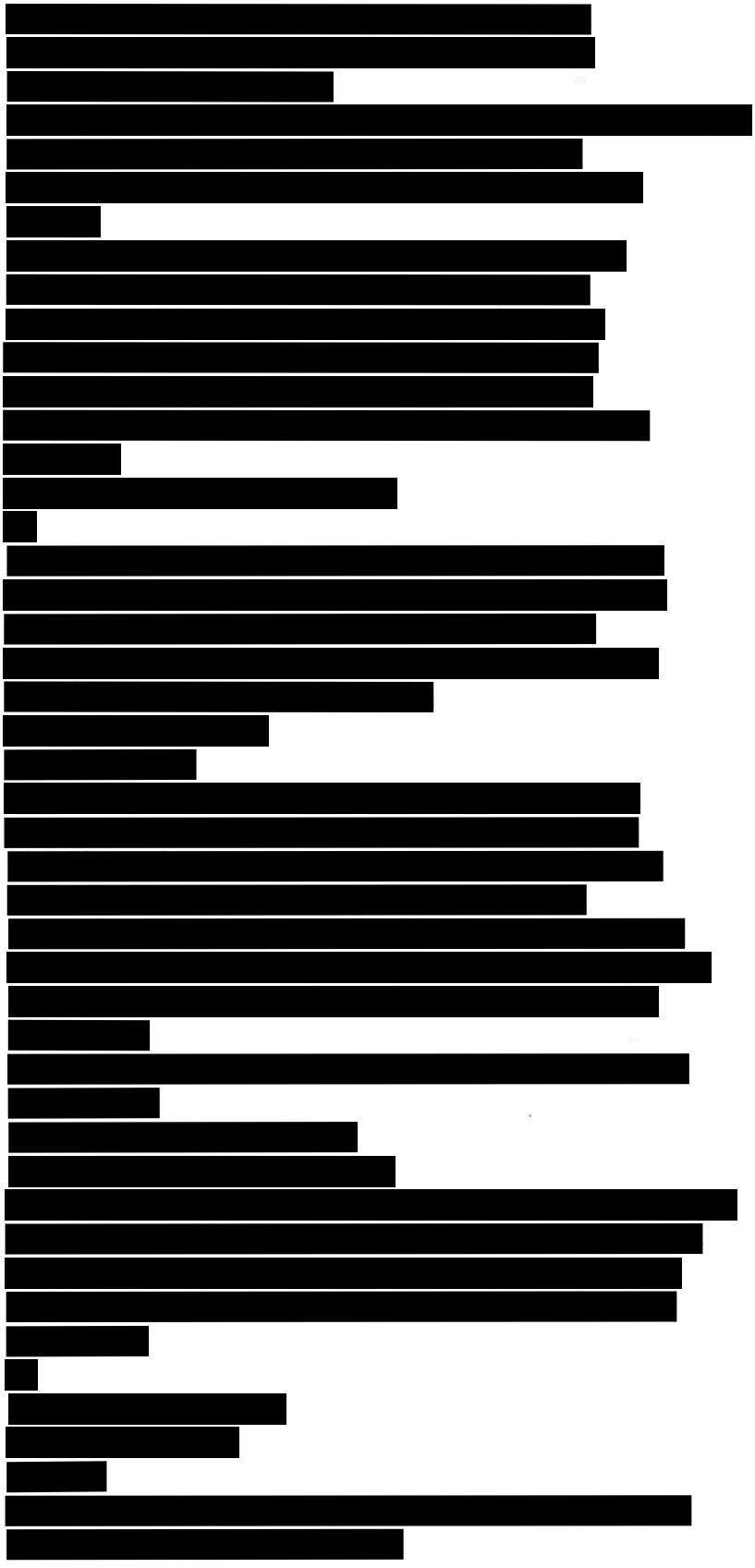

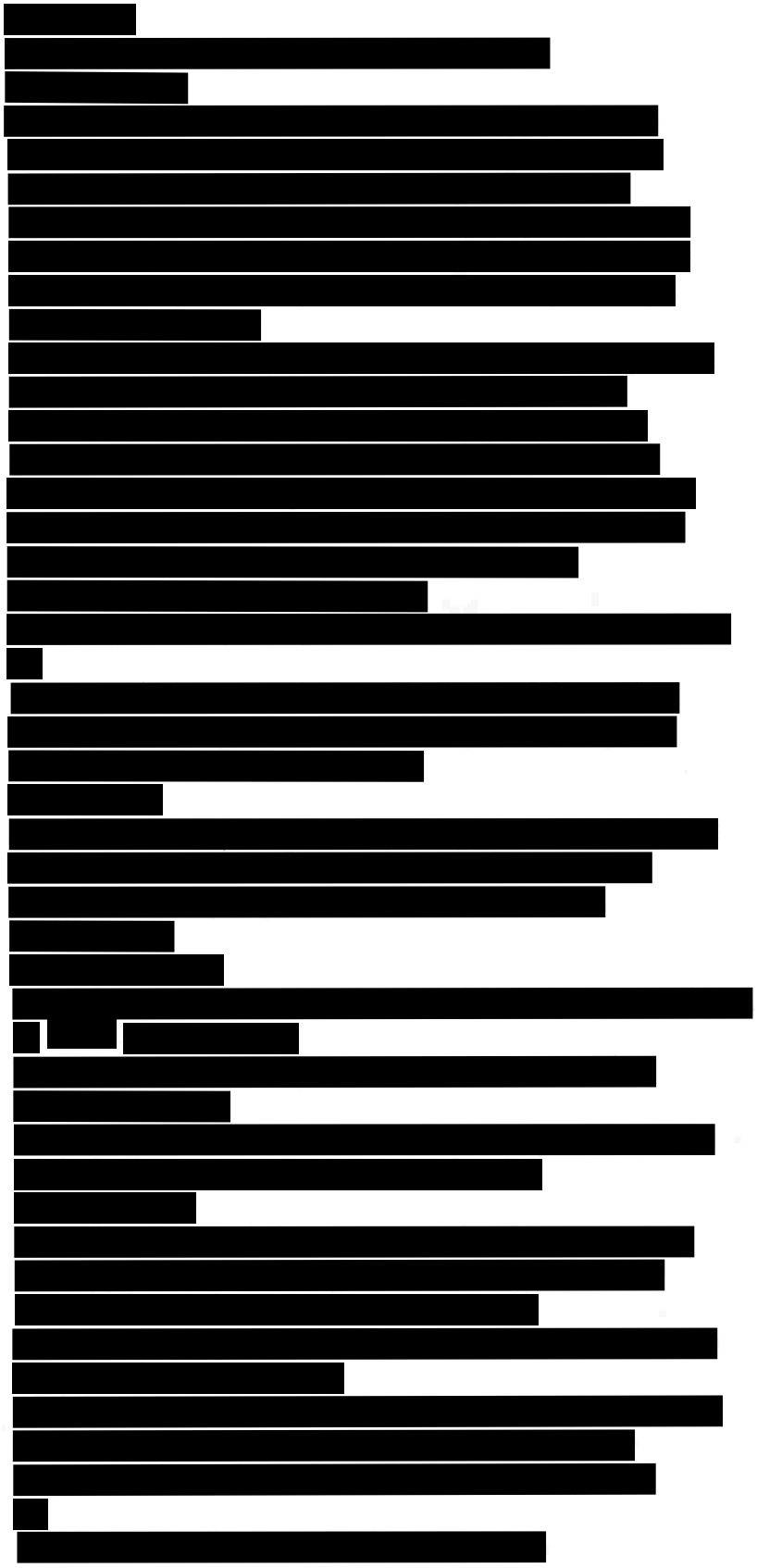

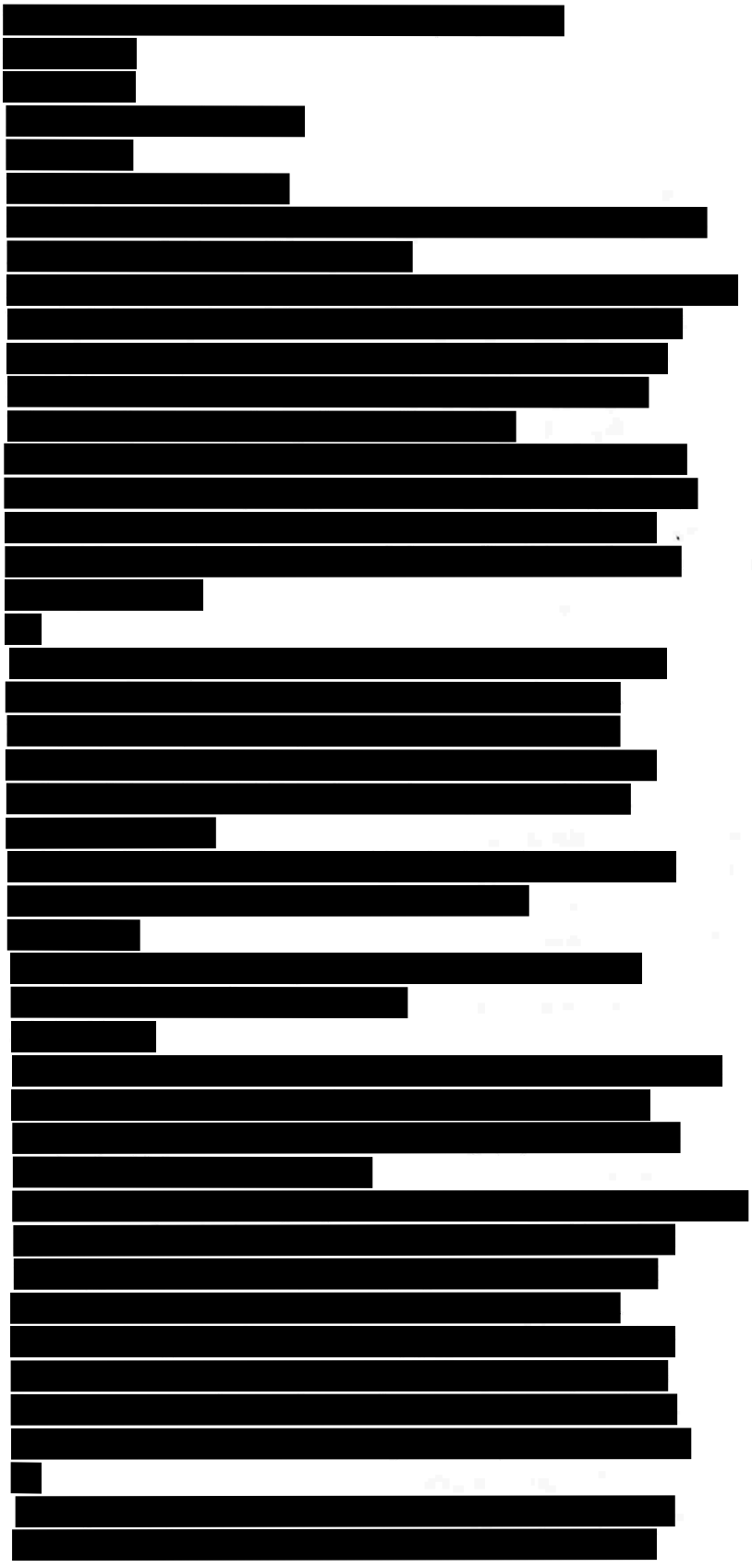

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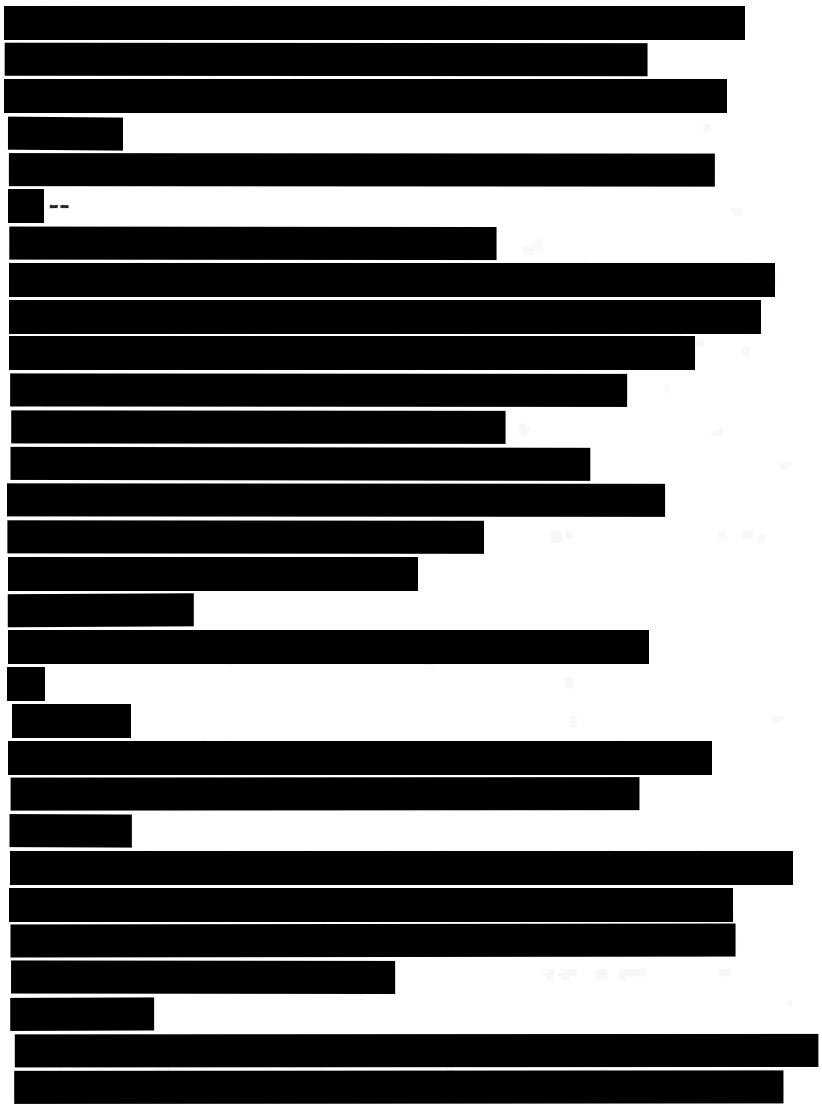
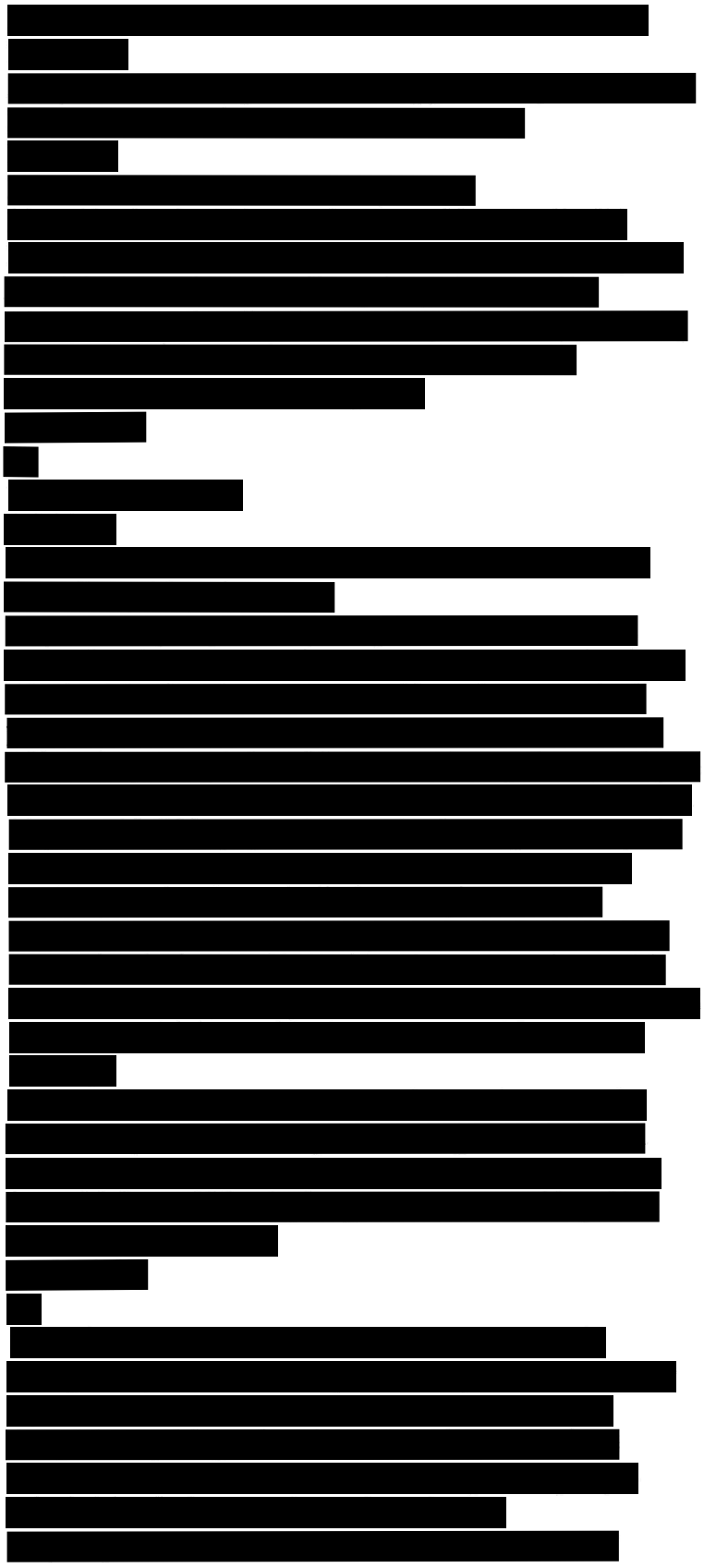
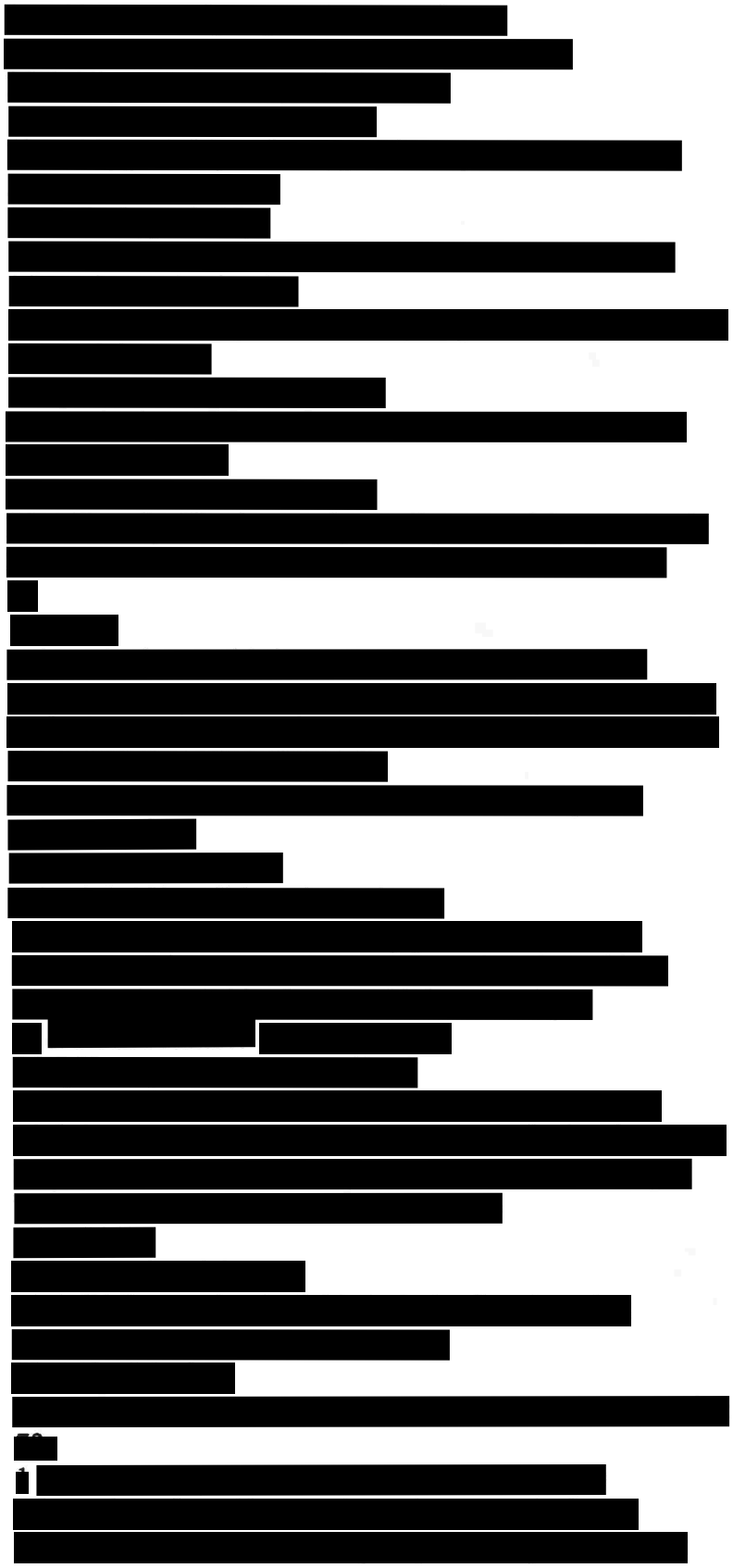
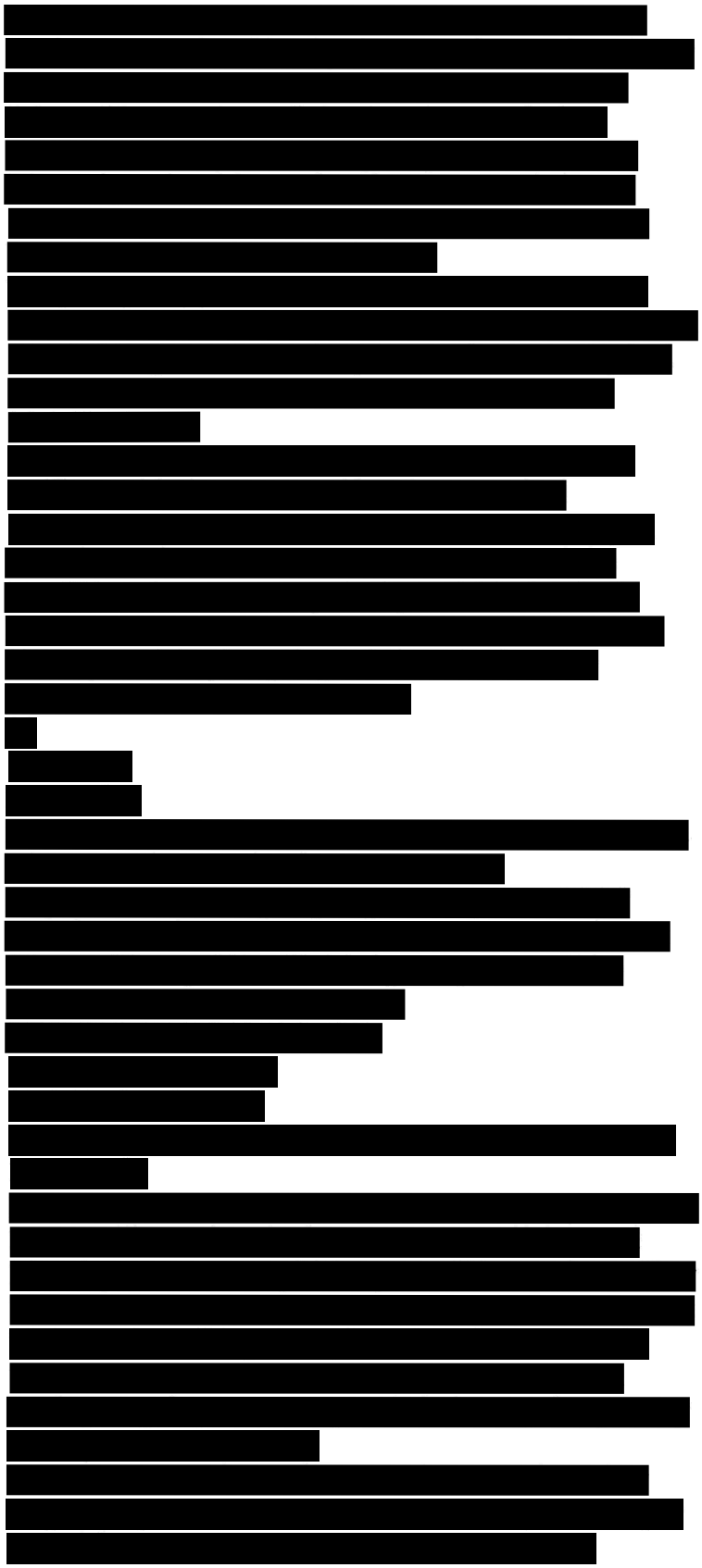
SERGEANT PATTERSON: Let's take a break.
SERGEANT MCCABE: Time?
SERGEANT PATTERSON: It's 11:10. Shut it off?
You want to leave it going?
ATTORNEY KRUPSKI: Shut it off, please.
OFF/ON THE RECORD
SERGEANT PATTERSON: -- the 23rd of February. It is now 11:39. Same participants are still here.
BY SERGEANT MCCABE:

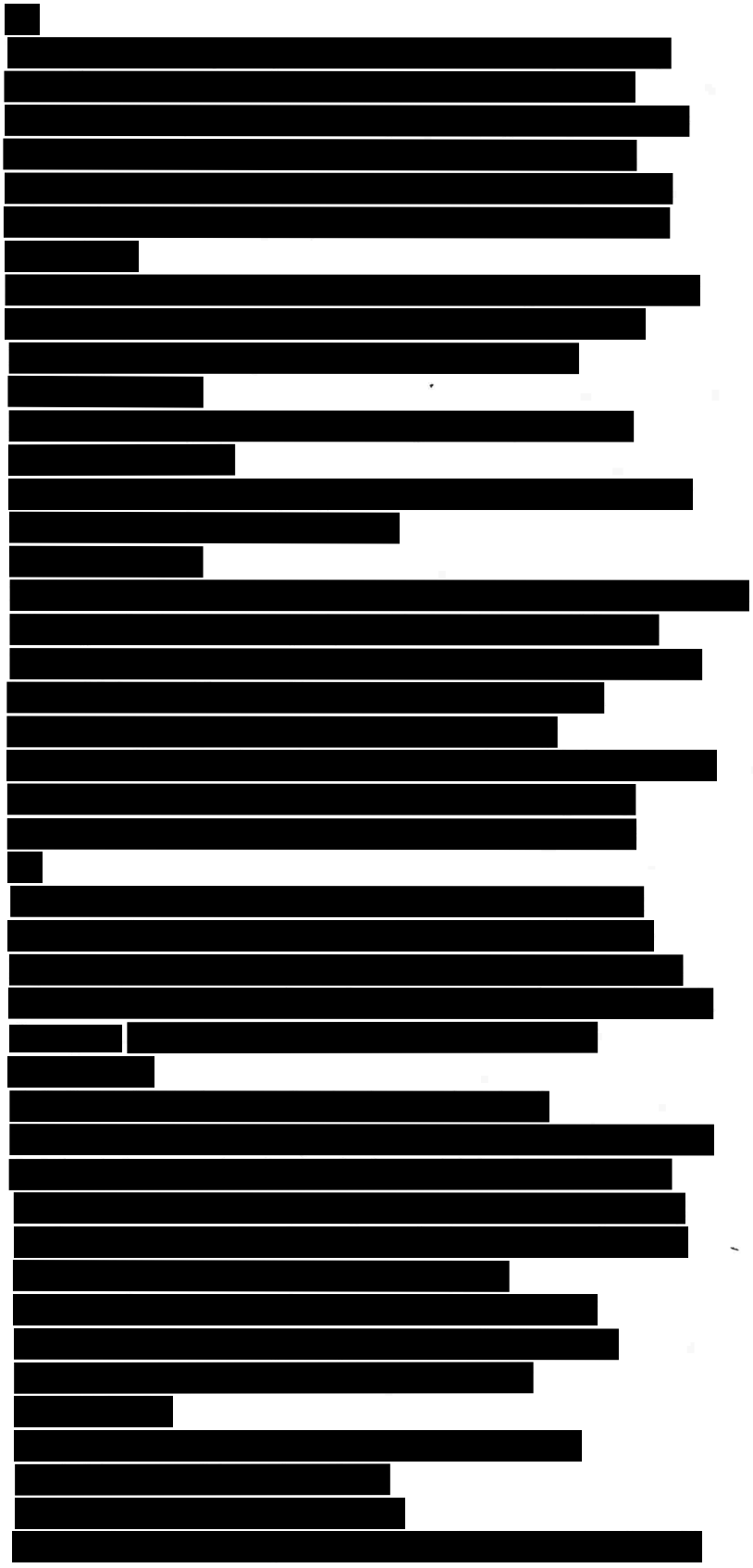
16 Q All right. Aaron, how long have you had that -- the
17 cell phone that you have, how long have you had that
18 cell phone number?
19 A The most current one was from like the end of 2013.
20 BY SERGEANT PATTERSON:
21 Q So you had a different number before that?
22 A Yeah.
23 Q So, when you -- when you were in the unit, you had a
24 whole completely -- when they gave you a phone. Did
67
1 they give you a phone?
2 A Yeah. When they brought me in, they did, yeah.
3 Q Okay. So, they just -- you just took the number that
4 you had. You didn't take your old number and port it
5 over?
6 A No. No.











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7 ATTORNEY KRUPSKI: None at this time.
8 SERGEANT PATTERSON: Okay. Stop the recording.
9 It is now 12:01.
10 ***END INTERVIEW***
88
STATE OF NEW HAMPSHIRE
HILLSBOROUGH, SS.
I, Jan-Robin Brown, a Certified Electronic Court Reporter and Transcriber, CER-415, CET-415, and Notary Public in the State of New Hampshire, certify that I transcribed from an electronic recording the foregoing 87 pages, and that the same is a true and accurate transcript of all the recorded testimony, to the best of my knowledge and belief.
I also certify that I am not related to, nor employed by any of the parties in the above-entitled action, and that I have no financial interest in the same.
This certification applies only to originals and copies that bear my signature and raised seal. Dated March 18, 2018.

_____

Jan-Robin Brown, Audio Transcriber
Notary Public
My Commission Expires July 22, 2020Officer X's statement--On this date and time at this location I interviewed Ofc X…it was recorded…these people were present…reverse garrity or other forms reviewed/signed etc. …this info was developed during the interview

Second Interview--Aaron Brown

THE MANCHESTER POLICE DEPARTMENT
MANCHESTER, NEW HAMPSHIRE

In Re: Internal Investigation of Detective Aaron Brown
INTERVIEW OF DETECTIVE AARON BROWN
March 16, 2018, 11:12 a.m.

This interview took place at the Manchester Police Department
Manchester, New Hampshire
DEPOSITION TRANSCRIPTION VERBATIM
Audio & Video Recording and Transcription Service
Paralegal, Notary Public, Medical Transcription
Jan-Robin Brown, CER-415, CET-415
Certified Electronic Court Reporter & Transcriber
86 Peaslee Hill Road
Weare, NH 03281
Telephone: 603.529.7212
E-mail: AudioDepos@GSINET.net
MEMBER: AMERICAN ASSOCIATION OF ELECTRONIC REPORTERS & TRANSCRIBERS, INC.

IN ATTENDANCE
INTERVIEWER(s): Sergeant Shawn McCabe
Sergeant Tim Patterson
Manchester Police Department
405 Valley Street
Manchester, NH 03103
603.624.6891
INTERVIEWEE: Detective Aaron Brown
3

DISCLAIMER/NOTES:
Deposition Transcription Verbatim was not present for and did not provide any of the recording equipment for the within recorded proceeding. All spelling related to proper names, whether individual or otherwise on the audio provided, has been accomplished by phonetic interpretation of the transcriber.
The use of "um," "uh," false starts, and stutters have been omitted for readability of the transcript.
4
1 SM All right. Today's date is March 16, 2018. The time
2 is 11:12. We're going to conduct a second interview
3 with Aaron Brown. All right, introduce ourselves:

I'm Sergeant McCabe.
TP Sergeant Patterson.
AB Aaron Brown.
JK John Krupski.
KC Ken Chamberlain.
DF Derek Feather.
BY SERGEANT MCCABE:
Q I'm just going to give you a copy of the Garrity.
A Sure.
Q I'll read that for you. Reverse Garrity warning, internal investigation, administrative purpose. This warning is to be used only when a member/employee of the Manchester Police Department is about to be questioned about possible criminal matters, and it has officially been determined that any self-incriminating statements made by the member/employee will not be used against him or her in a criminal prosecution. This is to inform you that as a member/employee of the Manchester Police Department, you are currently the subject of an internal investigation. We wish to question you regarding the investigation which

concerns a matter of inappropriate content on your department issued and paid-for cell phone. This questioning will concern administrative matters relating to the official business of the Manchester Police Department. We're not about to question you for the purpose of instituting a criminal prosecution against you. During the course of this questioning, even if you do disclose information which indicates that you may be guilty of criminal conduct, neither your self-incriminating statements, nor the fruits of any self-incriminating statements you make will be used against you in any criminal legal proceedings. Since this is an administrative investigation and any self-incriminating information you may disclose will not be used against you in a court of law, you're required to answer our questions fully and truthfully. The questions will relate specifically and narrowly to the matter under investigation. If you refuse to answer our questions or if you attempt to provide false, untrue or deliberately erroneous information, or attempt to hamper the investigation in any way, this in of itself is a violation of the rules and regulations of the Manchester Police Department, and

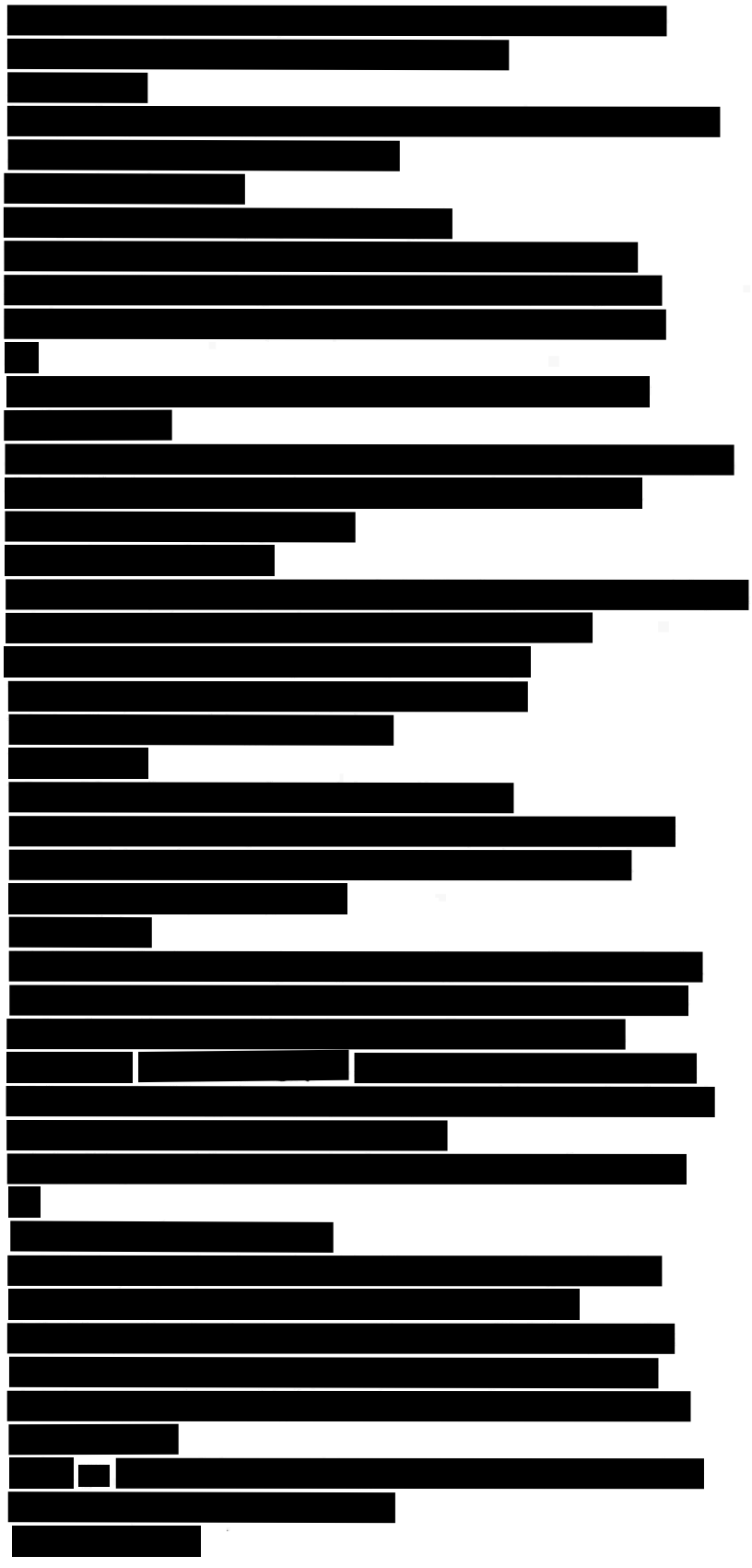
6
1 you will become subject to potential polygraphs,
2 disciplinary penalties up to and including termination
3 from your employment. You will be allowed union
4 representation during this interview. Your union
5 representative may act as your witness but he or she
6 may not represent you in a legal capacity or as
7 counsel.
8 Do you understand?
9 ATTORNEY KRUPSKI: Sergeant, just for the -- for
10 the record, would it be fair and accurate to say that
11 if he doesn't answer truthfully, fully, or attempts to
12 hinder this investigation or deliberately provide
13 false information, he will be subject to termination?
14 SERGEANT MCCABE: Correct.
15 ATTORNEY KRUPSKI: Thank you.
16 SERGEANT MCCABE: You want to just date and sign
17 it?
18 THE WITNESS: Sure.
19 ATTORNEY KRUPSKI: Time?
20 SERGEANT PATTERSON: What's that? The time --
21 ATTORNEY KRUPSKI: The time? Yep.
22 SERGEANT PATTERSON: -- is 11:15. And today is
23 the 16th.
24 ATTORNEY KRUPSKI: Witnessed right there.
7
1 SERGEANT MCCABE: Got a copy for you guys, now.
2 INTERVIEW BY SERGEANT PATTERSON:
3 Q All right, Aaron, thanks for coming in.
4 A Yep.
5 Q So, we're going to start by talking about your cell
6 phone. This was a department-issued phone, correct?
7 A Yep.
8 Q Okay. Who paid for it? The phone itself, as in the
9 bill for the phone?
10 A Oh, I don't know. It was issued through Special
11 Enforcement.
12 Q Okay, so -- Okay, so the -- So, the department paid
13 for the phone, paid the bill for the phone. Did you
14 use the phone for personal and business use?
15 A Yes.
16 Q Okay. Did you pay any portion of the bill?
17 A No.
18 Q So, there are certain phones that are in the
19 department that some people pay for their personal use
20 on the phone. So, you don't pay for personal use on

21 the phone?
22 A No.
23 Q Okay. All right. What was the phone number?
24 A [redacted].
8
1 Q Okay. And is this the phone?
2 A Yeah. Yes.
3 Q All right. All right. What was your assignment, or
4 what is your assignment?
5 A I'm assigned to Special Enforcement, Division of
6 Detectives.
7 Q Okay. What shift do you work?
8 A I work generally 3:00 to 11:30.
9 Q 3:00 to 11:30?

[redacted]

[redacted]

14 Q Okay. Want to talk about some others. Do you think
15 you're a racist?
16 A No.
17 Q Not at all?
18 A I might be prejudiced but definitely not racist.
19 Q "Prejudiced," in what way?
20 A I think I like to like either mock or make fun of like
21 the stereotypical like norms for like other races.
22 Q Okay. Such as?
23 A You know, like African-Americans liking fried chicken,
24 or something like that.
24
1 Q Okay. And would you say this stuff out loud, or is
2 this just something you would talk in your head?
3 A No. This is like, you know, banter between, you know,
4 my wife and I or, you know, whatever.
5 Q What's a parking ticket?
6 A A black -- black person.
7 Q "A black person." You refer to black people as
8 parking tickets? I'm sorry. Too many books. So, on
9 -- so, this is on May 10th at 3:53 in the afternoon.



19 black guy do something, how are we not going to sit
20 there and say -- how are we going to know and be
21 assured that if, you know, if they're both doing
22 something that's equally wrong, that you're not going
23 to just say, "You know what? I don't like black
24 people. I'm going to pick a black person," and go
32
1 after him as opposed to -- You know what I mean?
2 A I do. And again, I would refer to the activity. If
3 you pull those numbers, it's not going to be close as
4 far as who I would arrest, one versus the other. I
5 mean, I do my -- the way I do my job is very simple:
6 It's first come, first serve.
7 Q Okay.
8 A Who's the first guy that steps up and does something
9 they're not supposed to do, and I see it, that's the
10 guy I'm going to get.
11 Q Okay. It has nothing to do with race. So, you've
12 never ever let race influence the activity that you
13 did? You never ever let that bias and that
14 prejudicial bent -- or "bend" ever influence what you
15 did on the job?
16 A Not in the least.
17 Q Okay.
18 A Not in the least. It's whoever steps up first and
19 does something they're not supposed to.
20 Q Okay. You participated in search warrants with SED.
21 How many would you say you've been involved in?
22 A Oh, jeez. I couldn't even count, been so busy.
23 Q How long have you been in the unit?
24 A Four years.
33
1 Q "Four years."
2 A Almost five.
3 Q So, was it 2013?
4 A '13.
5 Q "13," all right. So, 2013 til now, you've been
6 involved in -- make a number up.
7 A I don't know what to say. Say we did -- trying to
8 think back of the yearly stats they would talk about.
9 I don't know. Say we did, on the low end, 80 a year.
10 So, you're talking --
11 Q It's a lot.
12 A Yeah, 300?
13 Q Okay.
14 A On the short end, I would say.

23 A Not in the least.
24 Q So, you don't think that you've allowed, you know --
30
1 Obviously what you're personal feelings are, you
2 haven't allowed that to affect your job performance --
3 A No, not in the least.
4 Q -- in any way, shape or form?
5 A Absolutely.
6 BY SERGEANT MCCABE:
7 Q But you indicate that you're stalking a parking
8 ticket.
9 A Essentially, what I'm saying is I'm out and we must
10 have been looking at something, either following
11 somebody or watching somebody do something. That's
12 what I'm talking about.
13 Q Well, it doesn't say it in the text. It just says
14 that you're stalking it like the jungle cat you are.
15 A Correct.
16 Q "Stalking the parking ticket," and parking ticket is a
17 black fella.
18 A Okay, so in that instance, we happen to be stalking a
19 black person for whatever the activity he was doing.
20 BY SERGEANT PATTERSON:
21 Q So, how can we as an agency ever be sure that you're
22 not going to go above and beyond when it comes to a
23 minority?
24 A What do you mean "above and beyond"?
31
1 Q So, a disproportionate contact or doing something
2 that's based just on their race and not because of
3 their activity of what they're doing?
4 A Well, there's a lot of catch-alls to get a -- like to
5 keep that in check, like checks and balances. So, you
6 have to actually see them doing something. You just
7 can't like pick somebody out of a hat and then
8 arbitrarily put a case on them. You're going to have
9 to go through the whole legal process at some point.
10 There's checks and balances all over the place.
11 You're going to get -- end up doing something like
12 that.
13 Q Okay. But you could then sit there and say, "Fine.
14 Yeah, there's checks and balances," but that's not
15 what -- I'm not talking about the actual case; I'm
16 talking about who gets a case put on them.
17 A Oh.
18 Q Like if you see a white guy do something and you see a

A Yeah, it's written there, but I'm trying to think what else I would have been saying, like the bag off him" or "slap" something -- I don't know -- I don't know why I would put "black," talking about him. He's not -- he's not a black kid. You look at him, you wouldn't think he's black for one second.
Q But he's a mixed race, bilateral of some sort?
A I would assume, yeah.
Q Okay. Well, either he is or he isn't. I mean, if he's --
A I don't know. I don't know what -- you know, I don't know what their -- their ethnicities would be.
Q So, -- so, "slap the black off of him" is just -- has nothing to do with a mixed race; it has nothing to do with --
A No, I -- I don't know why I would write "slap the black off him." I got to wonder if I was supposed to "slap the bag off him," or something like that. But I don't know why I would write "black."
Q Okay. But taken in context with the rest of these, do you see why we have a concern with this?
A Oh, absolutely. Absolutely.
Q That it appears that you have some definite racist,

29

prejudicial leanings, and that we have concerns with that?
A Sure.
Q Okay. And the fact that, you know, -- Do you feel that this is proper or -- or good for somebody that's working in our position, in our field, to have this kind of --
A Well, I guess what -- what my point of view is: We're all allowed to have our views on things. Now, I don't go out and specifically target, you know, people of minority, and I think all my activity would supposed that, if you look at all that sort of stuff.
Q Okay. So, if we did a run on all of your arrests, --
A Absolutely.
Q -- we wouldn't find a high proportion of minority arrests --
A No.
Q -- or dealings with --
A Not even close.
Q -- or assaults or --
A Nope.
Q -- anything of that nature?

6 Q Okay. There's a kid named [redacted] that works -- that
7 lives in your neighborhood.
8 A Yes.
9 Q What race is he?
10 A Yep. I think he's white.
11 Q He's a white kid?
12 A Looks white. Like white skinned.
13 Q So, can you explain this then? All right, so this is
14 October 2nd, of 17508 in the evening. "Next update,
15 just heard [redacted] -- This is your wife. "Just heard
16 [redacted] make [redacted] pinkie promise to call a female dog a
17 female dog and not a bitch. I'm guessing -- I'm
18 guessing we can thank [redacted] for that one, too." "Yup,
19 I suspect that's the case, too. Little shitface.
20 Should go down there and slap the black off him."
21 What does that refer to?
22 A Straighten him out.
23 Q "Slap the black off him"?
24 A Hmm?
27
1 Q "Slap the black off him," means to straighten him out?
2 A Well, yeah, he's causing problems with my kids.
3 Q Okay.
4 A Which is, like for him, it's constant.
5 Q Okay. I mean, I get -- I get you want to straighten
6 him out but what -- I'm not concerned about the
7 parenting. I applaud you for being a parent and
8 stepping up in that way, but the phrase, "Slap the
9 black off him," --
10 BY SERGEANT MCCABE:
11 Q How do you explain the "black"? Where's the black
12 come into play? What does that refer to? If he's
13 white --
14 A He is. Yeah, he's -- He is white. His dad's white.
15 His mom is -- She's not black. I don't know if she's
16 like Spanish or something, but definitely not black.
17 Q So is he mixed race?
18 A He might - Yeah, he could be. Could be mixed race.
19 Q So, what does the term "slap the black off of him"
20 mean, then? If you're saying he's not black, why do
21 you -- where's the black come into play?
22 A I don't know. I don't know why I would write "slap
23 the black off of him."
24 BY SERGEANT PATTERSON:
28
1 Q But you did it. It's right here.

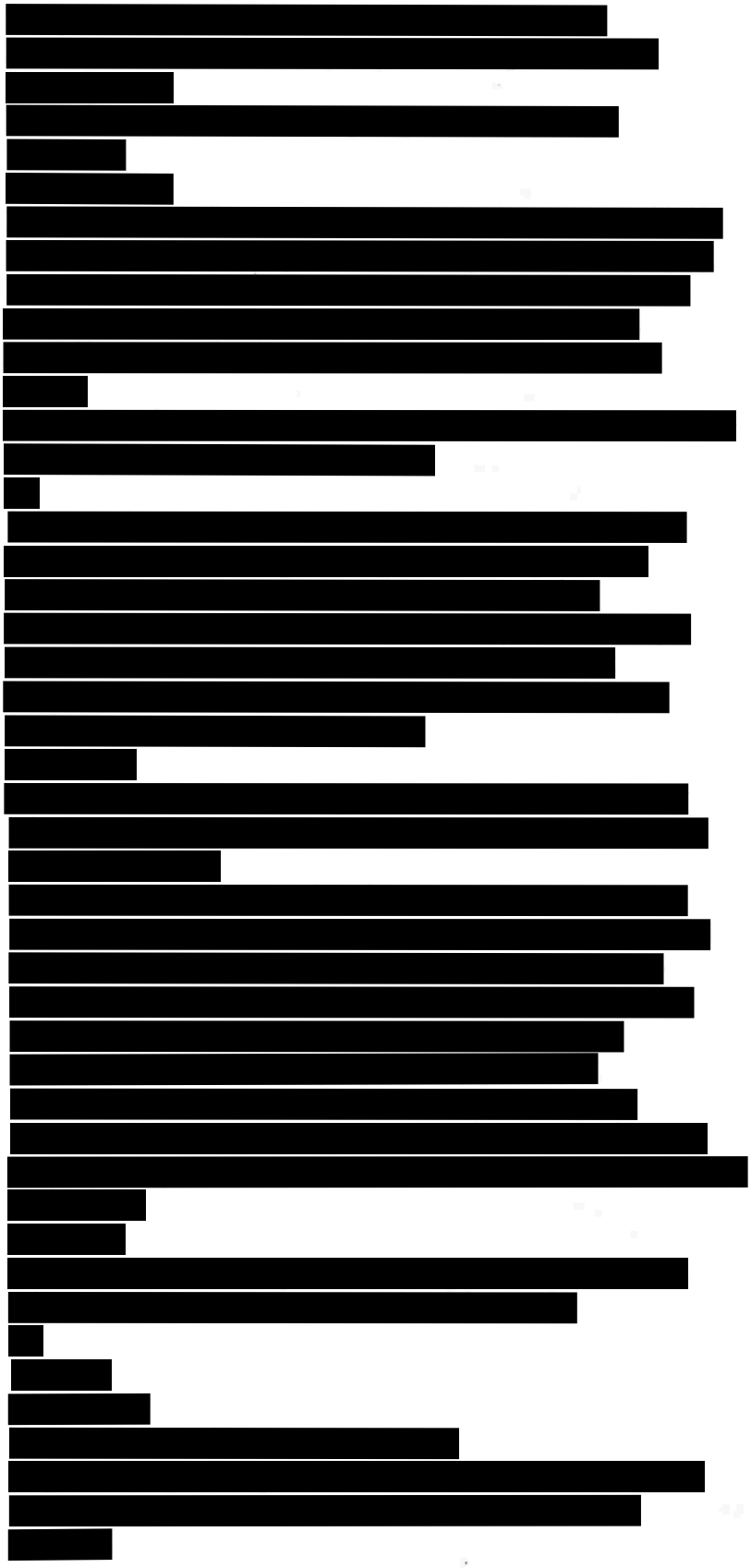
So, it says here, talking about "Coming to baseball tonight?" "Nope. Tied up. Road trip to Dorchester, it's looking like." "Oh, Jesus, that's a bit out of the way." This is again with your wife. "Little bit. LOL. Joint case with the FBI. 50/50 at the moment on if we have to go or not." "Gotcha. Let me know when you know. You know this stuff makes me a Nervous Nellie." "Yes, I know, it's all good because I got this new fancy gun. Take out parking tickets no problem." And then right after that, FYI parking tickets = black fella." So, you use that term "parking ticket" in a negative connotation. True?
A Correct.
Q About black people. So you do have prejudice leanings?

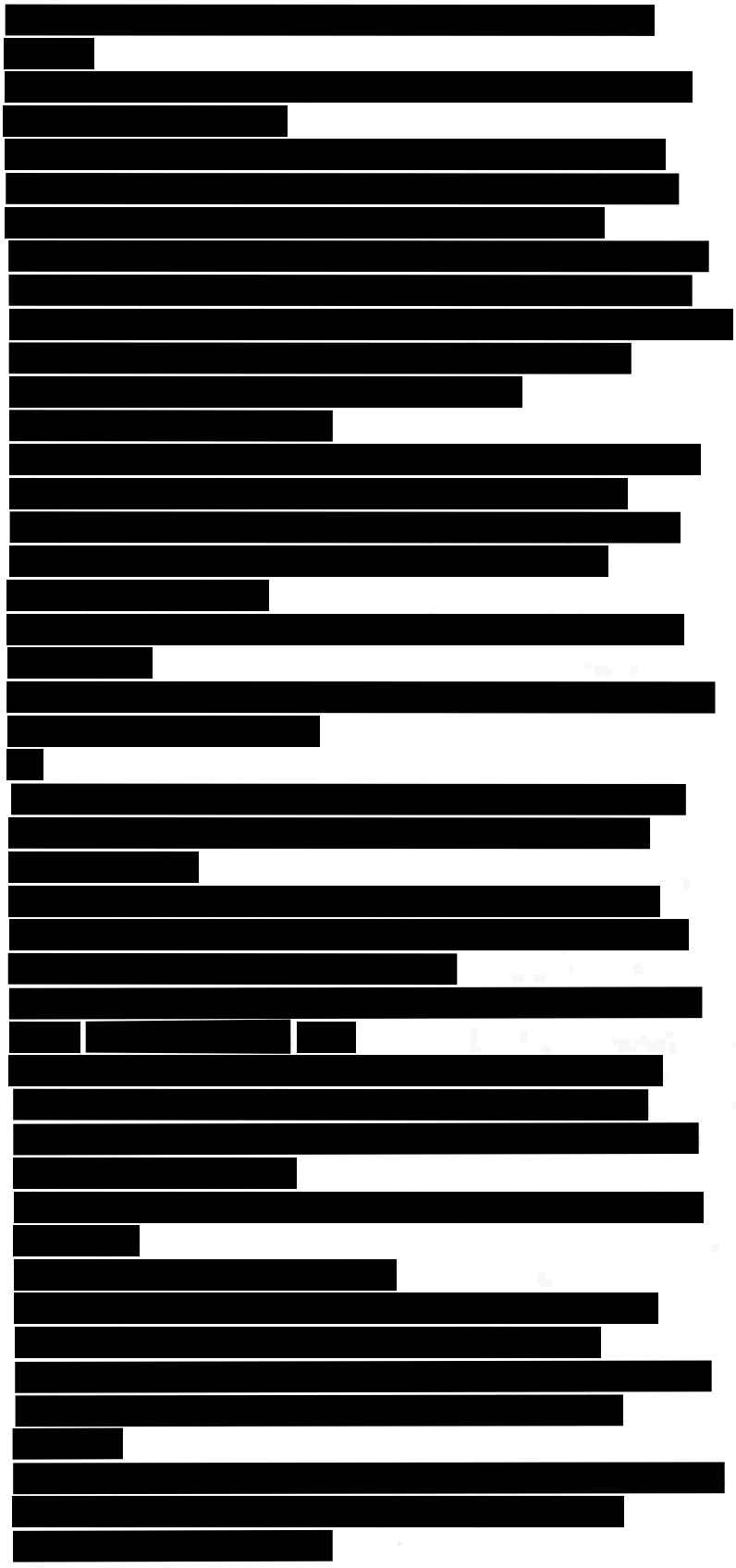
A Yes. That's what I said, "prejudiced."
Q Okay. And there's another one where you mention -- talking about parking tickets again. This is on the 22nd of August of 8:40 in the evening. Your wife says, "What are you doing at work tonight?" You say, "The usual. Currently putting the stalk on a parking ticket, like the big jungle cat that I am." She says, "I wish I followed that, though, but I have no idea what you mean." And you say, "Parking ticket = black fella, and I'm stalking him like a jungle cat." So, it appears to us, in reading this, that you have a problem with black people.
A I wouldn't say I have a problem with black people.
Q You don't?
A No, not in the least.
Q You just call them parking tickets, because why? What's the connotation of a parking ticket? What's the significance of the parking ticket?
A I don't really know. It's just a term that I've heard used before.
Q Where have you heard that?
A In and amongst other law enforcement realms.
Q Because I've got to be honest with you, I've never ever heard of parking ticket used for a black fella.

A Okay.
Q Not that I would have, but I've been in law enforcement for 20 years and I've never heard that. So, you don't have a problem with black people?
A No.

9 people, and talking about using lethal force on black
10 people?
11 A If it occurred, yeah, absolutely. But that's my point
12 to her.
13 Q But just black people. My point is you're going to
14 Dorchester. Dorchester is not a hundred percent
15 black. There's a bunch of Irish people running around
16 down there.
17 A Sure, yeah.
18 Q There's a bunch of Hispanics that are running around
19 down there. There's a bunch of every other race
20 that's running around down there.
21 A Right.
22 Q Having been to Dorchester, right? It's not a hundred
23 percent black. So, why would you just say, "I got
24 this new fancy gun" and "take out parking tickets no
60
1 problem." Why not, "Don't worry, honey, I'll be able
2 to protect myself." "Don't worry, honey, we've got
3 this. All the guys here are good." "Don't worry,
4 honey, we're all set." You specifically use the
5 phrase "parking ticket no problem." And that it's a
6 "black fella." Somebody on the outside looks at this
7 and reviews this and says, "Hmm, that looks like
8 racial profiling to me." This is the definition of
9 racial profiling, talking about a specific race, and
10 singling out that specific race. Correct?
11 A I suppose.
12 SERGEANT MCCABE: It's a yes or no question.
13 Q So, now you're racially profiling? Is that what
14 you're telling me?
15 A No. I don't racially profile people.
16 Q Then why would you just talk about parking tickets,
17 black people, and not talk every other person that you
18 potentially could encounter? How do you know who
19 you're going to encounter on the way down to
20 Dorchester?
21 A The targets that we were dealing with were African-
22 American people.
23 Q Okay. And those are the only people that potentially
24 you could have a problem with down there?
61
1 A Given our course of conduct we were going to be doing
2 there, that was essentially who we were going to be
3 dealing with.
4 Q So, --

13 "I'm going to Dorchester and it'll take white people
14 out just fine," or "It'll take anybody out just fine,"
15 or "I can defend myself because I have this fancy new
16 gun." You specifically say, "FYI parking tickets =
17 black fella." "My new gun will take out parking
18 tickets, easy." "No problem." Sorry. "Take out
19 parking tickets no problem." As an outsider looking
20 at this, what do you think they're going to make of
21 that?
22 A They can make whatever they want of it; probably say
23 like, you know, "Why would you say something like
24 that," but.
58
1 Q Why would you say something like that?
2 A I've already explained that to you.
3 Q Because you're a tough guy and you want to act tough
4 in front of your wife?
5 A Correct.
6 Q While singling out black people with a derogatory
7 term, "parking tickets." I mean, that's not a -- the
8 parking ticket is not a -- you're not using that as a
9 term of endearment. You're not using that as -- in a
10 positive light, correct?
11 A Well, essentially what I'm saying is "Don't worry."
12 Q No. I'm asking you about parking tickets,
13 specifically.
14 A Specifically, yes. "Don't worry. If someone
15 approaches me," --
16 Q Is that -- is that -- Is "parking ticket" a term of
17 endearment? Is it something --
18 A Oh, no.
19 Q -- you would say in a positive manner? So, it's not a
20 positive thing to say?
21 A It's -- I don't know what the word would be. Not like
22 a -- not like a [redacted] But, I don't know, like --
23 I don't know. I feel it will come to me.
24 Q But it's not -- You're not saying that to be -- to
59
1 say, "Hey, black people are great," right?
2 A Correct.
3 Q That's not what you're saying. You're calling them a
4 parking ticket. It's a very derogatory term, wouldn't
5 you agree?
6 A It's derogatory, sure.
7 Q And that's what you're using as a black person. So,
8 you're using a derogatory term to describe black





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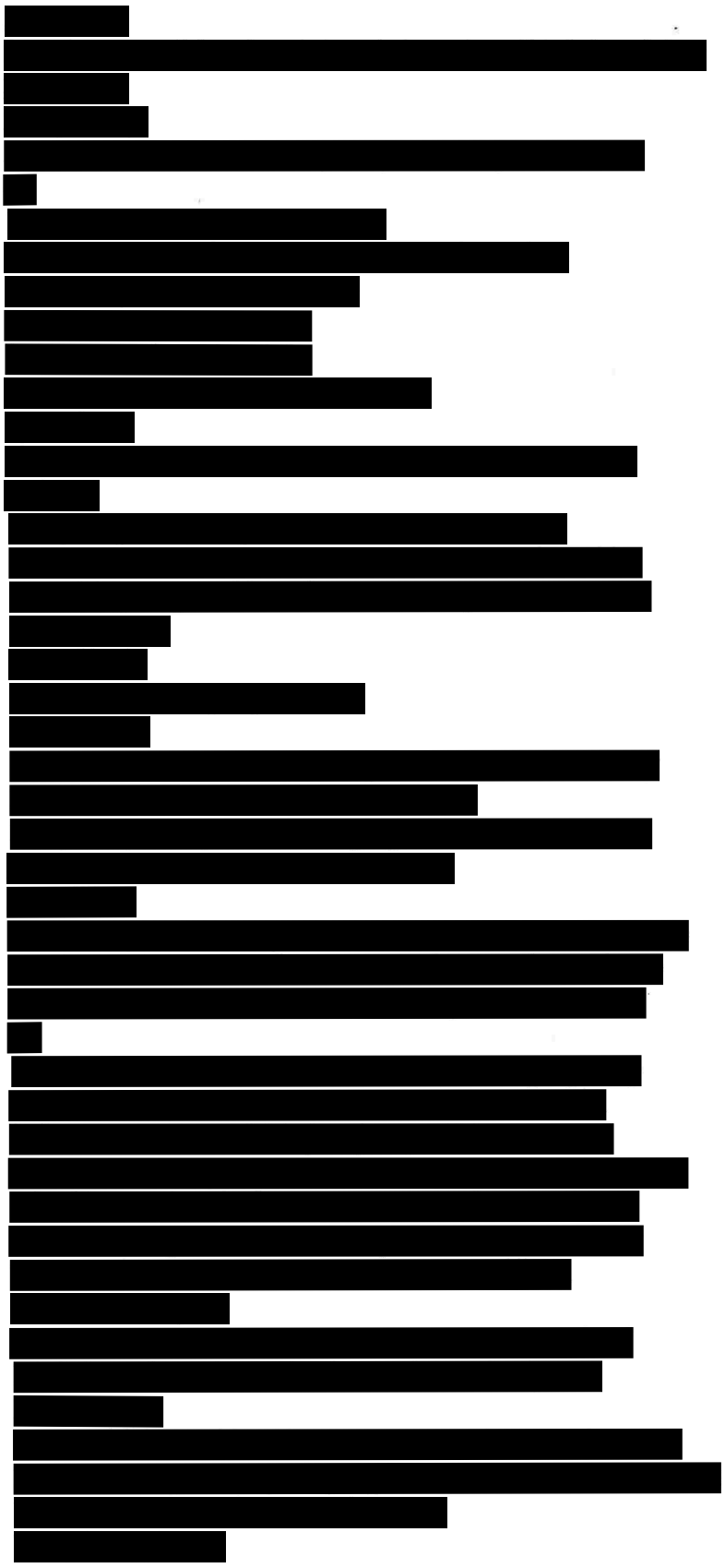

[redacted]

[redacted]

OFF/ON THE RECORD
SERGEANT MCCABE: All right.
SERGEANT PATTERSON: You good?
SERGEANT MCCABE: Yep.
SERGEANT PATTERSON: All right. All right, Aaron, we just have a few more questions for you. All right.
BY SERGEANT PATTERSON:
Q All right, so talking about the "parking ticket," again. Why would you call it a parking ticket? Why would you call a black fellow a parking ticket? What's the significance of "parking ticket"?
A I really don't know. It's just like a term that I had

53

heard, like a while back.
Q Heard from where?
A I don't recall specifically where. I was like just BS'ing with somebody. I can't remember who it was. But they were talking about --
Q Well, you said law enforcement sources.
A Yeah.
Q So, who was it? Somebody in this department? Was it somebody in another department.
A I don't recall. It could have been someone here. It could have been someone outside. It was just basically a bunch of -- bunch of us hanging around, shooting the shit.
Q So, a bunch of guys shooting the shit, talking about a parking ticket. Why "parking ticket"? I've heard of other phrases that were used, but never parking ticket.
A Yeah, yeah, no --
Q Why parking ticket?
A Same -- same way. I don't know. It's just another

21 phrase that I had heard.
22 Q And then you picked up and used?
23 A Yeah.
24 Q So, you thought it was applicable because you use it.
54
1 So, why -- why would you use that term?
2 A I don't know. Just like figured, you know, that was
3 the, you know, the newest thing that I heard. You
4 know, I don't -- I'm not going to use, you know, other
5 terms, really. It's just the easiest way to say it.
6 BY SERGEANT MCCABE:
7 Q Is it because everyone hates parking tickets? No one
8 likes to get a parking ticket? Well, you used the
9 phrase; I don't. I don't even -- first time I heard
10 of it was when we saw your texts.
11 A Sure. Yeah.
12 Q "Sure," what?
13 A What do you mean? I'm sorry. I didn't follow you.
14 Q Everyone hates to get parking tickets, so is that in
15 reference to everyone hates black people?
16 A Oh, yeah, I've heard that before. I just figured --
17 Q Well, you've heard it, but you use it.
18 A I just thought --
19 Q So, explain why you use it, if you heard it. Why
20 would you use that phrase if you say that you're not a
21 racist?
22 A I'm not a racist. I've already explained to you that
23 I do have like prejudices just like anyone else does.
24 Q So, when you talk about your gun, and being in
55
1 Dorchester, is Dorchester a hundred percent black2
orientated city, or are there other folks that live
3 there?
4 A In Dorchester?
5 Q Um hmm.
6 A I could imagine there's all types of folks that live
7 there.
8 Q Okay. So, why would you not say, in speaking with
9 your wife, that if somebody, no matter who it is, came
10 to approach you or whatnot, you would use your new
11 gun, as opposed to just referencing out black people
12 as parking tickets, with your new gun?
13 A I think we were heading down to -- the target
14 investigation -- I don't even remember who it was --
15 but we were heading down to watch them do a transfer
16 of, you know, drugs or whatever. These were black

17 folks we were dealing with.
18 Q So, you're making a reference to black people as
19 parking tickets because everyone hates parking
20 tickets, but you say you're not a racist; that you
21 have prejudices?
22 A Right. Correct.
23 Q So, what's -- explain the difference to me.
24 A As far as what? Prejudice --
56
1 Q Prejudiced and a racist.
2 A As I understand it, prejudice is just that you have
3 like a notion about whatever. Whereas racism is like
4 -- like a belief or like a way of -- I don't know --
5 like a way of life or something like -- Does that make
6 sense? Like you have a belief that translates into
7 like an actual way of life or something like that.
8 Q No, it doesn't make sense. Ultimately, what you're
9 saying is that you're going to shoot black people with
10 your new gun. That's what you say in your text.
11 A Yeah. My wife says, "I'm concerned about your going
12 down there." And I, again, bullshitting, being a
13 tough guy, say that.
14 BY SERGEANT PATTERSON:
15 Q That you're going to shoot a black person?
16 A Shoot? Yeah, if a black person approached me, or any
17 person.
18 Q No, that's not what it says. It says, "New gun will
19 take out parking ticket easy."
20 BY SERGEANT MCCABE:
21 Q You didn't say any person; you said "parking ticket."
22 "Parking ticket = black fella." That's what you said.
23 Those are your words. Those aren't our words.
24 A I understand.
57
1 Q Those are your words.
2 A Yup.
3 Q But you're not a racist. That's what you're trying to
4 portray, and sit here -- You're prejudiced, but you're
5 saying that you're going to shoot a black fella, aka a
6 parking ticket.
7 SERGEANT PATTERSON: You're wife, "Gotcha. Let
8 me know when you know. You know this stuff makes me a
9 Nervous Nellie." "Yes, I know. It's all good.
10 Besides, I got this new fancy gun. Take out parking
11 tickets, no problem. FYI parking tickets = black
12 fella." "Thanks for the clarification." Not just,

1 are they going to think?
2 A Well, if I'm writing that -- that specifically, I was
3 actually doing something at that point in time. But
4 it could have been very well that I could have been
5 like stalking somebody else.
6 BY SERGEANT MCCABE:
7 Q Would you write that in a 101?
8 A What's that?
9 Q That you were "stalking him like a jungle cat."
10 Stalking a parking ticket.
11 A No. That's a bunch of bullshit. I've already told
12 you that. I'm bullshitting -- I'm bullshitting with
13 my wife.
14 Q How is it bullshit? It's in your text. It's in a
15 text.
16 A I know that.
17 Q How is it bullshit?
18 A I'm bullshitting with my wife.
19 BY SERGEANT PATTERSON:
20 Q So, you're using a derogatory term in a text, talking
21 about what you're -- How do we know that this doesn't
22 bleed over into the rest of your work? How can we be
23 sure of that?
24 A You can go check my numbers. Go pull all of the
64
1 arrest reports, all the other numbers. I think
2 percentages is going to be very, very low as far as,
3 you know, minority arrests to white people arrests.
4 Q So, you just single out white people to arrest?
5 A No. That's my point. When you talk about first come,
6 first serve, it's whoever come across my radar is who
7 I deal with. I don't sit there and say, "Well, I
8 could go get that one, but this one is better." You
9 know what I mean? It's whoever comes first.
10 Q But in all of these text messages that I read here, I
11 never once saw something that said, "Hey, we're out
12 looking at white people." "Hey, we're out looking at
13 Hispanic people." "Hey, we're out looking at Chinese
14 people." There is no other minority that's mentioned
15 anywhere in these text messages.
16 SERGEANT MCCABE: 18,000 texts.
17 Q 758, in case you wanted to know how many there were.
18 A What's that?
19 Q Between April and February. How many text messages
20 you sent back and forth to your wife.
21 A Oh, oh, okay.

A But I'm not -- Yeah, I'm not saying we couldn't deal with somebody else, but --
BY SERGEANT MCCABE:
Q But you weren't saying your targets of any investigation; you were just saying in general terms, "parking ticket = black fellas." That's what you said.
A Okay, well, I didn't get specific and say, "Well, honey, the target is black -- If the target's a -- You know what I mean?
Q I understand. I can read your text. I understand what you said.
A Okay.
Q So, you say, "First come, first serve" as far as who you arrest and who you encounter, but when it comes to mention of your firearm, it doesn't say anything about first come, first serve. It just -- it mentions black fellas.
A Okay.
Q It's not okay. I'm not asking you an okay question.

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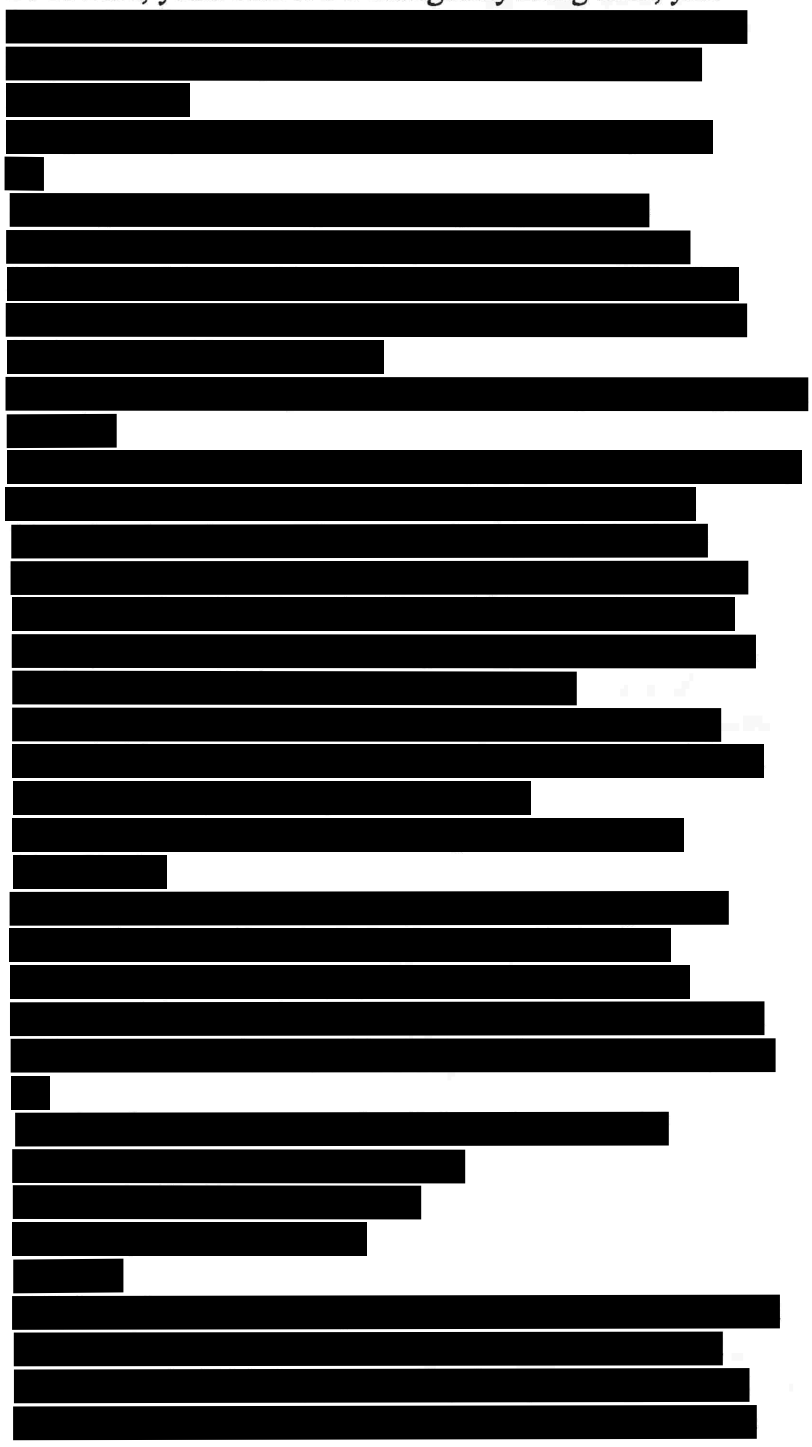
So, why -- why is that addressed in your text? If it's a first come, first serve basis, in your mind, why do you just single out the black fellas?
A In this instance, we weren't going to arrest anybody; we were just going down to facilitate --
Q I'm not talking about arresting anyone; I'm just talking in general terms.
A I don't understand what you're asking.
Q Because you spoke in general terms as far as if anyone -- You didn't say if anyone gave you any problem. You just said, "New gun." "Parking tickets = black fella." "Not to worry." So, are you insinuating that -- that you're going to encounter a black person, specifically?
A Essentially, we -- my -- my -- my anticipation would be, yeah, we would be dealing with African-Americans because they were involved in the investigation that was going on.
BY SERGEANT PATTERSON:
Q Well, how about this one where you talk about stalking him like a jungle cat.
A Yeah.
Q Stalking your parking ticket. Same thing. Somebody on the outside reviews this and looks at this, what

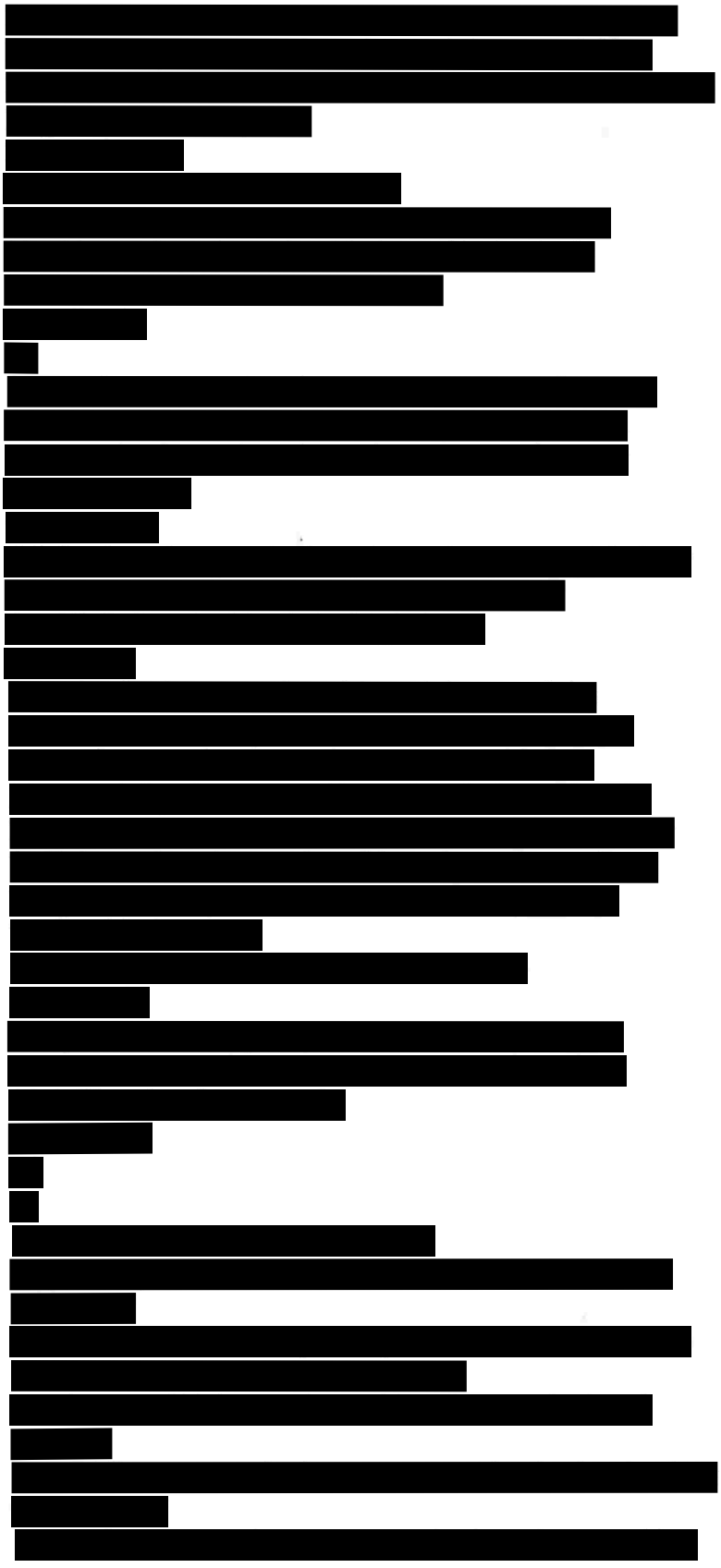
63

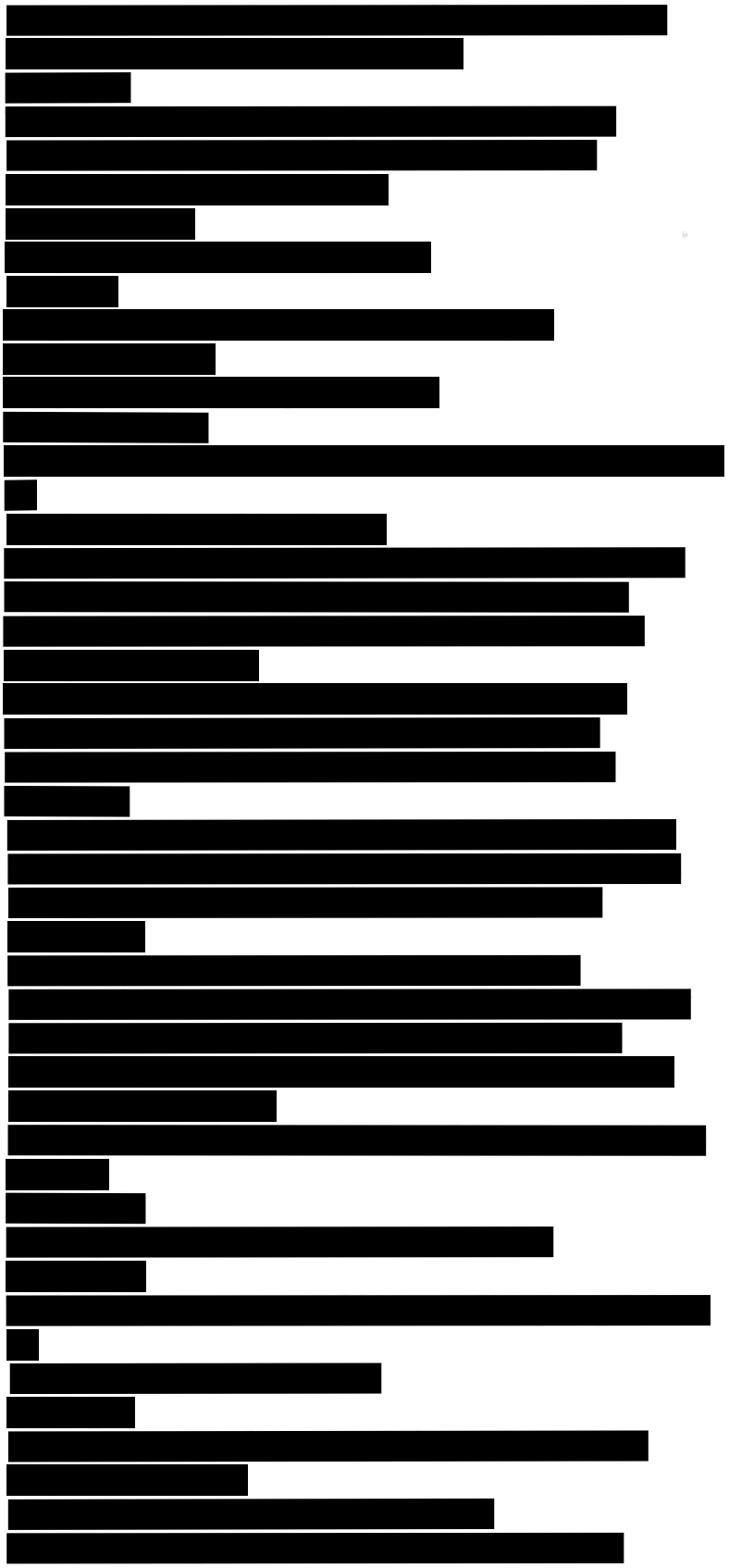
Q Not once do you mention any other race, except for "parking ticket = black fella." An outside person would look at this and say you're racially profiling black people. What do you have to say to that?
A I'm not a racist, and I don't profile anybody. I profile criminal activity irregardless of the person, male, female, black, white, otherwise.
Q Yet, you talk about it?
A I do, yup.
Q And that's the way you feel?
A I've had prejudices. I've admitted that.
Q Okay. Do you remember when you took your oath of office to come here? Remember what you said?
A Yeah. I can't say specifically, but.
Q I'll refresh it for you. Line two -- Well, line one says you'll faithfully and impartially enforce and uphold the constitution of the United States, the laws of the State of New Hampshire, and the Code of Ordinances for the City of Manchester. Line two states that you will never act officiously or permit personal feelings, prejudices, political beliefs, aspirations, animosities, or friendships to influence your decisions.
A Okay.
Q "Prejudices." You're acknowledging that you have prejudices against black people.
A But where have I -- where has that influenced my decisions or my actions?
Q How do we know that? How do we know that?
A I don't understand how --
Q So, what I'm trying to say is you're talking about black people here in a very negative and derogatory manner. How are we, the department, to know that you're not acting officiously, that you're not acting with a prejudice against black people? Because this is the only race that you mention in your text messages.
A Okay. But the work I've done, which is tangible, you can go and touch it and read it and look at it. It won't suggest that. Not to mention there's, you know, if you're a patrolman, how many other people are with you when you're taking official action, and I've had a partner for the better of, well, almost five years now, who's with me when I conduct these investigations

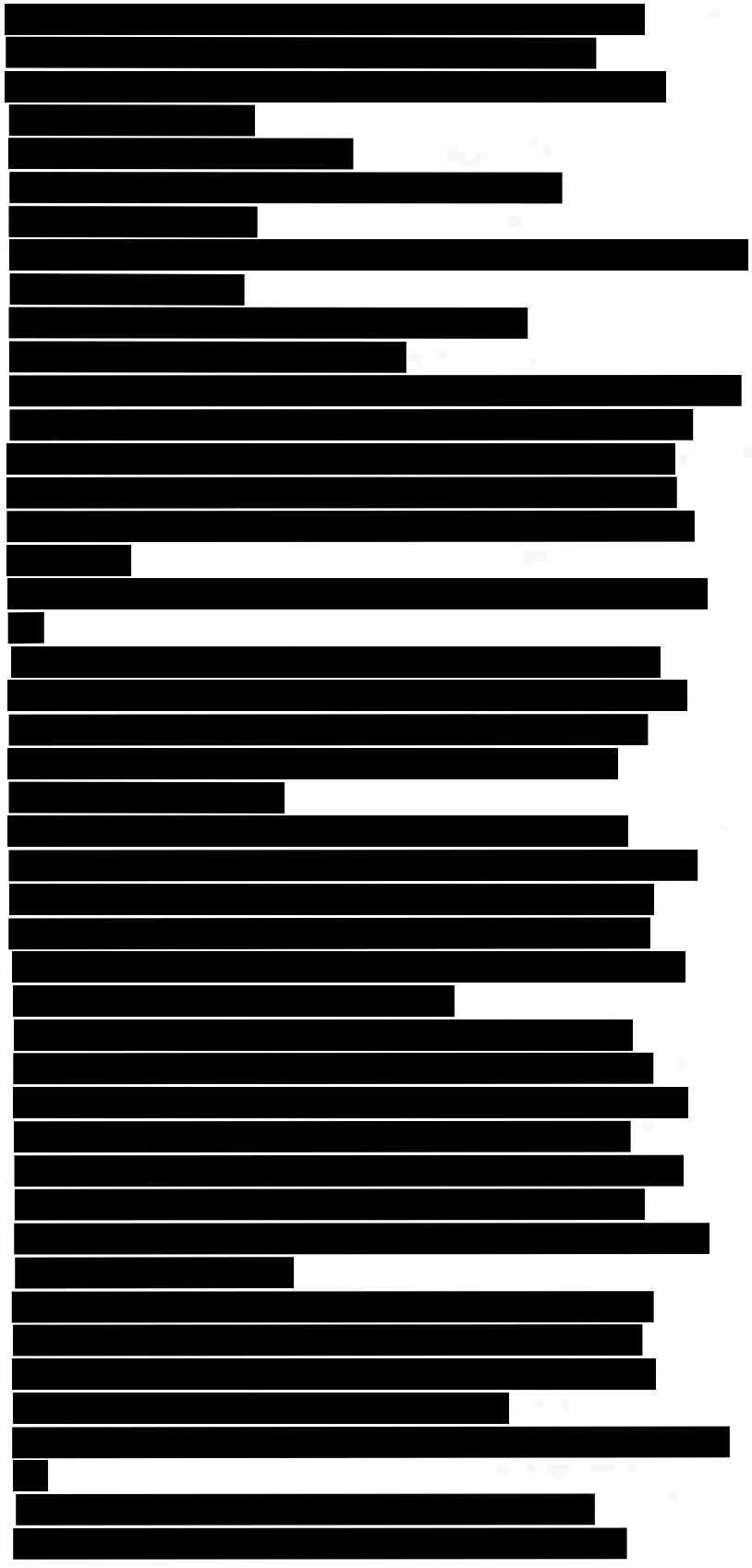
18 and make arrests.
19 Q Do you talk about this with your partner?
20 A As far as what, like --
21 Q Parking tickets.
22 A I can't recall like specifically anything, no.
23 Q So, you've never mentioned the word parking ticket,
24 even though you've heard it in a law enforcement
67
1 source? It was a law enforcement source that you got
2 it from, that you can't recall who the law enforcement
3 source was?
4 A I don't recall ever specifically sitting with anybody
5 and having a long conversation about these sorts of
6 things.
7 Q Doesn't have to be long. Did you ever use the word
8 "parking ticket" with your partners?
9 A I may have. I can't answer that yes or no, because I
10 can't recall anything in specifics.
11 Q Yet, you'll write in two separate occasions in a text
12 to your wife because you're trying to act tough?
13 A Correct.
14 Q But you'd never use that with your partners, the guys
15 that you're sitting in a car with for eight hours at a
16 whack?
17 A Yeah.
18 BY SERGEANT MCCABE:
19 Q When you heard the term "parking ticket," and you
20 found out what it meant, did you think it was a racist
21 or a derogatory comment towards black people?
22 A Yeah. I just thought it was another slang term.
23 Q So, you thought it was a racist remark, or derogatory,
24 but you used it back and forth with your wife?
68
1 A I didn't think it was racist, per se. It was just
2 another -- another like slang term.
3 Q "Slang" for what?
4 A What do you mean?
5 Q Slang for what? Meaning a race?
6 A Just another slang term for an African-American
7 person.
8 Q You just said that you thought it was a racist remark
9 and --
10 A It's not -- it's not a racist remark; it's just a
11 slang term, just like any of the other ones you hear.
12 BY SERGEANT PATTERSON:
13 Q But it's not a positive remark?

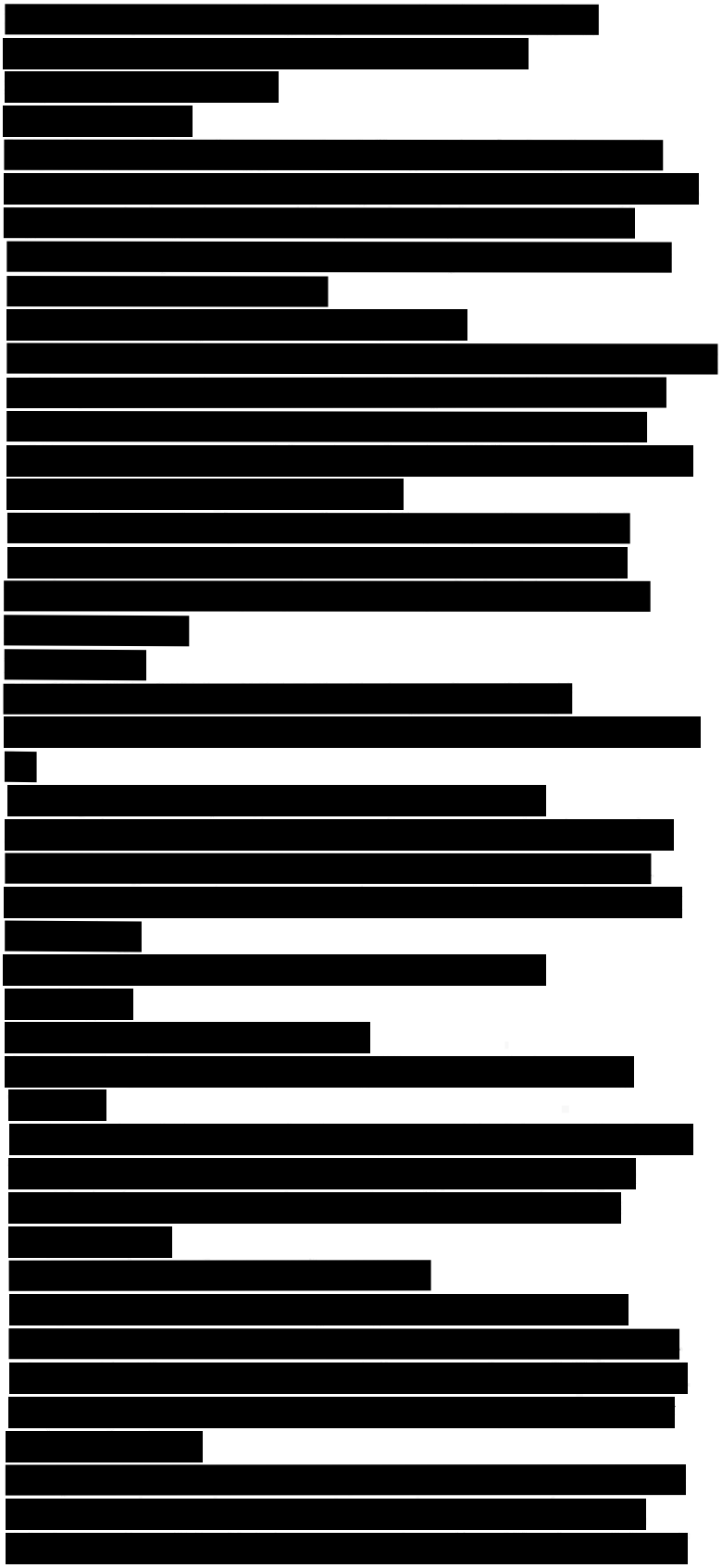
A Well, I wouldn't consider like a slang term to be a positive thing.
Q But you're using it. You had said you're using it in a derogatory manner, in a negative manner.
A Well, it's not respectful.
Q Did you or did you not say it was a derogatory term?
A Sure, yeah. Just it's a derogatory slang term, yes.











[redacted]

14 Q You say a lot of things are bullshit. And basically
15 that everything that we've spoken about has nothing to

16 do with you. You're not a racist; you're prejudiced.
17 You don't speak anywhere in those 18,000 text messages
18 about anybody else except parking tickets and black
19 people. So you're investigating it, so how does it
20 look to you? When everyone knows that everyone hates
21 to get a parking ticket. So, is that what you mean,
22 everyone hates black people? How do you look at it,
23 as the investigator?
24 A Well, as an investigator, you look at all angles of
91
1 it, so --
2 Q I'm looking at all angles.
3 A -- that would be one of it.
4 Q Okay. Right. And how do you get rid of those
5 statements? How do you -- how do you explain that?
6 Are you going to just tell me that it's bullshit?
[redacted]
9 Explain it to me. I'm willing to listen.
[redacted]

[redacted]

[redacted]

16 Q You're the one walking around portraying yourself to
17 be racist when you're making reference to parking
18 tickets as black fellows, and you talk about having a
19 new gun, and you're going to take care of the parking
20 ticket if the occasion arises. Doesn't say anything
21 about white people, Asian people. So, I'm not
22 painting you as anything; you're painting yourself as
23 that, but you say that you're not.
24 A I'm not.
96
1 Q Well, your words or your texts say otherwise. So, I
2 don't know how you -- how do you -- how do you -- how
3 would you answer to that, or how would you look at

that if you were me? Or, if it was an outside agency looking into this, what do you think that they're going to be saying?
A They would -- I'm sure they would say the same things you would. But then when you look at the data, you would see that it wasn't the case.
Q Screw the data. What's the data have to do with anything?
A Well, it has to do with everything. You're telling me that I -- I racially profile people, and that I have a -- I have a race -- racist motivations towards black people. But then you pull, let's say, arrest data, and their percentages aren't even close. You know what I mean? Like, so say for every one black person I arrest, I arrest 200 white people.
Q There's probably more white people that live in this city, or in this state, than black people, wouldn't you say?
A Potentially. I have no idea. I don't know what the populations are. No clue.
Q But you don't know what the population is in

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Dorchester, but yet you --
A Nope.
Q -- make reference to parking tickets and black fellas.
A Right. I made the same reference in one of the text messages working here.
SERGEANT MCCABE: I'm good.
SERGEANT PATTERSON: Good?
SERGEANT MCCABE: Yeah.
SERGEANT PATTERSON: All right. We're all set. And this is now 1:15.
END INTERVIEW

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STATE OF NEW HAMPSHIRE
HILLSBOROUGH, SS.

I, Jan-Robin Brown, a Certified Electronic Court Reporter and Transcriber, CER-415, CET-415, and Notary Public in the State of New Hampshire, certify that I transcribed from an electronic recording the foregoing 97 pages, and that the same is a true and accurate transcript of all the recorded testimony, to the best of my knowledge and belief.

I also certify that I am not related to, nor employed by any of the parties in the above-entitled action, and that I have no financial interest in the same.

This certification applies only to originals and copies that bear my signature and raised seal. Dated March 30, 2018.

_____

Jan-Robin Brown, Audio Transcriber
Notary Public
My Commission Expires July 22, 2020

DISPUTED FACTS

[redacted]

During the course of this internal investigation Detective A. Brown's Manchester Police Department issued cell phone was forensically searched. During the course of searching the content of the phone, text messages were recovered indicating that A. Brown has racial bias towards African Americans. While Interviewing Detective A. Brown he indicated that he is not a racist but that he is prejudice.

DISCUSSION & CONCLUSION

In examining the facts and circumstances surrounding all incidents involved with this Internal Investigation, Sergeant Patterson and I, Sergeant McCabe, find that Detective A. Brown violated the following Standard Operating Procedures and Rules and regulations;

[redacted]

Detective A. Brown violated MPD SOP's and engaged in Conduct Unbecoming as Prohibited by MPD Rules and Regulations, section IX, prohibited Conduct, Paragraph B;

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Detective A. Brown violated MPD SOP's and engaged in Conduct Unbecoming as Prohibited by MPD Rules and Regulations, section IX, prohibited Conduct, Paragraph B;

Conduct Unbecoming an Officer/Employee: Conduct unbecoming an officer/employee shall include on or off-duty conduct which brings the Department into disrepute or reflects discredit upon the officer/employee as a member of the Department, or that which impairs the operation or efficiency of the Department or the officer/employee.

This charge is **SUSTAINED** in that Detective A. Brown failed to comply with this prohibition in the following manner;

- Detective A. Brown engaged in conversations that calls his judgment and credibility into question and is conduct that will bring the Department into disrepute. On May 10th, 2017, Detective A. Brown has a conversation while working via text with his wife [redacted] Detective A. Brown lets [redacted] know that he is on his way Dorchester Massachusetts. Detective A. Brown tells [redacted] not to worry because he has a new fancy gun and that he can take out parking tickets no problem. Detective A. Brown then states to [redacted] that "parking tickets" = black fella. Detective A. Brown then has

Recommendation

Based on the findings of this investigation we recommend that these incidents be concluded with **FORMAL DISCIPLINE** for Detective Aaron Brown.

Prepared by:

Z10 Date: 4/4/18

Sgt. Shawn McCabe
Investigative Division

Z19 Date: 4/4/18

Sgt. Timothy Patterson
Investigative Division

Approved By:

Date:

Capt. Tessier
Legal Division/Office of Professional Standards

Date:

Enoch F. Willard
Chief of Police

another conversation with his wife [redacted] on August 22nd, 2017, while he is working and tells her that he is currently putting the stall on a parking ticket...like the big jungle cat that he is. [redacted] stated to Detective A. Brown that she wished she followed what he was saying because she has no idea what he meant. Detective A. Brown responded with parking ticket=black feller and he's stalking him like a jungle cat.

V. Copy of an inventory list of Detective Aaron Browns MPD issued equipment tha' turned in.
W. Copy of The MPD Fairpoint Communications Billing Cycle from May 200?
X. Time Line of this Investigation

Book 4- Book 6

Print out of Detective A. Browns text messages from his City of Manchester Police Department issued cell phone between his wife [redacted] and himself.

ATTACHMENTS

Book 2

A. Manchester PD Rules and Regulations

[redacted]

D. "Reverse Garrity" warning forms from

a. Detective Aaron Brown
b. Detective [redacted]
c. Sergeant [redacted]
d. Detective [redacted]
e. Sergeant [redacted]
f. Detective [redacted]
g. Detective [redacted]
h. [redacted]
i. Detective [redacted]

[redacted]

R. MPD IADB for Aaron Brown

[redacted]

BOOK 3

U. CD-R(s) Containing this report—all recorded interviews—photographs and images associated with this Internal Investigation—Forensic download of Detective Aaron Brown's work phone

Manchester Police Department
Standard Operating Procedure

Rules and Regulations	Effective Date: May 2013
Miscellaneous information:	Rescinds: Rules and Regulations January 2012

I. PURPOSE

A. Since a police department is quite often referred to as a department of public safety, it then becomes quite obvious that its prime functions are the protection of the lives and property of the citizens within its jurisdiction. To extend and categorize the foregoing terminology may be endless and repetitious, but it might suffice to say that duties include the preservation of the public peace, to see that all laws and ordinances are enforced by the detection and suppression of crime, and that the violators of said laws and ordinances are apprehended and prosecuted according to our judicial process.

B. Although police officers are primarily civilians, they are sworn into their positions by a formal oath in an organization that by its very nature becomes quasi military. As such, a police department then has prime requisites and therefore its employees must be guided by rules and regulations that are applicable to this type of an organization.

C. It must be remembered, however, that regardless of the effort and time involved in compiling a set of rules and regulations, it is obviously impossible to provide for every type of incident or occurrence and, therefore, this must be considered accordingly in any application.

D. Therefore, the Rules and Regulations contained herein have been approved by the Board of Police Commissioners and are the result of an intensive study in updating and revision.

E. They are designed to guide and assist the employees of the Manchester Police Department so that they will perform their sworn duties and tasks in a professional and efficient manner in the service of the City of Manchester.

II. POLICY

A. The primary mission of the police force is crime prevention and the protection of life and property. The laws and police procedures related to them are promulgated by police agencies for the purpose of maintaining order and continuity. The basis of all police action is the law, and the credibility of the law enforcement profession will be measured by its contribution to the welfare of man, its concern for excellence, and by the guidance it provides to its members toward a high level of ethical practice.

B. The purpose of this manual is to establish the principles for the management of the Manchester Police Department, and the standards of behavior to which every member of the department shall be held accountable. Its goals are to increase the quality of police service, to elevate the standards of the profession, and to strengthen the public confidence in law enforcement; to encourage officers individually and collectively, to fully appreciate the total responsibilities of their office; to earn the support and cooperation of the general public in these endeavors.

C. Police officers have a sworn obligation to respect and defend the rights guaranteed to the people in the Constitution. In the performance of those duties they may command obedience or prohibit behavior which tends to irritate and conflict with the expectations of free men in a free society, and particular attention must be given to its just and impartial application. Violations of law by those sworn to defend it will bring down the system more surely than all other forms of crime combined.

D. Positive police action, while intended to serve the department's peace keeping mission, must be administered without prejudice; always mindful that in the execution of their duties officers act not for themselves, but for the public. Consistent with that responsibility, officers should be constantly aware that it is not a proper police function to prohibit or stop dissent. Civil disturbance and dissent are not synonymous. While civil disobedience and disturbance are illegal, dissent is not. Only violations of law and actions inimical to public safety are within the purview of the police. Proper understanding of the relationships between the maintenance of order in the community as the principal objective, and the enforcement of the law as a tool to be used in achieving it, is a distinction well made.

E. The rules, regulations and job descriptions should serve as a guide to police officers and impress upon them the importance of their public service. The uniqueness of their role identifies them as members of a profession capable of performing that service with dedication and wisdom.

III. PROCEDURES

A. The regulations in this manual are adopted as a guide for the discipline and government of the police department.

B. It cannot be expected that any set of regulations will cover all situations or emergencies that arise. In a role as complex as that of a police officer, intelligence and discretion will often be the only available guidelines.

C. If any part of these regulations is rendered inoperable or declared illegal by any court or tribunal of competent jurisdiction, the balance of the entire manual will remain in full force and effect.

IV. DEFINITIONS

A. **Department**—The Police Department

B. **Chief**—The executive head of the Police Department

C. **Officer-in-Charge**—Commanding Officer of any given situation

D. **Relief Commander**—Commanding Officer of a shift

E. **Ranking Officer**—the officer having the highest rank or grade; officers of the same rank according to the date of their appointment. When two or more officers are on duty together the officer of the highest rank is in command and shall be held responsible for the operation.

For a special detail and for a specific period, an officer may be designated by the Relief Commander to take command without regard to rank.

F. **Member/Officer**—A duly appointed police officer in the Department

G. **Employee**—A civilian employee of the Department

H. **Manual**—The Police Manual of the Department

I. **General Orders**—Commands or instructions, oral or written, given by one member to a member of lesser rank

J. **Memorandum**—An informal record of any proceeding or an informal communication of any kind

K. **Shift**—A regular tour of duty, unless otherwise ordered by the Chief of Police

L. **Grammar**—wherever context permits, the use of the masculine will also include the feminine and the use of the singular will also include the plural.

M. **Division**—A unit under command of a Captain who reports directly to the Assistant Chief of Police or the Chief of Police.

N. **Post**—a fixed point or location to which an officer is assigned for duty.

O. **Route**—a length of street, street, or geographic area designated for patrol purposes. A route is used for the assignment of foot patrolmen, patrol cars, etc.

P. **Orders**—an instruction given by a superior officer to a subordinate. It may be either oral, written, or by hand signal.

Q. **Chain of Command**--The unbroken line of authority extending from the Chief of Police through a single subordinate at each level of command down to the level of execution.

R. **Daily Bulletin**—the official daily publication of the Department. All directives contained in the Daily Bulletin have the force and effect of departmental orders.

V. PROFESSIONAL RESPONSIBILITIES

A. Police officers are professionals, and as such are expected to maintain exceptionally high standards in the performance of their duties. Effective and efficient performance of his duty requires that a police officer maintain the respect and cooperation of his community. This requirement dictates that the conduct of all police officers be above reproach in all matters both within and outside the Department.

B. General professional responsibilities include taking appropriate action to:

1. protect life and property
2. preserve the peace
3. prevent crime
4. detect and arrest violators of the law
5. enforce all laws coming within the departmental jurisdiction
6. supervise public functions (such as parades or dances) where public order requires
7. police presence
8. respond to all public emergencies
9. endeavor to maintain good community relations

VI. CONFLICT OF INTEREST

Since the position of a police officer is a public trust, it is important to avoid all situations involving conflicts of interest whether in fact or only in appearance.

A. **Membership in Organizations:** A member or employee of this Department shall not affiliate with or become a member of any organization if such affiliation or membership would in any way interfere with or prevent him from performing his duty.

B. **Employment Outside of the Department:** A member or employee of this department shall not affiliate with or become a member of any organization if such affiliation or membership would in any way interfere with or prevent him from performing his duty.

1. Officers/employees may engage in off-duty employment subject to the following limitations:

   a. such employment shall not interfere with the officers/employees employment with the Department, or impair his/her independence of judgement in the exercise of official duties

   b. officers/employees shall submit a written request for off-duty employment to the Chief, whose approval must be granted prior to engaging in such employment. Said request will be submitted on a yearly basis as requested by Administration.

   c. officers/employees shall not engage in any employment or business involving the driving of taxicabs, the sale or distribution of alcoholic beverages, bail bond agencies, security or alarm services, or investigative work for insurance agencies, private guard services, collection agencies or attorneys.

2. In addition to the above restrictions, approval may be denied where it appears that the outside employment might:

   a. render the officer unavailable during an emergency

   b. physically or mentally exhaust the officers to the point that their performance may be affected (i.e....chronic absenteeism)

   c. require that any special consideration be given to scheduling of the officer's regular duty hours

   d. bring the Department into disrepute or impair the operation or efficiency of the Department or officer

C. **Political Activities**: Political activity by members and employees shall be restricted to voting and activities affecting working conditions of members and employees. Members and employees shall not solicit or make contributions in money or other things directly or indirectly on any pretext to any person, committee or association for political purposes not directly affecting working conditions of members and employees. They shall not use the influence of their office.

D. **Gifts and Gratuities**: Members and employees shall not under any circumstances solicit or accept any gift, gratuity, loan, service reward or fee where there is any direct or indirect connection between the solicitation and their departmental membership or employment, except as may be specifically authorized to the Chief.

Members and employees must pay for all meals and beverages. No member or employee of the department shall receive any gift or gratuity from other members or employees junior in

rank without the express permission of the Chief of Police.

E. **Unauthorized Transactions**: Members and employees are prohibited from entering into any transactions of material value at substantially lower than fair market value, or the value at which such goods or services are being offered to the general public, when such transaction takes place between themselves and any person involved in any matter or case which arose out of their employment with the Department, except as may be specifically authorized by the Chief. This section shall not preclude officers from taking advantage of standard police discounts available to all departmental members.

F. **Disposition of Unauthorized Gifts, Gratuities, Etc.**: Any unauthorized gift, gratuity, loan fee, reward or other thing falling into any of these categories coming into the possession of any member or employee shall be forwarded to the office of the Chief of Police together with a written report explaining the circumstances connected therewith.

G. **Use of Official Position:** Officers/employees shall not use their official position, official identification cards or badges:

1. for personal or financial gain;

2. for obtaining privileges not otherwise available to them except in the performance of duty

3. for avoiding consequences of illegal acts

Officers/employees shall not lend to another person their identification cards or badges or permit them to be photographed or reproduced without the approval of the Chief. Officers/employees shall not authorize the use of their names, photographs, or official titles which identify them as officers/employees, in connection with testimonials or advertisements of any person, commodity or commercial enterprise, without the approval of the Chief.

VII. ORDERS

An order is a command or instruction, written or oral given by a superior officer. All lawful orders, written or oral, shall be carried out fully and in the manner prescribed.

A. **Effectiveness of Orders**: All general orders, memorandums, special circulars or other orders printed upon authorized departmental forms that have been approved by the Chief of Police shall have the force and effect of a departmental regulation. All members and employees of the Department shall become familiar with the regulations and provisions thereof.

B. **General Orders:** General orders are permanent written orders issued by the Chief of Police outlining policy matters which affect the entire Department. A General Order is the most authoritative written order the Chief issues, and may be used to amend, supersede or cancel any previous order. General Orders remain in full effect until amended, superseded or canceled by the Chief. Arrangements shall be made to include General Orders in the Police Manual. Relief Commanders, and/or officers in charge as the case may be, will see to it that the following regulations pertaining to conduct within the police station are followed and they will be held to answer for violations during their duty tours under normal conditions.

C. **Special Orders**: Special Orders are temporary written orders issued by the Chief of Police outlining instructions covering particular situations. Special Orders are automatically canceled when their objective is achieved.

D. **Unlawful Orders:** No member/employee shall knowingly issue an order in violation of any law or any departmental regulation. Unlawful orders shall not be obeyed.

The officer/employee to whom the order was given shall notify the ordering member/employee of the illegality of his order. Responsibility for refusal to obey rests with the officer/employee to whom the order was given. He/she shall be strictly required to justify his/her action.

E. **Unjust or Improper Orders**: Lawful orders which appear to be unjust or improper shall be carried out. After carrying out the orders, the officer/employee to whom the order was given may file a written report to the Chief via the chain of command indicating the circumstances and reasons for questioning the orders, along with his/her request for clarification of departmental policy. An officer/employee who performs an order found to be unjust or improper by the Chief of Police may not be held responsible for performing such order.

F. **Conflicting Orders**: Should any order given by a supervisor conflict with any previous departmental order, the member/employee to whom such order is given will call attention to the conflict. If the supervisor does not change his/her order to avoid such conflict his/her order will be obeyed, but the member/employee obeying such order will not be held responsible for disobedience of the previous order. It should later be reported to the Chief in writing for clarification.

G. **Personnel Orders**: Orders pertaining to assignments, change-of-duty assignments, administrative matters related to conditions of employment, and employee rights and benefits.

H. **Complying with Instructions from Radio Dispatcher:** All messages transmitted over the police radio system by any member/employee of the force shall be direct and concise and shall conform with all departmental radio procedures and the rules and regulations of the Federal Communications Commission. No member/employee shall disobey or refuse to take cognizance of any communication transmitted by the Dispatcher, unless directed to do so by a supervisor. Neglect to comply with the instructions of the Dispatcher shall be regarded as a violation of these regulations.

I. **Memorandum Orders**: Written communications issued by the Chief of Police or other authorized command personnel for the following purposes:

1. to issue information or instructions which do not warrant a formal order
2. to direct the actions of subordinates in specific situations
3. to explain or emphasize portions of previously issued orders

J. **Relayed Order:** Any lawful order of a supervisor relayed from a supervisor by an employee of the same or lesser rank shall be carried out.

VIII. REQUIRED CONDUCT

A. **Roll Call / Roll Call Training**: Unless otherwise directed, members and employees shall report to daily roll call at the time and place specified, prior to the start of their relief, properly uniformed and equipped. They shall sign for equipment when needed or requested and shall give careful attention to orders and instructions while avoiding unnecessary talking and movement.

B. **Training:** All in-service training is considered mandatory. Any variation from the original in-service training schedule must be pre-approved by the Training Director.

C. **Awareness of Activities:** A member/employee, upon reporting for duty or upon returning to duty from any absence, shall inform him/herself about all new orders, regulations,

memoranda, previous shift activities and all other important matters governing his/her assignment.

D. **Submitting Reports**: A member/employee shall promptly and accurately complete and submit all reports and forms as required by the "Records" SOP - Section X.A.

E. **Identification**: At the time of employment, each member of the Manchester Police Department shall be issued an employee identification card. This card shall include the employee's name, photograph, rank and date of hire. All sworn members shall carry their badge and identification card at all times, except when impractical or dangerous to his/her safety or to an investigation. All sworn members shall furnish their name and badge number to any person requesting that information and shall allow any person requesting to view the identification to do so. These requirements will be followed when the member is on duty or while acting in an official capacity as a member of the Manchester Police Department. Exceptions apply when the withholding of such information is necessary for the performance of police duties or is authorized by proper authorities.

When on-duty all non-uniform and non-sworn personnel, unless explicitly exempted by the Chief of Police, shall have displayed upon their person, their Manchester Police Department identification card and shall allow anyone who requests to view the identification to do so.

F. **Address and Telephone:** A member or employee of the Department shall have a telephone in his residence or a telephone number at which he can be reached and shall promptly report any change of telephone number or address to their Division Head, the Executive Secretary, and the Payroll Coordinator within twenty-four (24) hours of any change.

G. **Truthfulness:** A member or employee of the Department shall speak the truth at all times and under all circumstances. In cases where he/she is not allowed by regulations of the Department to divulge facts within his knowledge, he/she shall decline to speak on the subject.

H. **Physical Fitness:** A member shall maintain good physical condition in accordance with a standard determined by the Chief of Police after consultation with a physician.

I. **Examination**: A member/employee shall submit to a physical or psychological examination at any time, at the expense of the Department, when so ordered by the Chief of Police.

J. **Civil Suits for Personal Injuries:** Any claims for damage to clothing or other personal property belonging to a member or employee caused by the members and employees shall not seek, in any way, nor accept from any person, money or compensation for damages sustained or for expenses incurred by them in the line-of-duty without first notifying the Chief of Police in writing.

1. Members or employees who have received municipal salaries for illness or for personal injuries sustained while off-duty shall notify the Chief of Police, in writing, of any intent to seek, sue, solicit, or accept compensation as damages for illness or injury.

2. Notice shall be filed before action is taken. It shall include the facts of the claim and the name of the defendant. The Chief of Police shall be informed of the status of the case and of the final Court decision.

3. This provision shall not apply to private insurance policies held by members or employees for which premiums are not paid for in part or in whole by the municipality.

K. **Line-of-duty Disability**: Any injury, illness or disability incurred in the line-of-duty, shall be reported in accordance with departmental procedure.

1. Final disposition as to line-of-duty injuries, illness or disabilities shall be made by the Chief of Police after consultation with a physician.

2. In each case of injury, illness or disability incurred in the line-of-duty, no member/employee shall be returned to duty until his ability to be placed on duty status is confirmed by his physician.

L. **Failure to Report for Duty**: No member or employee shall be absent from duty, except during annual vacation, regular day off or, on account of sickness. At least one (1)-hour prior notice shall be given to the Relief Commander, if a member or employee, for any reason, cannot report to assigned duty.

M. **Leaving the City**: Whenever a member/employee of this Department, during his/her tour of duty, is about to leave the City limits for purposes of investigation, pursuit, or any other reason, he/she shall inform his/her supervisor or Dispatcher prior to his/her leaving and on his/her return.

N. **Paid Details**: Paid police details shall be assigned through the Budgets Division according to current departmental policies and procedures.

O. **Hours of Duty**: The Chief of Police shall have the power and the authority to call to duty any member/employee when occasion requires such action.

P. **Duty Outside the City**: Members of the Department will not be detailed to perform duty beyond the limits of City of Manchester except to assist the authority of another city or town, to suppress disorder or preserve the peace under the direction of the Commanding Officer of such city or town involved. Members of this department shall have authority as a police officer within the limits of such city or town and shall have the same immunity and privileges as when acting in the City of Manchester.

Q. **Property Identification**: All personnel property, including all money, whether lost, stolen, confiscated, or given to the department, which comes under an officer's/employee's control, shall be tagged and turned over to the proper authority according to current departmental procedures.

R. **Public Defects**: Every member/employee shall observe and forthwith report any defect, obstruction, or nuisance in the streets, sidewalks, or other public areas, which may cause a hazard to the general public or create a civil liability upon the City. Appropriate notification shall be made to the radio dispatcher and a request for a supervisor when more immediate remedial action is necessary.

S. **Report of Use of Weapon**: A member/employee of the Department, who uses any weapon as outlined in the Standard Operating Procedure Titled "Authority" - Section X, shall immediately notify the Relief Commander and shall complete a "Use of Force Report". An immediate investigation may be conducted regarding the proper use of said weapon. A member/employee shall never brandish a weapon nor shall he/she remove his/her weapon from its holster other than in the proper performance of his/her duty.

T. **Duty to Obey:** Every member/employee of the department shall promptly obey, without reservation, the Regulations of the Department and all the lawful orders of a Supervisor.

U. **Duty to Cooperate**: Every member/employee of the Department shall fully cooperate in all Departmental investigations.

V. **Conduct**: Every member/employee shall conduct his/her personal and official lives so as to bring credit to this Police Department.

W. **Civility**: Every member/employee of the Department shall be civil, orderly, diligent, discreet, courteous and patient as a reasonable person is expected to be in any situation and shall not engage in any altercation, physical or otherwise, whether on duty or not, with any other member/employee of the Department. All members/employees will conduct themselves in accordance the "Professional Conduct" Standard Operating Procedure.

X. **Questions of Citizens**: Every member/employee of the Department shall answer questions from citizens in a courteous manner and, if unable to supply an answer, shall make every effort to obtain the answer for the citizen, avoiding argument and unnecessary conversation. If requested, a member/employee of this Department shall give his/her name and badge number in a courteous manner to any person whom so requests.

Y. **Duty Status:** Although certain workday hours are allotted to every member of the force for the performance of specific workday duties, a member of the force shall be in an "on-duty" status at all times, for the preservation of the peace and the protection of life, liberty, and property. A member shall be prepared at all times and under all circumstances, to perform immediately a police duty whether or not the member is in uniform or off workday duty, whenever the member is cognizant of a need for police service. A member of the force shall be fit for duty at all times except when carried on "sick" or "injured" report.

Z. **Equipment**: All equipment must be clean, in good working order, and must conform to Departmental specifications.

AA. **Accessories and Equipment:** Only issued or approved accessories or equipment shall be worn on the uniform or carried by officers on duty.

BB. **Knowledge of the City**: Every member/employee (employee as job function necessitates) shall familiarize him/herself with the geography of the city, including routes of public transportation, the location of streets, highways, bridges, public buildings and places, hospitals, courts, transportation offices and stations, prominent or important office buildings, large industrial plants or commercial establishments, and such other information as may be disseminated by supervisors from time to time.

CC. **Incurring Department Liability:** A member or employee shall not make any purchase for goods or services charged to the City of Manchester without the consent of the Chief of Police.

DD. **Radio Dispatcher**: All members/employees of the Department operating the Police radio either from a remote unit or in the communications center, shall strictly observe regulations for such operations as set forth in radio procedures and by the Federal Communications Commission.

EE. **Questions Regarding Assignment:** Members/employees in doubt as to the nature or detail of their assignment shall seek such information from their supervisors by going through the chain of command.

FF. **Reporting Violations of Laws, Ordinances, Rules or Order:** Members/ employees knowing of other members or employees violating laws, ordinances, or Rules of the Department, or disobeying orders, shall report same in writing to the Chief of Police, through official channels. If the member or employee believes the information is of such gravity that it must be brought to the immediate personal attention of the Chief of Police, official channels may be bypassed.

GG. **Relief**: All members/employees are to remain at their assignment and on duty until five (5) minutes before the end of tour or until relieved by proper authority.

HH. **National Colors and Anthem:**

1. All members of the department shall stand at attention and salute the official National Colors and the National Anthem:

   a. As they pass in public parades, ceremonies or other occasions.

   b. At any detail indoors when the officer is in uniform.

   c. When carried in ceremony, into any building room or place.

2. If in uniform, seated at a banquet function or if not in uniform and on official duty, members shall stand and hold their right hand over their heart.

3. Said salute shall be held until the end of the anthem or until the colors have passed or been posted.

4. Salutes shall face the flag if posted or being carried in. If no flag is present during the playing of the National Anthem, said salute shall face the music, the stage or where attention is being directed.

IX. PROHIBITED CONDUCT

The following acts by a member or employee of the Manchester Police Department are prohibited or restricted:

A. **Unlawful Conduct**: Infractions of any law of the United States, the State of New Hampshire or of any State or local jurisdiction in which a member or employee is present. A conviction for the violation of any law shall be prima facie evidence of a violation of this section.

B. **Conduct Unbecoming an Officer/Employee**: Conduct unbecoming an officer/employee shall include on or off-duty conduct which brings the Department into disrepute or reflects discredit upon the officer/employee as a member of the Department, or that which impairs the operation or efficiency of the Department or the officer/employee.

C. **Neglect of Duty**: A member/employee being absent from assigned duty without leave, or failure to take suitable and appropriate action when any crime, public disorder or other incident requires attention.

D. **Insubordination**: Failure or deliberate refusal of a member/employee to obey a lawful order issued by a supervisor.

E. **Unnecessary Force:** The use of more physical force than that which is necessary to accomplish a proper police purpose. Members shall use force in accordance with law and with departmental procedures.

F. **Discourtesy**: Discourtesy, rudeness or insolence to a member of the public by any member/employee is expressly prohibited. A member/employee shall be courteous and tactful in the performance of his duties. He/she shall control his temper, exercising the utmost patience and discretion, even in the face of extreme provocation.

   All members/employees shall conduct themselves according to the Standard Operating Procedure "Professional Conduct Policy".

G. **Use of Alcohol and Drugs:** A member or employee of the Department shall not bring, place, or permit to be brought or placed, or allow to be kept in any building location, or vehicle within the Department, any exhilarant, hypnotic, hallucinogen or narcotic, except in strict performance of police duty as required by regulations or orders or when it is needed for prompt administration by a licensed physician. A member or civilian employee of the Department shall not drink intoxicating beverages or use intoxicants in any manner while on duty or in uniform, unless authorized by the Chief or his designee. A member or employee of the Department shall not use or render himself unfit for duty through the use of intoxicants, narcotics, exhilarants, hypnotics, hallucinogens, or other toxic drugs unlawfully or lawfully administered.

H. **Drug-Free Workplace:** The Manchester Police Department recognizes that substance abuse is a workplace problem because it affects members/employee health and safety, productivity and health care costs. Studies show that compared to alcohol/drug free workers, substance abusers are far less productive, miss more workdays, are more likely to injure themselves or others, file more insurance and Workers' Compensation claims, cause friction among coworkers and cause damage to equipment. Accordingly, it is the purpose of the department to establish a drug-free workplace, which reflects the department's strong commitment to a workplace free of illegal drugs and the use of alcohol and the abuse of prescription drugs.

The department will protect the right of all members/employees to work in an environment free from the problems and risks associated with substance abuse. Drug and alcohol abuse in the workplace is inconsistent with the behavior expected of members/employees of the Manchester Police Department and it may subject the City of Manchester, its members/employees and the general public to unacceptable risks or workplace incidents, accidents or other failures that undermine the Department's ability to operate safely, effectively and efficiently. Each member/employee of our workforce - from Chief to the most recently hired, has the responsibility and will play a role in achieving a drug-free workplace.

MANCHESTER POLICE DEPARTMENT DRUG-FREE STATEMENT

1. The Manchester Police Department will maintain a workplace free from alcohol or other drug abuse and its effects. The Manchester Police Department will not tolerate or condone substance abuse.

2. It is strictly forbidden for members/employees to unlawfully manufacture, distribute, dispense, possess or use illegal drugs or other controlled substances or abuse prescription drugs while on duty or while within the police station, substations or other official work facilities under the control of the Manchester Police Department.

3. The use of alcoholic beverages while on-duty or in uniform is forbidden. This shall not be construed as applying to officers on special assignment who, because of their assignment, have been authorized by the Chief to consume alcoholic beverages while on-duty.

4. The use of alcoholic beverages within the police station, sub-stations or other official work facilities under the control of the Manchester Police Department is forbidden.

5. Members/employees are prohibited from arriving at work under the influence or effects of alcohol or any drug that adversely affects the members/employees job performance, including the use of prescribed drugs under medical direction. Where physician directed use of prescription drugs adversely affects job performance, it is in the best interest of the member/employee, co-workers and the Police Department, that sick leave is used.

6. A member/employee who is in violation of paragraph 2, 3, 4 or 5 or who is convicted of an alcohol or drug-related offense that occurred while on-duty will be subject to the disciplinary process. The discipline may include options such as mandatory counseling, treatment, and testing; they may also include reprimands, suspensions and termination.

7. Based on work performance, a member/employee determined to be alcohol or drug involved shall be subject to referrals to treatment and/or the disciplinary process. Such members/employees may also be suspended until such time as it is determined that the member/employee is capable of performing his/her job without posing a risk to others or him/herself. A member/employee, who is suspended under these conditions and demonstrates that he/she is unwilling or unable to successfully and capably return to the workplace, may be subject to additional disciplinary measures up to and including termination.

8. Any member/employee convicted of any violation of any criminal drug or alcohol statute, including City, State or Federal laws or laws of any other state or municipality, is required to notify the Chief of Police in writing no later than five (5) days after such conviction.

9. The Police Department realizes that early recognition and treatment of chemical dependency problems is important for successful rehabilitation, service to the public and reduced personal, family and social disruption. Participation in the Employee Assistance Program or other rehabilitative program is encouraged but does not, in and of itself, protect the member/employee from other appropriate discipline that the Department may impose, but active participation in such a program shall be considered by the Department.

10. Constructive disciplinary measures may be used to provide motivation for members/employees to seek assistance. This is not to be construed as barring the Department from taking other disciplinary action, including termination if appropriate, when drug/alcohol abuse or dependency results in unacceptable job performance, violations of Rules, Regulations, Standard Operating Procedures or the law.

DRUG-FREE AWARENESS PROGRAM

In order to maintain a drug and alcohol free workplace, the Police Department has established a drug/alcohol free awareness program to educate employees about:

1. The dangers of drug/alcohol in the workplace

2. The Manchester Police Department's Drug Free Workplace directive

3. The availability of services to assist employees with problems related to the use and abuse of drugs and alcohol

Specific steps include:

1. Every employee receives a copy of the Drug Free Workplace directive.

2. Every employee receives a presentation by the City of Manchester Employee Assistance Program Coordinator.

3. The Police Department provides periodic training and the distribution of educational materials regarding the dangers of drug and alcohol abuse.

4. The Police Department provides periodic training sessions for supervisors, command staff and administrators, on recognizing substance abuse in the workplace and methods of handling problems.

I. **Improper Associations:** A member /employee shall not maintain or establish relationships with persons engaged in unlawful activities, nor shall a member/ employee establish relationships with persons who may tarnish the reputation of the Department as determined by the Chief of Police except in the discharge of official duty, and with prior knowledge of the Chief of Police.

J. **Personal Preferment**: No member/employee shall seek the influence or intervention of any person for purposes of personal preferment, advantage, transfer, or advancement.

Members/employees are forbidden to solicit petitions for their promotions or change in the line of duty, or for the promotion or change of duty of any other member/employee, or for the appointment of any person to the Department, or to promote any political influence to affect such an end.

K. **Recommending Private Services**: No member/employee shall recommend or suggest in any manner the employment or purchase of any particular professional or commercial service or product, such as lawyers, bondsmen, undertakers, towing services, or burglar alarm companies, except in the transaction of personal business.

L. **Personal Business**: No member/employee shall conduct personal business while on duty unless authorized by the Chief of Police.

M. **Departmental Letterhead:** No member/employee shall use the departmental letterhead for private correspondence or sending official correspondence out of the Department without the permission of the Chief of Police.

N. **Mailing Address**: No member/employee shall use the Department as a mailing address for private purposes, especially for the purpose of a motor vehicle license or registration.

O. **Possessing Keys to Private Buildings**: No member/employee shall have keys to private buildings or dwellings.

P. **Sleeping:** No member/employee shall sleep while on duty.

Q. **Reading**: No member/employee shall read for recreational purpose while on duty, except during meals.

R. **Smoking**: No member/employee shall conspicuously smoke while on duty.

S. **Notices**: No member/employee shall alter, deface or remove any posted notice of the Department. No notice shall be posted on the Department Bulletin Board without the permission of the Chief of Police or the Relief Commander.

T. **Report of Loss or Damaged Property:** In the event that Departmental property is lost, or found bearing evidence of damage which has not been reported, the last member/employee using the property may be charged with failure to report and may be held responsible for damages.

U. **Unsatisfactory Performance**: A member/employee shall maintain sufficient competency to perform his/her duty and to assume the responsibilities of his/her position.

Unsatisfactory Performance may be demonstrated by any one or more of the following:

1. a lack of knowledge of the application of laws required to be enforced
2. an unwillingness or inability to perform assigned tasks
3. the failure to conform to work standards established for the officer's/employee's rank, grade or position
4. repeated poor evaluations or repeated infractions of the rules and regulations
5. a lack of knowledge of the application of the Standard Operating Procedures or Rules and Regulations of the department.

V. **Assisting Criminals:** Members/employees shall not communicate in any manner, either directly or indirectly, any information which might assist persons guilty of criminal or quasi criminal acts to escape arrest or punishment of which may enable them to dispose of secret evidence of unlawful activity or money, merchandise or other property unlawfully obtained.

W. **Dissemination of Information**: A member/employee of the Department shall not divulge to any unauthorized person, in or out of the Department (i.e., one who does not have an official "need to know"), any information concerning the business of the Department and shall not talk for publication, be interviewed, make public speeches on police business, or impart information relating to the official business of the Department unless authorized by the Chief.

1. Officers / Employee accessing the STATE POLICE TELECOMMUNICATIONS SYSTEM (SPOTS) are reminded that the system is designed exclusively for use by law enforcement and criminal justice agencies in conducting their official, lawfully authorized duties. Use of the system, solicitation of another officer/employee to use the system or release of information obtained from the system for any other purpose is prohibited
2. Officers / Employees are prohibited from using or soliciting another officer / employee to use the ILEADS system or any other source of information they are authorized to access by virtue of their position with this agency to access or release information for any reason outside of their official and lawfully authorized duties.

X. **Public Statements**: A member/employee shall not make public derogatory or disrespectful statements, which tend to undermine the efficiency or the morale of the Department, or statements, which may subvert public confidence in the Department.

Y. **Removal of Records**: A member/employee shall not remove or copy any official records or reports, except in accordance with established Departmental procedures.

Z. **Feigning Illness**: A member/employee shall not feign illness or injury, falsely report him/herself ill or injured, or otherwise deceive or attempt to deceive any official of the Department as to the condition of his/her health.

AA. **Towing Service**: No member/employee shall solicit or assist in any way for a towing service. All requests for towing shall be in accordance with the Standard Operating Procedure "Traffic Division" Section XVII (Towing or Removal of Motor Vehicles)

BB. **Use of Telephone**: Local private calls are authorized for immediate family business only. Calls shall be minimal in frequency and duration, so as not to impede or interfere with the efficiency of the department. No member/employee shall use Departmental phones for any private long distance calls unless authorized by a ranking supervisor. No member/employee shall use another member/employees issued long distance pin number.

Calls outside of the continental United States shall be approved by a ranking supervisor prior to such call being made.

CC. **False Information on Records**: A member/employee of the Department shall not make false official reports or knowingly or willingly enter or cause to be entered into any departmental books, records, or reports, any inaccurate, false, altered or improper police information or material matter.

DD. **Withholding Evidence:** A member/employee of the department shall not fabricate, withhold, or destroy any evidence of any kind.

EE. **Testimony in Civil Cases:** A member/employee of the department shall not testify in any civil case in court unless legally summonsed to do so or unless he/she shall have received permission or order from the Chief of Police. When summonsed to testify, he/she shall notify the Chief of Police in writing.

FF. **Use of Private Vehicles**: While a member/employee of the department is on duty, he/she shall not drive a private vehicle to his/her post, assignment, patrol area, or cover his assignment with a private vehicle unless authorized by a supervisor.

GG. **Use of Departmental Vehicles**: Members/employees shall not use any Departmental vehicle without the permission of a supervisor. Departmental vehicles shall never be used for personal business or pleasure. Vehicles can be used only with the permission of the Chief of police or his designee for conveying officers to and from home.

HH. **Public Appearance Requests:** All requests for public speeches, demonstrations and the like will be routed to the Chief of Police for approval and processing.

Members/employees directly approached for this purpose shall suggest that the party submit his request to the Chief of Police in writing.

II. **Debts**: Members/employees shall not undertake any financial obligations which they know or should know they will not be able to meet, and shall pay all just debts when due. Repeated instances of financial difficulty may be cause for disciplinary action.

Members/employees shall not co-sign a note for any supervisor.

JJ. **Punishable Offenses:** Specifically, but not exclusively, the offenses for which a member/employee of the Department may be subject to discipline and punishment are the following:

1. violation of any statute, law or ordinance
2. disobedience or violation of any departmental regulation, rule, order, instruction or memorandum
3. insubordination
4. disobedience of a lawful order
5. neglect of duty
6. gross inefficiency
7. any malfeasance, or misfeasance

8. gross incompetence
9. failure to keep as physically fit as duty status requires
10. disrespect towards a superior officer
11. arrogance, oppression or tyranny in discharging of duty
12. unnecessary violence or indignity to a citizen or detainee
13. indecent, profane or unnecessarily harsh language
14. absence from duty, post or station without proper leave
15. sleeping or loafing while on post
16. failure to discover a detectable crime in an area of responsibility
17. negligence in the care of public property (i.e., its abuse, misuse, waste or willful destruction)
18. false official statement, oral or written
19. failure to pay a just debt
20. contracting a debt under false or fraudulent pretenses
21. communicating information relating to police business to unauthorized persons
22. intoxication or consumption of alcoholic beverages while on duty
23. immorality of any kind
24. conduct unbecoming an officer/employee
25. conduct prejudicial to the public peace or welfare
26. conduct tending to case disrepute on the Department
27. any other act or omission contrary to good order or discipline
28. unlawful use of narcotic, exhilarant, hypnotic or other drug
29. making recommendation for the disposition of any case pending in court without proper authorization of the Chief of Police Departmental

KK. **Investigations**: A member/employee may be discharged or otherwise disciplined for refusing to answer questions, if the questions are specifically, narrowly and directly related to the officer's/employee's performance of official duties. The questions do not have to be limited to on-duty conduct, but can inquire into an officer's/employee's private affairs and off-duty conduct if that inquiry is reasonably related to the officer's/employee's ability and fitness to perform his/her duties as a member/employee. The member/employee is not required to waive his/her immunity with respect to the use of his answers.

As long as the answers or the fruits thereof cannot be used against him/her in any criminal proceedings, he/she will have to answer.

LL. **Use of the Polygraph:** If the Chief or his designee so orders, a member/employee shall submit to polygraph examinations provided the examinations are conducted in accordance with Section KK.

MM. **Examinations Lineups**: If the Chief or his designee so orders, a member/employee shall submit to any medical, ballistics, chemical or other tests, photographs or lineups provided that the examination is specifically, directly and narrowly related to the member's/employee's performance of his/her official duties.

NN. **Radio and Communications Protocol**: Members/employees, when transmitting radio communications must conform to Federal Communications Commission Regulations. All transmissions will be broadcast in a clear, concise, courteous, and professional manner. Radio transmissions that are sarcastic, rude, argumentative, or otherwise unprofessional are strictly prohibited.

OO. **Damage to City or Department Property/Department Vehicle Accidents:** Members and employees operating city owned or department vehicles are required to contact a supervisor immediately if involved in any incident resulting in damage, however slight, to any department/city owned vehicle. Loss or damage of issued equipment or property will be reported to a supervisor immediately. In all instances, an administrative note will be typed explaining the circumstances in detail

PP. **Non Compliance with Court Cancellation Procedure:** Every officer/employee will familiarize themselves and comply with the Court Cancellation Procedure (Legal Process Policy - Section V.) utilizing the Department's voice mailbox system.

CITY 2

[redacted]

CITY 3

[redacted]

City 3

CITY 4

Gty Y

CITY 5

[redacted]

+[redacted] 5/10/2017 3:52:15 PM(UTC-4)

Are you coming to baseball tonight?

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0xE7FF4 (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 5/10/2017 3:53:06 PM(UTC-4)

No I'll be tied up. Road trip to Dorchester it's looking like

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0xE7B1A (Table: message, chat, Size: 17645568 bytes)

+[redacted] 5/10/2017 4:10:27 PM(UTC-4)

Oh Jesus

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0xE790C (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 5/10/2017 4:10:31 PM(UTC-4)

That's a bit out of the way

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0xE7767 (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 5/10/2017 4:13:45 PM(UTC-4)

Little bit lol. Joint case with the FBI. 50/50 at the moment on it f we have to go or not

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0xE759E (Table: message, chat, Size: 17645568 bytes)

+[redacted] 5/10/2017 4:23:54 PM(UTC-4)

Gotcha. Let me know when you know. You know this stuff makes me all nervous nelly

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0xE7358 (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 5/10/2017 4:25:30 PM(UTC-4)

Yes I know. It's all good. Besides I got this new fancy gun. Take out parking tickets no problem

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0xE8FF4 (Table: message, chat, Size: 17645568 bytes)

+[redacted] 5/10/2017 4:26:10 PM(UTC-4)

FYI "parking tickets" = black fella

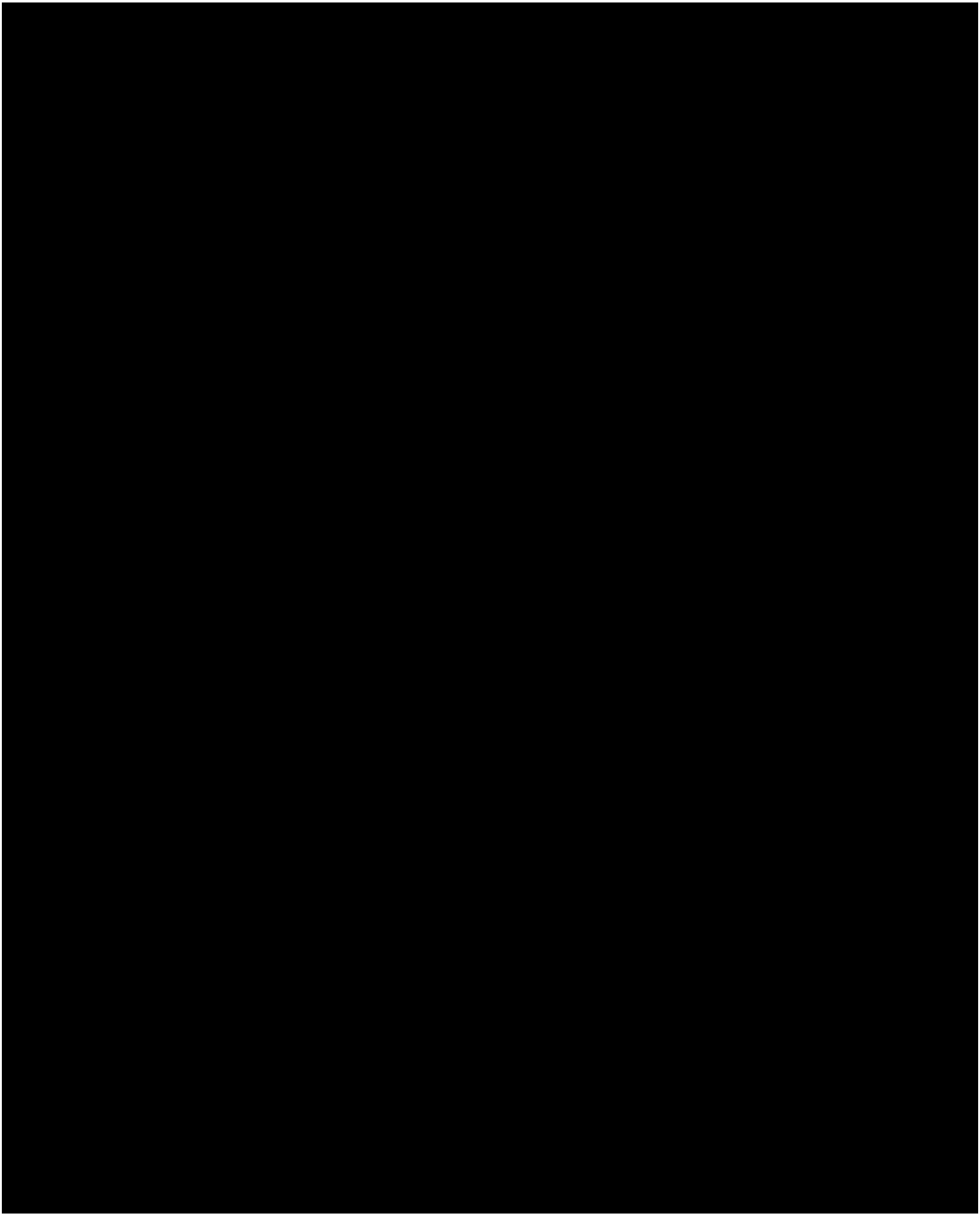
Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0xE8DA0 (Table: message, chat, Size: 17645568 bytes)

+[redacted] 5/10/2017 4:34:26 PM(UTC-4)

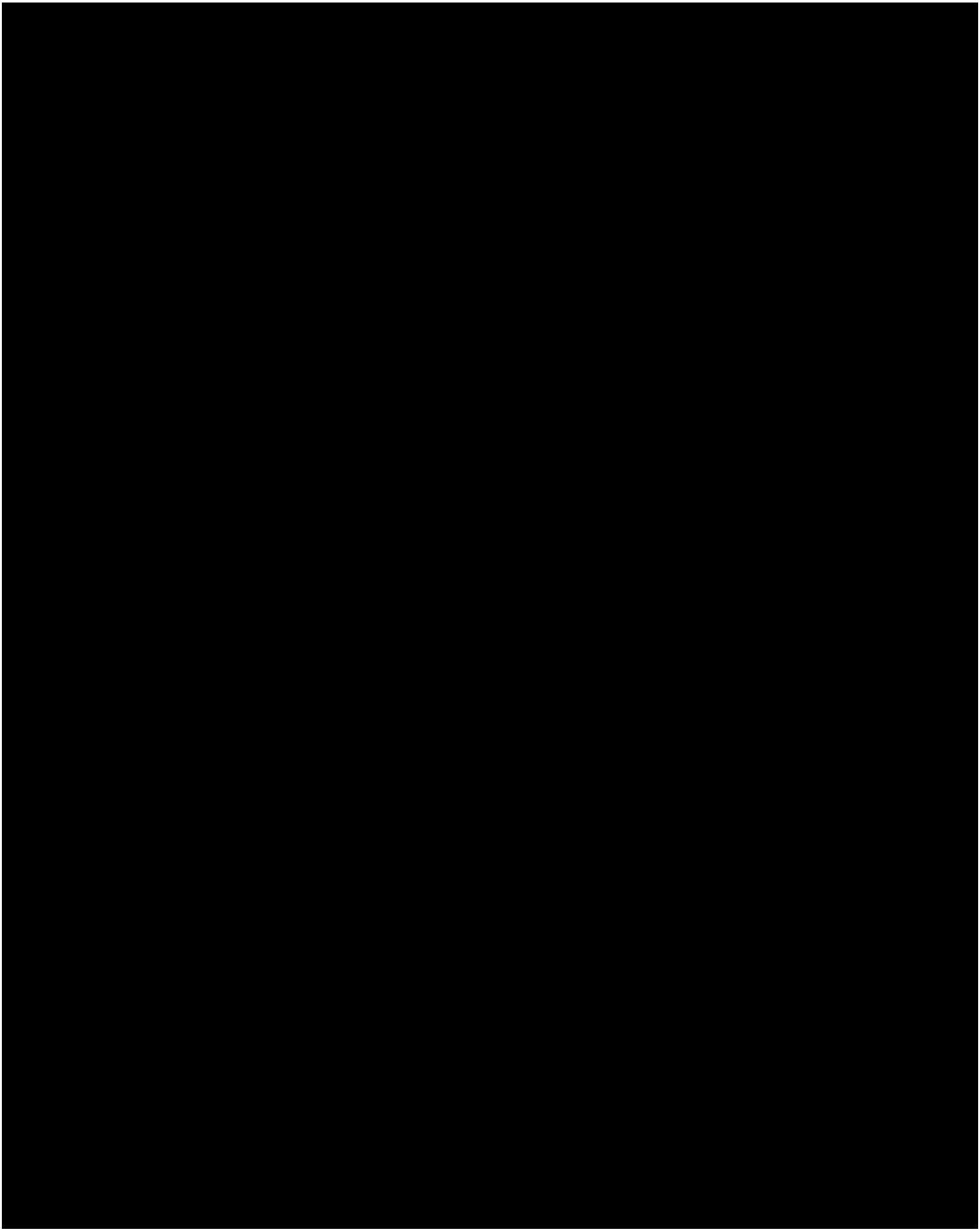
Thanks for the clarification

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0xE8BC7 (Table: message, handle, chat, Size: 17645568 bytes)

C-5



00342



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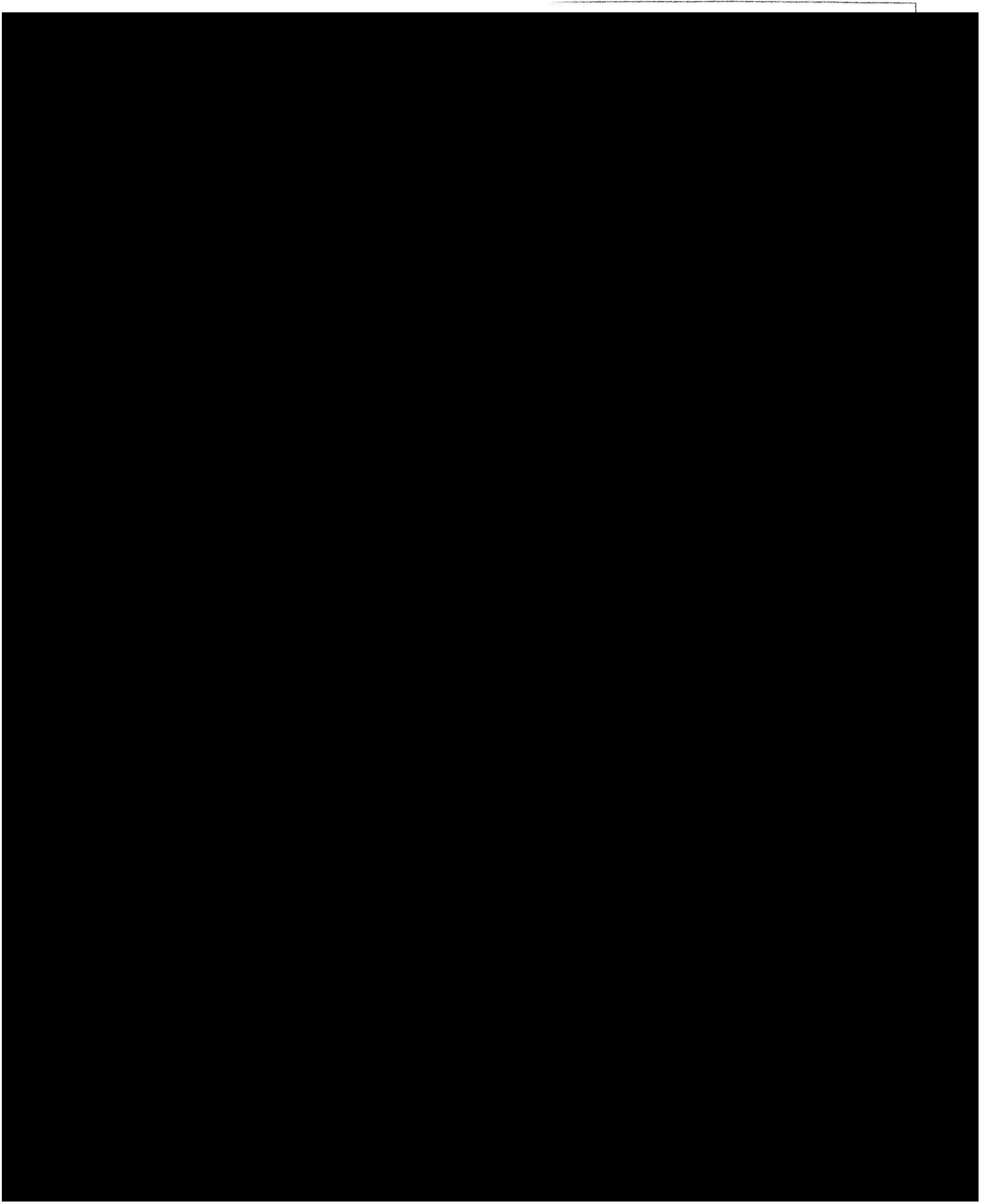


00344

[redacted]

+[redacted] 10/2/2017 5:08:26 PM(UTC-4)

Next update.... just heard [redacted] make [redacted] pinky promise to call a female dog "a female dog" and not a bitch
I'm guessing we can thank [redacted] for that one too

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x536374 (Table: message, handle, chat, Size: 17645568 bytes)

+[redacted] 10/2/2017 5:10:05 PM(UTC-4)

Yup I suspect that's the case too

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x537FF4 (Table: message, chat, Size: 17645568 bytes)

+[redacted] 10/2/2017 5:10:30 PM(UTC-4)

Little shit face. Should go down there and slap the black off him

Source file: Aaron's iPhone/var/mobile/Library/SMS/sms.db : 0x537E1F (Table: message, chat, Size: 17645568 bytes)

[redacted]

CITY 6

C-6

Manchester Police Administrative Division

[redacted]

[redacted]

[redacted]

[redacted]

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Manchester Police Patrolman's Association

v.

City of Manchester

Arbitration before: Gary Altman

Case No. G-0103-12

August 21, 2019

MANCHESTER POLICE PATROLMAN'S ASSOCIATION CLOSING BRIEF

I. INTRODUCTION

This one (1) day arbitration before Arbitrator Gary Altman, Esq. on August 21, 2019, was the result of the unjust and unlawful discharge of Aaron Brown (hereinafter "Aaron") by the City of Manchester and the Manchester Board of Police Commissioners (hereinafter "City"). The City's pre- judgment of this matter biased any attempt at a fair investigation causing the City to fail to properly review the evidence and issue disproportionate discipline in violation of Aaron's contractual rights. As a result, the Manchester Police Patrolman's Association (hereinafter "MPPA") was forced to vindicate Aaron's rights and the integrity of the collective bargaining agreement in arbitration. This Brief follows.

II. RELEVANT CONTRACT LANGUAGE

3.1 The MPPA and the Commission agree that there will be no discrimination against any employee on account of membership or non membership in the MPPA and no disciplinary action shall be taken against an employee except for just cause. See, Joint Exhibit 1, Article 3.1

III. STANDARD

The analysis of whether a sanction is legally or procedurally justified under the contract is governed by the seven criteria for analyzing whether just cause exists. These include (1) the reasonableness of the employer's position; (2) the notice given to the employee; (3) the timing of the investigation undertaken; (4) the fairness of the investigation; (5) the evidence against the employee; (6) the possibility of discrimination; and (7) the relation of the degree of discipline to the nature of the offense and the employee's past record. Appeal of Merrimack County, 156 N.H. 35, 41 (2007). Importantly the burden of proof is upon the City as the employer took the precipitating action and has the burden of proving that their actions satisfied the Just cause standard by "clear and convincing evidence". Bornstein, Labor and Employment Arbitration, 2nd Ed., Chapter 14.03 [2][a].

As the City is a governmental body the fairness of the investigation also requires that Aaron's constitutionally protected due process rights are not violated by the City. A governmental body may not divest an individual of a property interest without due process of law. A "just cause" clause within a collective bargaining agreement creates a protected property interest. This requires, at a minimum, notice of the charges against him, an opportunity to be heard and a presentation of the evidence against him prior to discharge. See, N.H. Constitution, Part I, Article 15; Duffley v. N.H. Interschool. Ath. Assoc., Inc. 122 N.H. 484 (1982); Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) and Gilbert v. Homar, 520 U.S. 924 (1997). This minimum due process is then followed by a more thorough post deprivation due process contained within the collective bargaining agreement. See, Joint Exhibit 1 Article 3.1.

IV. STIPULATED ISSUE

Whether the City of Manchester had just cause to terminate the employment of Aaron Brown? If not, what shall be the remedy?

V. BACKGROUND/FACTS

A. Stipulated Facts

1. The City of Manchester ("City") is a public employer as that term is defined by RSA 273-A:X. The principal place of business of the City of Manchester is located at 1 City Hall Plaza in Manchester, New Hampshire.

2. The Manchester Police Patrolman's Association ("MPPA") is the certified exclusive representatives for certain members of the Manchester Police Department, including all regular full-time Police Officers.

3. The parties agree that substantive and procedural arbitrability are not in dispute in this matter.

4. The parties are signatories to a collective bargaining agreement which is Joint Exhibit 1.

5. The parties agreed upon an abbreviated grievance procedure is attached as Joint Exhibit 2.

6. The parties agree that should the MPPA prevail in this matter, the parties will work diligently and amicably towards resolving any potential backpay award and if unsuccessful, the arbitrator shall retain jurisdiction for a period of thirty (30) days after issuance of the award for the parties to seek resolution.

7. The parties agreed upon a reduced grievance procedure, commencing with the pre-arbitration meeting (see, Joint Exhibit 1 at p. 7). Joint Exhibit 2.

8. Aaron Brown ("Aaron") was hired as a full-time police officer with the Manchester Police Department ("MPD") on July 16, 2007. Joint Exhibit 3.

9. Aaron was assigned to the Special Enforcement Division on October 28, 2013. Joint Exhibit 4.

10. The April 11, 2018 Letter of Disciplinary Intent (p. 1- 4); Charges and Specifications (p. 5 – 10) and the Disposition Sheet (p.11) is Joint Exhibit 5.

11. The termination letter of Aaron dated April 16, 2018 is attached as Joint Exhibit 6.

12. The "*Garrity* Warnings" for Aaron are attached as Joint Exhibit 7.

13. [redacted]

14. [redacted]

15. The Manchester Police Department Standard Operating Procedure, Rules and Regulations Section IX Professional Conduct is attached as Joint Exhibit 11.

16. The Manchester Police Department Standard Operating Procedure, Rules and

VI. THE CHARGES

This unfortunate matter was the result of private communications via text messages between a husband and wife that was taken out of context and the failure of the City to conduct an objective and impartial review of the evidence.

On April 12, 2018, veteran and decorated police officer Aaron Brown was terminated from his position in the special enforcement unit (undercover) for allegedly violating eight (8)

[1] At the hearing, the City objected to the proposed Joint Exhibit 8 (Press Release dated April 11, 2018) which became Union Exhibit 1. The other exhibits were not renumbered.

separate department operating procedures. Joint Exhibit 6. The eight (8) charges all derive from fictional texts sent by Aaron to his wife.

[redacted]

[redacted]

[redacted]

Lastly, the City alleges that on two (2) separate occasions, May 10, 2017 and August 22, 2017, Aaron sent inappropriate text messages to his wife. The City claimed that this constitutes conduct unbecoming an officer (Charges #7 and #8) Joint Exhibit 5, p. 9-10; Joint Exhibit 11, Section IX ¶ B, p. 10. However, Aaron agrees in retrospect that the text messages may have been inappropriate but that the texts are taken out of context, disproportionally exaggerated, and the penalty of termination is too severe for this matter when the evidence is reviewed in the entirety.

VIII. ARGUMENT

A. Background

Aaron Brown was hired by the Manchester Police Department on July 16, 2007. See, Joint Exhibit 3. During his tenure, Aaron did not receive any formal discipline. Testimony Willard; Testimony Aaron. Aaron's performance evaluations demonstrated that he either met or exceeded standards on all performance criteria. See, Union Exhibit 3. In 2009, a supervisor remarked that, "he makes more arrests than any other officer assigned to the patrol division. This is attributed to the fact that he is constantly searching for criminal behavior and conducting research on the MDT. This research will often result in motor vehicle related arrests or provide him with the PC to dig deeper into an investigation." See, Union Exhibit 3, p. 18.

Aaron, during his tenure also received a meritorious service award and was recognized as "Officer of the Month" on several occasions. Union Exhibit 2. Outside organizations also recognized Aaron's value as a police officer when he was issued an award by Police Standards and Training for "Looking Beyond the Stop". See, Union Exhibit 4. This concerned a motor vehicle stop which resulted in the arrest of a subject who was illegally wearing a bullet proof

vest while in possession of three (3) 45 caliber pistols and over ten (10) magazines of ammunition. This enabled a criminal to be removed from the street when he had the capability of causing a great amount of harm to the public. Union Exhibit 3, p. 18.

Aaron also served in the roles of a firearms instructor, a field training officer, and was assigned to a coveted role in the special enforcement division on October 28, 2013. See, Joint Exhibit 4. His supervisors also recognized him as an outstanding officer. Former Chief Willard described Aaron as an excellent officer that he thought highly of in the performance of his duties. Testimony Willard. However, even upon the bright career of Aaron, a few raindrops must fall.

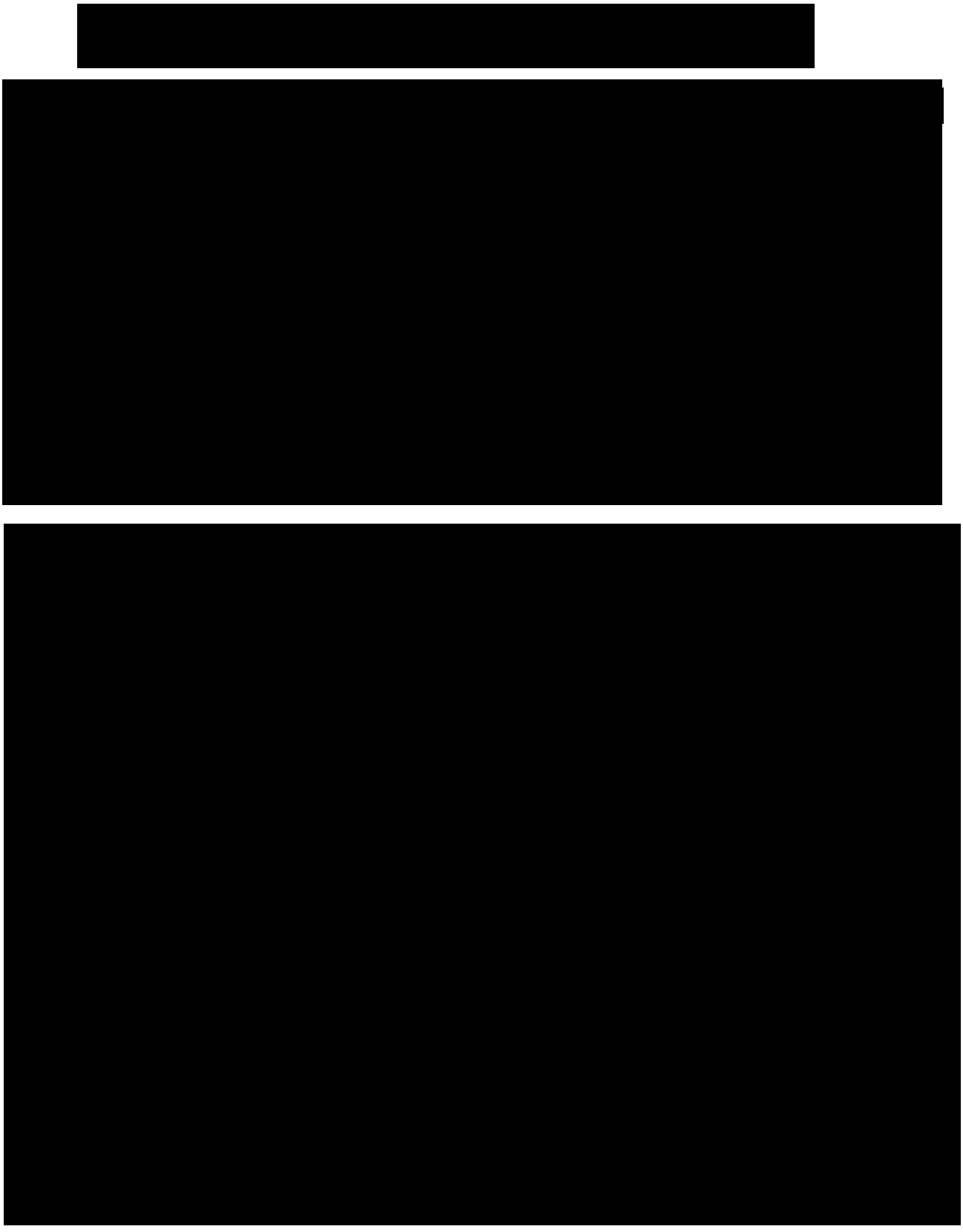
When Aaron entered into the special enforcement division in 2013, he was given a department issued cell phone. At the time, he was informed that he could use the cell phone for personal use. Testimony Aaron. This conforms with the department's rules and regulations in regards to these matters. The rules and regulation provide, "**Use of Telephone:** Local, private calls are authorized for immediate family business only. Calls should be minimal in frequency and duration so as to not impede or interfere with the efficiency of the department..." Joint Exhibit 11, Section IX ¶ BB, p. 14.

At no point did the City claim Aaron's use of his telephone for text messages impeded or interfered with the efficiency of the department. This is despite the fact that his text messages to his wife during his tenure with the Manchester Police Department filled three (3) three-inch binders, or approximately 9 inches of paper amounting to thousands of text messages, of which

[2] At the arbitration hearing, the Arbitrator requested what information should be excluded or deemed irrelevant as only pertaining to the unsustained charges. These include City Exhibit 6; City Exhibit 1, p. 2-15 and 144-145.

the City found only four (4) text messages to be potentially actionable by the City. The text message comprised of 1,285 pages (Union Exhibit 6(a)(b)) and 18,000 texts (City Exhibit 1, p. 124). It is also clear by a review of the record that Aaron and his wife engaged in a distinct form of banter in which he would over dramatize his daily events and his wife would reciprocate by engaging in a type of hero worship. To be illustrative, rather than exhaustive, in a February 15, 2017 text message between Aaron and his wife, his wife responds "Jeepers you fellas are like action figures this evening sounds so fancy and dangerous" "Who knew my hubby was such a bad ass". See Union Exhibit 5, p. 1. The personal nature of the text messages are illustrated in Union Exhibit 6A and 6B. Even the text messages provided by the City demonstrate the personal nature of messages. [redacted] Aaron and his wife communicated in this fashion during his entire tenure with the department and was never informed that such activity was disallowed.

B. [redacted]

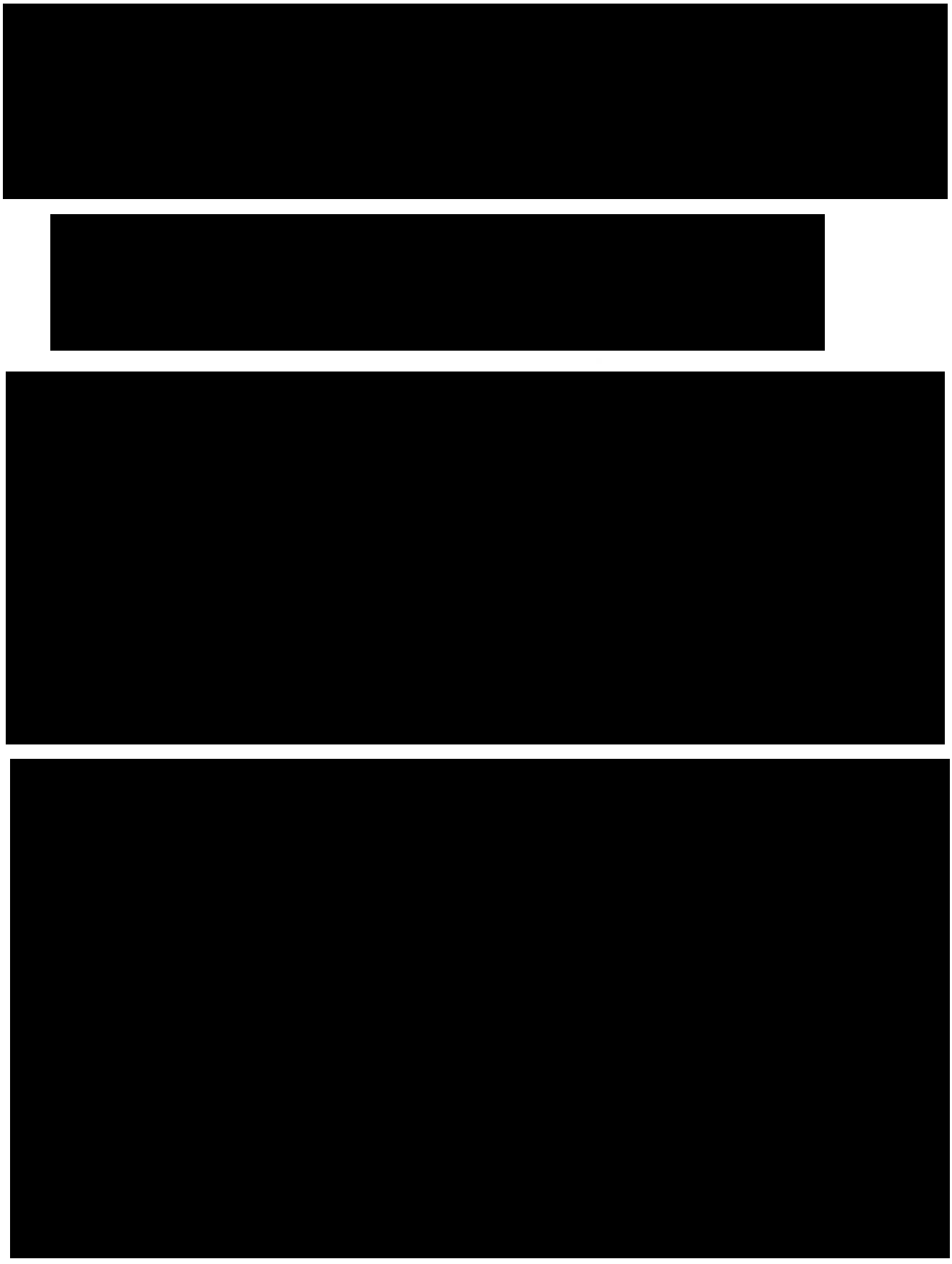


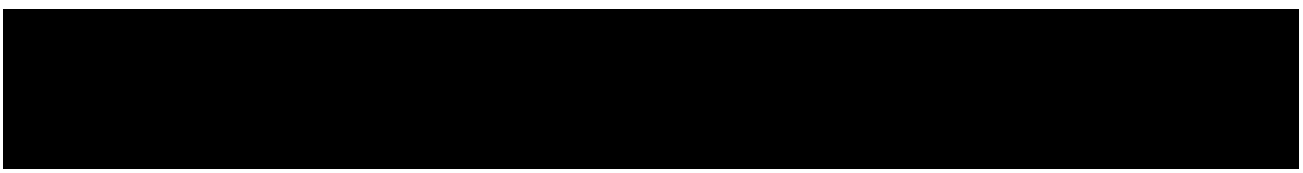
[redacted]

[redacted]

[redacted]

C. [redacted]





D. Two Private Text Messages Do Not Warrant Termination

The text messages constituting Charges #7 and #8 were privileged communications in which Aaron had a reasonable expectation of privacy. The text messages were proven to be fictitious and banter between a husband and a wife. There is no objective proof of any wrong doing, racial profiling or disrepute brought upon the City by Aaron's actions.

The last two (2) allegations against Aaron concern two (2) racially insensitive text messages that were fictitious and taken out of context by the City. Statements made by police officers that are private and not expected to be published are not actionable and are protected. Rights of Law Enforcement Officers, 5th Ed. P. 247, Author: Will Aitchinson. The exception is if the speech impairs the efficiency of the Department. The City's own rules and regulations mimic this in their "conduct unbecoming" policy. The City must demonstrate that Aaron either discredited himself or impaired the efficiency or operations of the department, pursuant to policy. See, Joint Exhibit 11, Section IX ¶ B, p. 10. The policy reflects that the City must prove that the officer was discredited or that the statements impaired the efficiency or operations of the department.

First, it should be recognized that the two texts were taken out of context and were isolated statements. The record reflected that the City retrieved over 1,285 pages of texts. Union Exhibit 6(a)(b). The information contained 18,000 text messages between Aaron and his wife. City Exhibit 1, p. 124. It is clear by a review of the texts that personal nature of the messages meant that he did not expect them to be published and testified as such. Testimony Aaron. Even a cursory review of the text messages provided demonstrates the personal and intimate nature of the texts. The discovery of these text messages were only ancillary to another investigation that was not sustained and not part of this record. See, City Exhibit 1, p. 144. These texts were provided during Aaron's last evaluation period, in which he was provided with ratings of all performance criteria of either satisfactory or exceeds expectations. See, Union Exhibit 3, p. 1-2.

After receiving his discipline and Patterson labeling him a racist, Aaron engaged in self-reflection and sought professional to assist him. Testimony Aaron. After consulting with professionals who had evaluated him as not being racist. He suffered from what is known as "implicit prejudice" that all human beings inherently possess in the cognitive structure. This is a tendency for social preferences, which is internal and subconscious. It is deeply routed in the primary recesses of the brain. The questions is whether these thoughts manifest themselves in discriminatory acts, in this case they have not. In fact, Aaron pled with the City to analyze the data and determine if he was profiling or treating any group of individuals disparately. Aaron had the highest record of arrest with the department and he considered himself to be an equal opportunity enforcer of the law. There is no evidence to the contrary.

These text messages took place over six (6) months before the investigation and in one instance it was almost a year before and there had not been one complaint of profiling, racial disparity or any discriminatory acts. At his request, Aaron sought to have the City run the records of all of his arrests and determine if there was any indicia of profiling, racism or inappropriate conduct. He was told by his supervisor, "screw the data". City Exhibit 1, p. 142. There is no evidence that Aaron has ever acted on those statements or has he ever treated any racial group disparately.

This matter also concerns a privileged communication between a husband and wife. New Hampshire recognizes a material privilege pursuant to NH Rules of Evidence 504:

> Husband and wife are competent witnesses for or against each other in all cases, civil and criminal, except that unless otherwise specifically provided, neither shall be allowed to testify against the other as to any statement, conversation, letter or other communication made to the other or to another person, nor shall either be allowed in any case to testify as to any matter which in the opinion of the Court would lead to a violation of marital confidence.

Aaron testified that he tried to defuse a situation with his wife being nervous of him going to Dorcester rather than a baseball game he was supposed to attend. She described herself as a "nervous nelly". City Exhibit 5, p. 1. Aaron used bravado and inappropriate statements in order to allay his wife's fear of a very serious situation. Testimony Aaron. The fact remains that he did not use a weapon in Dorcester that day, or any other day. The record reflects no excessive use of force at any time. The record reflects that Aaron did not, at any point in time use his badge to promote racism or to disparately treat any racial group. The record does not reflect any profiling or targeting of any minority groups by Aaron.

Aaron reasonably believed these statements would never see the light of day as he was allowed, by policy, to communicate with his wife or his family. Joint Exhibit 11,

Section IX ¶ BB, p. 14. In fact, when Aaron was out on work related leave for several months and not performing any work for the City, he was allowed to keep and use his phone for personal business. Further, while he was out on work-related leave, he was provided with a new cell phone and was told to keep the old one. He offered to give the old cell phone back to the City and he was told that it was his to keep and it was his property. Aaron's son now utilizes that cell phone. Testimony Aaron. Based on objective evidence, Aaron treated his cell phone as if it was his own personal property because the City allowed him to treat it as his personal property. There was a clear expectation of privacy and that this information would not be disclosed up and until the City required him to surrender his cell phone. Aaron's lack of racial bias in the performance of his duties is also verified by his supervisors and colleagues. Sergeant Sanders, Aaron's immediate supervisor, provided that he did not have any knowledge of any racial bias by Aaron. City Exhibit 1, p. 30. Sergeant Sullivan was asked the same question and he provided that he did not have any racial bias. City Exhibit 1, p. 24. The same is true with Detectives McGuire, Ellston and Jajuga. City Exhibit 1, p. 21, 37, 40 respectively.

The City was provided with multiple opportunities, through exhibits and witnesses, to prove that Aaron's two (2) text messages had somehow impaired the efficiency or operations of the Manchester Police Department. They failed to do so. In fact, the City reemphasized that the internal affairs investigation should remain confidential in their press release of April 11, 2018. Union Exhibit 1. Further, his official termination letter provides, "Your personnel file will remain the property of the Manchester Police Department and will contain a notation regarding termination. That information will not be available for view outside of this agency without written authorization from you.". Joint Exhibit 6.

E. Termination is too Severe and Offends the Concept of Just Cause

Discipline is considered excessive when it is disproportionate to the degree of the offense. It is also considered excessive if it is punitive, rather than corrective or if mitigating factors are ignored by management. Elkouri, How Arbitration Works, 8th Ed., Chapter 15.3.F.i, p. 15-44-15-45 (May 2016).

The just cause standard requires that progressive discipline be applied and that the penalty be commensurate with the infraction. In this particular situation, when viewed as a whole and not in isolation, this is an individual with an outstanding work performance for a period of over ten (10) years, decorated and acknowledged as a leader within the department. An individual who had previously suffered no discipline and had the respect of his supervisors and colleagues. In a lapse of judgment, Aaron sent to text messages that were admittedly inappropriate and racially insensitive. However, this communication was not meant for public consumption and was meant solely for the view of his beloved wife. This does not warrant a termination of employment and a destruction of a career. Assuming arguendo that discipline is warranted termination is too severe of a discipline. The notion of progressive discipline and just cause renders termination in this particular matter unwarranted because Aaron has not shown himself to be incorrigible.

IX. CONCLUSION

For the reasons stated above, the Manchester Police Patrolman's Association and Aaron Brown respectfully request that Arbitrator Altman find that the City of Manchester did not have just cause to terminate Aaron Brown and order that Aaron be reinstated and made whole.

Respectfully submitted,

Manchester Police Patrolman's Association
By and Through their attorneys,
MILNER & KRUPSKI, PLLC

Dated: October 25, 2019

By: _____

John S. Krupski, Esquire
109 North State Street, Suite 9
Concord, NH 03301
(603) 410-6011
jake@milnerkrupski.com

STATE OF NEW HAMPSHIRE
Public Employee Labor Relations Board

Manchester Police Patrolman's Association

v.

City of Manchester

Case No. G-0103-12
(Gr. Aaron Brown)

CITY OF MANCHESTER'S POST HEARING BRIEF

I. INTRODUCTION

This case presents the question of whether a Police Department in a racially and ethnically diverse city can tolerate the continued employment of a police officer [redacted] who has espoused hostility and violence towards African Americans. The obvious answer is no. [redacted]

A record of hostility towards members of any ethnic or racial group is contrary to the basic tenants of law enforcement, which is to protect and serve all members of a community in an equal, fair, and just manner. That the grievant, an experienced police officer, holds racial

biases cannot be disputed, as they are evidenced by his own text messages. Every future interaction that this officer has with members of the African American community will be measured in the context of his known bias and will be inherently suspect. This is particularly true of incidents involving the use of force, as his interest in "stalking" African Americans "like the jungle cat I am" and his carrying a "new fancy gun" in order to "take out" African Americans is documented in his text messages. The fact that he holds and espouses racial biases not only undermines his ability to function as a police officer, but creates an additional, significant liability risk for the City.

The MPD at all times complied with Brown's contractual and constitutional rights. The disciplinary action taken against him meets the "just cause" standard provided for in the collective bargaining agreement. The City respectfully requests that this grievance be denied

II. STATEMENT OF FACTS

The Manchester Police Department (MPD) serves the City of Manchester, New Hampshire. Manchester is the largest community in New Hampshire and the largest New England city north of Boston, with a population of approximately 112,000. The Arbitrator may take notice that Manchester is a racially and ethnically diverse community with many of the same challenges faced by larger urban centers.

The grievant, Aaron Brown ("Brown"), has been employed by the MPD since 2007. Joint Ex. 3. He has no disciplinary history. He has received minor commendations (Union Exs. 3, 4) and favorable performance evaluations. Union Ex. 3. In 2013, he was assigned to the MPD's Street Crime Unit (SCU), which conducts plainclothes and undercover operations throughout the City. Joint Ex. 4

[redacted]

[redacted]

---

1 [redacted]

[redacted][4]

[3] This was accomplished by comparing the phone and text records with Brown's reported work hours.

[4] The Union may argue that it was inappropriate for the MPD to search Brown's Department issued cell phone. This argument is without merit. In general, a public employer may search an employee's personal effects without violating the employee's constitutional rights where the search is reasonable under the circumstances. *O'Connor v Ortega*, 480 U.S. 709 (1987) (attached). Whether a search is "reasonable" is determined based on 1) whether the search was justified at its inception, and 2) whether the search conducted was reasonably related in scope to the circumstances that justified the search in the first place. *Id.* at 724. This standard applies to both investigatory and non-investigatory searches pursuant to typical workplace needs. *Id.*

In *City of Ontario v. Quon*, (attached) the Supreme Court applied the *O'Connor* standard to a search of a police officer's department issued pager. 560 U.S. 746 (2010). In that case, an officer had regularly exceeded a pager character usage quota. The department searched his phone in order to determine whether his text messages were related to work, and whether the department should increase its monthly text quota. *Id.* at 752. In doing so, the department found that many texts sent during work hours were not related to work, and that many were sexually explicit. The Court found that the search of the pager was justified at its inception and reasonable in scope, and therefore met the standard established by *O'Connor*. *Id.* at 761. It noted that even if the officer had a reasonable expectation of privacy in his phone (which the Court declined to decide), it was unreasonable for him to expect that his texts, from his employer-issued phone, would be immune from any scrutiny.

In *Sollenberger v. Sollenberger*, (attached) a federal district court found that a police department had not violated an officer's Fourth Amendment rights when it searched the officer's *personal* cell phone in response to a credible allegation that the officer was using the phone to exchange extremely racist and violent text messages. 173 F.Supp.3d 608 (S.D. Oh. 2016). In that case, the NAACP obtained a transcript of these texts from the officer's estranged wife. The NAACP brought them to the attention of the department, which then searched the cell phone and discovered the offending texts. The court found that this search was reasonable and complied with the standard set forth by *O'Connor*. The Court held that the search was reasonable at the outset because the department had received a credible allegation that the officer's phone contained evidence of violations of department policy. It was reasonable in scope because the phone, though personal, was used for work purposes, and the information extracted

During the review of Brown's on duty phone and text messages, the investigators discovered evidence of potential misconduct unrelated to Ms. Rogers' initial allegations. City Ex.1, p.2. [redacted] Other text messages revealed that Officer Brown was biased against African Americans. In those texts, he singled out African Americans as potential threats to his safety and as potential recipients of violent responses to perceived threats. [redacted] The misconduct that resulted in Brown's termination is detailed below.

[redacted]

from it was extracted in the course of a justified workplace investigation. *Id.* at 624. The court rejected the argument that the search of the phone was unreasonable simply because it may have revealed intimate aspects of the officer's life. *Id.* The court also distinguished *Riley v. California*, which found that the police generally must obtain a warrant prior to the search of a phone, on that grounds that that case involved searches of members of the public incident to arrest, and not a workplace investigation. 573 U.S. 373 (2014).

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] [redacted]

[redacted]

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5 [redacted]

[redacted]

[redacted][8]

[6] All of the officers interviewed were provided with "reverse Garrity" notices and the opportunity for Union representation. Records of the Garrity notices were included in Book 2 of the investigation report, which was provided to the Union but not introduced by either party at the arbitration hearing. City Ex. 1, Attachments, Book 2. All of the interviews were recorded and also provided to the Union.

[7] [redacted]

[8] [redacted]

[redacted]

[redacted]

[redacted] [redacted]

[redacted]

[redacted]

[redacted]

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[9] [redacted]

> [redacted]

[redacted]

> [redacted]

[redacted]

[redacted]

[redacted]

> [redacted].

[redacted]

C. "Parking Tickets"

On May 10, 2018, Brown, while on duty, exchanged a series of text messages with his wife:

Wife-Are you coming to baseball tonight?

Brown-No Ill be tied up. Road trip to Dorchester. It's looking like

Wife-Oh Jesus
That's a bit out of the way

Brown-Little bit lol. Joint case with the FBI. 50/50 at the moment on if I we have to go or not

Wife-Gotcha. Let me know when you know. You know this stuff makes me all nervous nelly.

Brown-Yes I know. It's all. Besides I got this new fancy gun. Take out parking tickets no problem.

Brown-FYI 'Parking tickets'= black fella.

Wife-Thanks for the clarification

City Ex. 5, p.1. Neither the investigators nor any of the officers they interviewed were familiar with the use of the words "parking tickets" as a slang term for African Americans.[10] In his interview, Brown said that "parking ticket" was a term he had heard others use in reference to blacks. City Ex. 1, p.103. He understood that blacks were referred to as parking tickets because everyone hates parking tickets. City Ex. 1, p.119. He agreed that it was "a derogatory term, sure." City Ex. 1, P.121.

Brown explained that he was assigned to travel to the Dorchester neighborhood of Boston to witness a "transfer of, you know, drugs or whatever. These were black folks we were dealing with." City Ex. 1, pp. 119-120. He agreed that Dorchester is a racially and ethnically diverse neighborhood. City Ex. 1, p. 122. He also conceded that his text message only referenced the potential use of deadly force if a problem arose with blacks. He explained that he only referenced "parking tickets" because they "would be dealing with African Americans." City Ex. 1, p. 122. He acknowledged having prejudices, but denied being a racist. However, he agreed that "talking about a specific race, and singling out that specific race" was the definition of racial profiling. He claimed that this was another example of his "bullshitting" to sound like a tough guy for his wife's benefit. City Ex. 1, p. 124.

On August 22, 2017, Brown and his wife had the following text message exchange:

Wife-What are you doing at work tonight?

Brown-The usual Currently putting the stall (sic)[11] on a parking ticket…like the big jungle cat that I am

Wife-I wish I followed that though but I have no idea what you mean

[10] This term could not be found in any available slang dictionaries.
[11] Brown acknowledged that he intended to type "stalk".

Brown-Parking ticket=black feller

Brown-And I'm stalking him like a jungle cat

Wife Ah, I see

Wife I need an Aaron-urban dictionary for translations. Hahaha.

Brown-Haha, I'll make a cheat sheet for you.

City Ex. 5, p.4. Brown explained that this was another example of "bullshitting" with his wife.

Based on the content of the text messages, the investigators concluded that Brown had engaged in conduct unbecoming an officer, in that his text messages referencing having a "fancy gun" to protect him from African-Americans and to "stalking" an African-American "like a big jungle cat," "calls his judgement and credibility into questions and is conduct that will bring the Department into disrepute." City 1, p.150.

The investigator's report (City Ex. 1) was submitted to a review board consisting of then Assistant Chief (now Chief) Capano, and Captains Sanclemente and Grant. After reviewing the report, they recommended [redacted] charges against Brown consistent with the investigation findings.[12] Joint Ex. 5. [redacted] Brown was notified of the charges against him and provided with the opportunity to meet with then Police Chief Willard to explain why the review board's recommendations should not be followed. Following this *Loudermill* proceeding, Chief Willard decided to accept the review board's recommendations and terminated Brown's employment. Joint Exs. 2, 6. This grievance and demand for arbitration followed.

[12] [redacted]

III. ARGUMENT

[redacted] Separately, but not less importantly, it is inconsistent with the basic tenets of law enforcement to entrust the safety of all citizens – including African American citizens – to an officer who has espoused racist views and who is willing to say that African American citizens should be dealt with through the use of deadly force.

A. Brown was Terminated for Just Cause.

The MPD collective bargaining agreement provides that "no disciplinary action shall be taken against an employee except for just cause." Joint Ex. 1, Article 3.1. The New Hampshire Supreme Court has adopted the following criteria for determining whether the "just cause" standard has been met:

> (1) the reasonableness of the employer's position; (2) the notice given to the employee; (3) the timing of the investigation undertaken; (4) the fairness of the investigation; (5) the evidence against the employee; (6) the possibility of

discrimination; and (7) the relation of the degree of discipline to the nature of the offense and the employee's past record.

Appeal of Merrimack County (New Hampshire Public Employee Labor Relations Board), 156 NH 35, 41 (2007).

In the instant case, it was reasonable and necessary for the MPD to investigate Brown's conduct. Brown was given prompt and timely notice that his conduct was under investigation. The investigation was promptly initiated and completed in a timely manner. No allegation has been made that the investigators, any witnesses, or the decision makers harbored any personal bias or discriminatory attitudes towards Brown. To the contrary, Chief Willard testified that Brown was a well-regarded police officer and he found it difficult, but ultimately necessary, to terminate his employment.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

n

[redacted]

[redacted][1314]

[redacted]

[13] [redacted]

[redacted][15]

[redacted]

[redacted]

> [redacted]

[15] [redacted]

[redacted] Through his texts, Brown made clear that he has a unique hostility to African-Americans. While describing a work assignment in Dorchester, a racially and ethnically diverse community, Brown told his wife that he had a "fancy new gun. Take out parking tickets no problem." Brown then translated that "'parking tickets'= black fella." Brown acknowledged that, while unclear on its origin, "parking tickets" was a derogatory term for African-Americans.

In effect, Brown told his wife that she need not worry that he might be in danger because he had a gun fully capable of killing black citizens. The racism in this statement is nothing less than appalling. Brown presumed that, whatever danger he might face, what he needed to be prepared to

[16] [redacted]

do is to kill African Americans – not the Hispanics, Asians, Irish, Italians, and other ethnic and racial groups that form the Dorchester community. Brown measured the effectiveness of his "fancy gun" not on its ability to defend himself against all potential threats, but only its ability to kill African Americans.

Neither the MPD nor any professional law enforcement organization issue or condone the use of special weapons for killing specific ethnic or racial minorities, nor do they measure the effectiveness of a weapon based on its ability to "take out" black citizens. The continued employment of an officer who identifies only African Americans as a threat he needs to be prepared to kill is simply untenable. The Arbitrator need only envision a future circumstance in which Brown is required to use his weapon in the line of duty and shoots a black citizen. If Brown's text message became known, as it certainly would, in the investigation of the shooting that would follow such an incident, it would be extremely difficult, if not impossible, to establish that Brown's view of blacks as threats that he might need to take out did not cause him to use unnecessary and excessive force.

Equally appalling is Brown's statement that he stalks "parking tickets." A police officer might stalk a suspect and hunters might stalk prey, but there are no circumstances where it is appropriate for anyone to stalk an individual because he is black. The "like a jungle cat" comment adds an additional racist layer, as it creates imagery of a jungle environment in which non-whites might fall prey to lions or tigers. Again, one need only imagine a circumstance in which Brown uses force in the performance of his duties and causes harm to a black citizen. How could his discussion of stalking "parking tickets" be seen as anything other than racial animosity, and how could that animosity not be seen as a factor in Brown's decision to use force? As Chief Willard testified, Brown's articulated attitude towards African Americans is consistent with the basic tenets of law enforcement and cannot be tolerated by the MPD.

IV. Conclusion

As set forth in the MPD's policies and procedures:

> Police officers have a sworn obligation to respect and defend the rights guaranteed to the people in the Constitution. In the performance of those duties they may command obedience or prohibit behavior which tends to irritate and conflict with the expectations of free men in a free society, and particular attention must be given to its just and impartial application. Violations of law by those sworn to defend it will bring down the system more surely than all other forms of crime combined.

Joint Ex. 11, Section II (C), p.2. A police department cannot function without trust – both between the department and the public, and among members of the department itself. [redacted] The MPD respectfully submits that there is no form of progressive discipline that would allow Brown to restore the discredit he has brought upon himself and the Department. For the reasons set forth above, the MPD respectfully requests that the grievance be denied.

Respectfully submitted,

CITY OF MANCHESTER

By Its Attorneys,

DRUMMOND WOODSUM & MACMAHON

Dated: October 25, 2019

By: /s/ Mark T. Broth

Mark T. Broth, Esquire (NH Bar #279)
1001 Elm Street, Suite 303
Manchester, NH 03101
603-716-2895
mbroth@dwmlaw.com

Attachment 1
O’Connor v. Ortega

107 S.Ct. 1492
Supreme Court of the United States

Dennis M. O'CONNOR, et al., Petitioners
v.
Magno J. ORTEGA.

No. 85–530.
|
Argued Oct. 15, 1986.
|
Decided March 31, 1987.

Synopsis
Former chief of professional education at state hospital brought action against various state hospital officials, alleging claims under § 1983 and state law. On cross motions for summary judgment, the United States District Court for the Northern District of California, John P. Vucasin, Jr., J., granted summary judgment against plaintiff, and he appealed. The Court of Appeals, 764 F.2d 703,affirmed in part and reversed and remanded with instructions in part, and officials petitioned for certiorari. The Supreme Court, Justice O'Connor, held that: (1) public employers' intrusions on constitutionally protected privacy interest of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by standard of reasonableness under all the circumstances, and (2) whether public employer's search of hospital supervisor's office was reasonable, both in its inception and in its scope, presented factual question precluding summary judgment.

Reversed and remanded.

Justice Scalia, concurred in judgment and filed opinion.

Justice Blackmun, dissented and filed opinion in which Justices Brennan, Marshall, and Stevens, joined.

****1493 *709** *Syllabus* *

Respondent, a physician and psychiatrist, was an employee of a state hospital and had primary responsibility for training physicians in the psychiatric residency program. Hospital officials became concerned about possible improprieties in his management of the program, particularly with respect to his acquisition of a computer and charges against him concerning sexual harassment of female hospital employees and inappropriate disciplinary action against a resident. While he was on administrative leave pending investigation of the charges, hospital officials, allegedly in order to inventory and secure state property, searched his office and seized personal items from his desk and file cabinets that were used in administrative proceedings resulting in his discharge. No formal inventory of the property in the office was ever made, and all the other papers in the office were merely placed in boxes for storage. Respondent filed an action against petitioner hospital officials in Federal District Court under 42 U.S.C. § 1983, alleging that the search of his office violated the Fourth Amendment. On cross-motions for summary judgment, the District Court granted judgment for petitioners, concluding that the search was proper because there was a need to secure state property in the office. Affirming in part, reversing in part, and remanding the case, the Court of Appeals concluded that respondent had a reasonable expectation of privacy in his office, and that the search violated the Fourth Amendment. The court held that the record justified a grant of partial summary judgment for respondent on the issue of liability for the search, and it remanded the case to the District Court for a determination of damages.

Held: The judgment is reversed, and the case is remanded.

764 F.2d 703 (CA9 1985), reversed and remanded.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice WHITE, and Justice POWELL, concluded that:

1. Searches and seizures by government employers or supervisors of the private property of their employees are subject to Fourth Amendment restraints. An expectation of privacy in one's place of work is based upon societal expectations that have deep roots in the history of the Amendment. However, the operational realities of the workplace may make *some* public employees' expectations of privacy unreasonable ***710** when an intrusion is by a supervisor rather than a law enforcement official. Some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable. Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis. Because the record does not reveal the extent to which hospital officials may have had work-related reasons to enter respondent's office, the Court of Appeals should have remanded the matter to the District Court for its further determination. However, a majority of this Court agrees with the determination of the ****1494** Court of Appeals that respondent had a reasonable expectation of privacy in his office. Regardless of any expectation of privacy in the office itself, the undisputed evidence supports the conclusion that respondent had a reasonable expectation of privacy at least in his desk and file cabinets. Pp. 1497–1499.

2. In determining the appropriate standard for a search conducted by a public employer in areas in which an employee has a reasonable expectation of privacy, what is a reasonable search depends on the context within which the search takes place, and requires balancing the employee's legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace. Requiring an employer to obtain a warrant whenever the employer wishes to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unreasonable. Moreover, requiring a probable cause standard for searches of the type at issue here would impose intolerable burdens on public employers. Their intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this standard, both the inception and the scope of the intrusion must be reasonable. Pp. 1499–1503.

3. In the procedural posture of this case, it cannot be determined whether the search of respondent's office, and the seizure of his personal belongings, satisfied the standard of reasonableness. Both courts below were in error because summary judgment was inappropriate. The parties were in dispute about the actual justification for the search, and the record was inadequate for a determination of the reasonableness of the search and seizure. On remand, the District Court must determine these matters. Pp. 1503–1504.

Justice SCALIA concluded that the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter, and no special circumstanceswere ***711** present here that would call for an exception to the ordinary rule. However, government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment. Because the conflicting and incomplete evidence in the present case could not conceivably support summary judgment that the search did not have such a validating purpose, the decision must be reversed and remanded. Pp. 1505–1506.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion in which REHNQUIST, C.J., and WHITE and POWELL, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post,* p. ——. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post,* p. ——.

Attorneys and Law Firms

Jeffrey T. Miller argued the cause for petitioners. With him on the briefs were *John K. Van de Kamp,* Attorney General of California, *Marvin Goldsmith,* Assistant Attorney General, and *Jeffrey T. Miller* and *Teresa Tan,* Deputy Attorneys General.

Joel I. Klein, by invitation of the Court, 475 U.S. 1006, argued the cause and filed a brief as *amicus curiae* in support of the judgment below. *Magno J. Ortega, pro se,* filed a brief as respondent.*

* *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller, Alan I. Horowitz, Barbara L. Herwig,* and *John P. Schnitker* filed a brief for the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Peter W. Morgan, Jack Novik, Burt Neuborne,* and *Michael Simpson;* and for the American Federation of State, County, and Municipal Employees, AFL-CIO, by *Richard Kirschner.*

Opinion

Justice O'CONNOR announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, Justice WHITE, and Justice POWELL join.

This suit under 42 U.S.C. § 1983 presents two issues concerning the Fourth Amendment rights of public employees. First, we must determine whether the respondent, a public ***712** employee, had a reasonable expectation of privacy in his office, desk, and file cabinets at his place of work. Second, we must address the appropriate Fourth Amendment standard for a search conducted by a public employer in areas in which a ****1495** public employee is found to have a reasonable expectation of privacy.

I

Dr. Magno Ortega, a physician and psychiatrist, held the position of Chief of Professional Education at Napa State Hospital (Hospital) for 17 years, until his dismissal from that position in 1981. As Chief of Professional Education, Dr. Ortega had primary responsibility for training young physicians in psychiatric residency programs.

In July 1981, Hospital officials, including Dr. Dennis O'Connor, the Executive Director of the Hospital, became concerned about possible improprieties in Dr. Ortega's management of the residency program. In particular, the Hospital officials were concerned with Dr. Ortega's acquisition of an Apple II computer for use in the residency program. The officials thought that Dr. Ortega may have misled Dr. O'Connor into believing that the computer had been donated, when in fact the computer had been financed by the possibly coerced contributions of residents. Additionally, the Hospital officials were concerned with charges that Dr. Ortega had sexually harassed two female Hospital employees, and had taken inappropriate disciplinary action against a resident.

On July 30, 1981, Dr. O'Connor requested that Dr. Ortega take paid administrative leave during an investigation of these charges. At Dr. Ortega's request, Dr. O'Connor agreed to allow Dr. Ortega to take two weeks' vacation instead of administrative leave. Dr. Ortega, however, was requested to stay off Hospital grounds for the duration of the investigation. On August 14, 1981, Dr. O'Connor informed Dr. Ortega that the investigation had not yet been completed, and that he was being placed on paid administrative leave. Dr. Ortega remained on administrative leave until ***713** the Hospital terminated his employment on September 22, 1981.

Dr. O'Connor selected several Hospital personnel to conduct the investigation, including an accountant, a physician, and a Hospital security officer. Richard Friday, the Hospital Administrator, led this "investigative team." At some point during the investigation, Mr. Friday made the decision to enter Dr. Ortega's office. The specific reason for the entry into Dr. Ortega's office

is unclear from the record. The petitioners claim that the search was conducted to secure state property. Initially, petitioners contended that such a search was pursuant to a Hospital policy of conducting a routine inventory of state property in the office of a terminated employee. At the time of the search, however, the Hospital had not yet terminated Dr. Ortega's employment; Dr. Ortega was still on administrative leave. Apparently, there was no policy of inventorying the offices of those on administrative leave. Before the search had been initiated, however, petitioners had become aware that Dr. Ortega had taken the computer to his home. Dr. Ortega contends that the purpose of the search was to secure evidence for use against him in administrative disciplinary proceedings.

The resulting search of Dr. Ortega's office was quite thorough. The investigators entered the office a number of times and seized several items from Dr. Ortega's desk and file cabinets, including a Valentine's Day card, a photograph, and a book of poetry all sent to Dr. Ortega by a former resident physician. These items were later used in a proceeding before a hearing officer of the California State Personnel Board to impeach the credibility of the former resident, who testified on Dr. Ortega's behalf. The investigators also seized billing documentation of one of Dr. Ortega's private patients under the California Medicaid program. The investigators did not otherwise separate Dr. Ortega's property from state property because, as one investigator testified, "[t]rying to sort State from non-State, it was too much to do, so I gave it ***714** up and boxed it up." App. 62. Thus, no formal inventory of the property in the office was ever made. Instead, all the papers in Dr. Ortega's office were merely placed in boxes, and put in storage for Dr. Ortega to retrieve.

****1496** Dr. Ortega commenced this action against petitioners in Federal District Court under 42 U.S.C. § 1983, alleging that the search of his office violated the Fourth Amendment. On cross-motions for summary judgment, the District Court granted petitioners' motion for summary judgment. The District Court, relying on *Chenkin v. Bellevue Hospital Center, New York City Health & Hospitals Corp.,* 479 F.Supp. 207 (SDNY 1979), concluded that the search was proper because there was a need to secure state property in the office. The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part, 764 F.2d 703 (1985), concluding that Dr. Ortega had a reasonable expectation of privacy in his office. While the Hospital had a procedure for office inventories, these inventories were reserved for employees who were departing or were terminated. The Court of Appeals also concluded—albeit without explanation—that the search violated the Fourth Amendment. The Court of Appeals held that the record justified a grant of partial summary judgment for Dr. Ortega on the issue of liability for an unlawful search, and it remanded the case to the District Court for a determination of damages.

We granted certiorari, 474 U.S. 1018, 106 S.Ct. 565, 88 L.Ed.2d 551 (1985), and now reverse and remand.

II

The strictures of the Fourth Amendment, applied to the States through the Fourteenth Amendment, have been applied to the conduct of governmental officials in various civil activities. *New Jersey v. T.L.O.,* 469 U.S. 325, 334–335, 105 S.Ct. 733, 738–739, 83 L.Ed.2d 720 (1985). Thus, we have held in the past that the Fourth Amendment governs the conduct of school officials, see *ibid.,* building inspectors, see *Camara v. Municipal Court,* 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967), and Occupational Safety and Health ***715** Act inspectors, see *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 312–313, 98 S.Ct. 1816, 1820–1821, 56 L.Ed.2d 305 (1978). As we observed in *T.L.O.,* "[b]ecause the individual's interest in privacy and personal security 'suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards,' ... it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.' " 469 U.S., at 335, 105 S.Ct., at 739 (quoting *Marshall v. Barlow's, Inc., supra,* 436 U.S., at 312–313, 98 S.Ct., at 1820 and *Camara v. Municipal Court, supra,* 387 U.S., at 530, 87 S.Ct., at 1731). Searches and seizures by government employers or supervisors of the private property of their employees, therefore, are subject to the restraints of the Fourth Amendment.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." Our cases establish that Dr. Ortega's Fourth Amendment rights are implicated only if

the conduct of the Hospital officials at issue in this case infringed "an expectation of privacy that society is prepared to consider reasonable." *United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable. Instead, "the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Oliver v. United States,* 466 U.S. 170, 178, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214 (1984) (citations omitted).

Because the reasonableness of an expectation of privacy, as well as the appropriate standard for a search, is understood to differ according to context, it is essential first to delineate the boundaries of the workplace context. The workplace includes ****1497** those areas and items that are related to work and are generally within the employer's control. At a hospital, for ***716** example, the hallways, cafeteria, offices, desks, and file cabinets, among other areas, are all part of the workplace. These areas remain part of the workplace context even if the employee has placed personal items in them, such as a photograph placed in a desk or a letter posted on an employee bulletin board.

Not everything that passes through the confines of the business address can be considered part of the workplace context, however. An employee may bring closed luggage to the office prior to leaving on a trip, or a handbag or briefcase each workday. While whatever expectation of privacy the employee has in the existence and the outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the *contents* of the luggage is not affected in the same way. The appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag or a briefcase that happens to be within the employer's business address.

Within the workplace context, this Court has recognized that employees may have a reasonable expectation of privacy against intrusions by police. See *Mancusi v. DeForte,* 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968). As with the expectation of privacy in one's home, such an expectation in one's place of work is "based upon societal expectations that have deep roots in the history of the Amendment." *Oliver v. United States, supra,* 466 U.S., at 178, n. 8, 104 S.Ct., at 1741, n. 8. Thus, in *Mancusi v. DeForte, supra,* the Court held that a union employee who shared an office with other union employees had a privacy interest in the office sufficient to challenge successfully the warrantless search of that office:

> "It has long been settled that one has standing to object to a search of his office, as well as of his home.... [I]t seems clear that if DeForte had occupied a 'private' office in the union headquarters, and union records had been seized from a desk or a filing cabinet in that office, he would have had standing.... In such a 'private' office, ***717** DeForte would have been entitled to expect that he would not be disturbed except by personal or business invitees, and that records would not be taken except with his permission or that of his union superiors." 392 U.S., at 369, 88 S.Ct., at 2124.

Given the societal expectations of privacy in one's place of work expressed in both *Oliver* and *Mancusi,* we reject the contention made by the Solicitor General and petitioners that public employees can never have a reasonable expectation of privacy in their place of work. Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer. The operational realities of the workplace, however, may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official. Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation. Indeed, in *Mancusi* itself, the Court suggested that the union employee did not have a reasonable expectation of privacy against his union supervisors. 392 U.S., at 369, 88 S.Ct., at 2124. The employee's expectation of privacy must be assessed in the context of the employment relation. An office is seldom a private enclave free from entry by supervisors, other employees, and business and personal invitees. Instead, in many cases offices are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits. Simply put, it is the nature of government offices that others—such as fellow employees, supervisors, consensual visitors, and the general public—may have frequent access to an individual's office. We agree with Justice ****1498** SCALIA that "[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer," ***718** *post,* at 1505, but some government offices may be so open to fellow employees or the public that no expectation of privacy is

reasonable. Cf. *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"). Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.

The Court of Appeals concluded that Dr. Ortega had a reasonable expectation of privacy in his office, and five Members of this Court agree with that determination. See *post,* at 1504 (SCALIA, J., concurring in judgment); *post,* at 1506 (BLACKMUN, J., joined by BRENNAN, MARSHALL, and STEVENS, JJ., dissenting). Because the record does not reveal the extent to which Hospital officials may have had work-related reasons to enter Dr. Ortega's office, we think the Court of Appeals should have remanded the matter to the District Court for its further determination. But regardless of any legitimate right of access the Hospital staff may have had to the office as such, we recognize that the undisputed evidence suggests that Dr. Ortega had a reasonable expectation of privacy in his desk and file cabinets. The undisputed evidence discloses that Dr. Ortega did not share his desk or file cabinets with any other employees. Dr. Ortega had occupied the office for 17 years and he kept materials in his office, which included personal correspondence, medical files, correspondence from private patients unconnected to the Hospital, personal financial records, teaching aids and notes, and personal gifts and mementos. App. 14. The files on physicians in residency training were kept outside Dr. Ortega's office. *Id.,* at 21. Indeed, the only items found by the investigators were apparently personal items because, with the exception of the items seized for use in the administrative hearings, all the papers and effects found in the office were simply placed in boxes and made available to Dr. Ortega. ***719** *Id.,* at 58, 62. Finally, we note that there was no evidence that the Hospital had established any reasonable regulation or policy discouraging employees such as Dr. Ortega from storing personal papers and effects in their desks or file cabinets, *id.,* at 44, although the absence of such a policy does not create an expectation of privacy where it would not otherwise exist.

On the basis of this undisputed evidence, we accept the conclusion of the Court of Appeals that Dr. Ortega had a reasonable expectation of privacy at least in his desk and file cabinets. See *Gillard v. Schmidt,* 579 F.2d 825, 829 (CA3 1978); *United States v. Speights,* 557 F.2d 362 (CA3 1977); *United States v. Blok,* 88 U.S.App.D.C. 326, 188 F.2d 1019 (1951).

III

Having determined that Dr. Ortega had a reasonable expectation of privacy in his office, the Court of Appeals simply concluded without discussion that the "search ... was not a reasonable search under the fourth amendment." 764 F.2d, at 707. But as we have stated in *T.L.O.,* "[t]o hold that the Fourth Amendment applies to searches conducted by [public employers] is only to begin the inquiry into the standards governing such searches.... [W]hat is reasonable depends on the context within which a search takes place." *New Jersey v. T.L.O.,* 469 U.S., at 337, 105 S.Ct., at 740. Thus, we must determine the appropriate standard of reasonableness applicable to the search. A determination of the standard of reasonableness applicable to a particular class of searches requires "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify ****1499** the intrusion." *United States v. Place,* 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983); *Camara v. Municipal Court,* 387 U.S., at 536–537, 87 S.Ct., at 1734–1735. In the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacyagainst ***720** the government's need for supervision, control, and the efficient operation of the workplace.

"[I]t is settled ... that 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.' " *Mancusi v. DeForte,* 392 U.S., at 370, 88 S.Ct., at 2125 (quoting *Camara v. Municipal Court, supra,* 387 U.S., at 528–529, 87 S.Ct., at 1731). There are some circumstances, however, in which we have recognized that a warrant requirement is unsuitable. In particular, a warrant requirement is not appropriate when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara v. Municipal Court, supra,* at 533, 87 S.Ct., at 1733. Or, as Justice BLACKMUN stated in *T.L.O.,* "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." 469 U.S., at 351, 105 S.Ct., at 749 (concurring in judgment). In *Marshall v. Barlow's, Inc.,* 436

U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), for example, the Court explored the burdens a warrant requirement would impose on the Occupational Safety and Health Act regulatory scheme, and held that the warrant requirement was appropriate only after concluding that warrants would not "impose serious burdens on the inspection system or the courts, [would not] prevent inspections necessary to enforce the statute, or [would not] make them less effective." 436 U.S., at 316, 98 S.Ct., at 1822. In *New Jersey v. T.L.O., supra,* we concluded that the warrant requirement was not suitable to the school environment, because such a requirement would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.

There is surprisingly little case law on the appropriate Fourth Amendment standard of reasonableness for a public employer's work-related search of its employee's offices, desks, or file cabinets. Generally, however, the lower courts have held that any "work-related" search by an employersatisfies ***721** the Fourth Amendment reasonableness requirement. See *United States v. Nasser,* 476 F.2d 1111, 1123 (CA7 1973) ("work-related" searches and seizures are reasonable under the Fourth Amendment); *United States v. Collins,* 349 F.2d 863, 868 (CA2 1965) (upholding search and seizure because conducted pursuant to "the power of the Government as defendant's employer, to supervise and investigate the performance of his duties as a Customs employee"). Others have suggested the use of a standard other than probable cause. See *United States v. Bunkers,* 521 F.2d 1217 (CA9 1975) (work-related search of a locker tested under "reasonable cause" standard); *United States v. Blok, supra,* at 328, 188 F.2d, at 1021 ("No doubt a search of [a desk] without her consent would have been reasonable if made by some people in some circumstances. Her official superiors might reasonably have searched the desk for official property needed for official use"). The only cases to imply that a warrant should be required involve searches that are not work related, see *Gillard v. Schmidt, supra,* at 829, n. 1, or searches for evidence of criminal misconduct, see *United States v. Kahan,* 350 F.Supp. 784 (SDNY 1972).

The legitimate privacy interests of public employees in the private objects they bring to the workplace may be substantial. Against these privacy interests, however, must be balanced the realities of the workplace, which strongly suggest that a warrant requirement would be unworkable. While police, and even administrative enforcement personnel, conduct searches for the primary purpose of obtaining evidence ****1500** for use in criminal or other enforcement proceedings, employers most frequently need to enter the offices and desks of their employees for legitimate work-related reasons wholly unrelated to illegal conduct. Employers and supervisors are focused primarily on the need to complete the government agency's work in a prompt and efficient manner. An employer may have need for correspondence, or a file or report available only in an employee's office while the employee is ***722** away from the office. Or, as is alleged to have been the case here, employers may need to safeguard or identify state property or records in an office in connection with a pending investigation into suspected employee misfeasance.

In our view, requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome. Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable. In contrast to other circumstances in which we have required warrants, supervisors in offices such as at the Hospital are hardly in the business of investigating the violation of criminal laws. Rather, work-related searches are merely incident to the primary business of the agency. Under these circumstances, the imposition of a warrant requirement would conflict with "the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick v. Myers,* 461 U.S. 138, 143, 103 S.Ct. 1684, 1688, 75 L.Ed.2d 708 (1983).

Whether probable cause is an inappropriate standard for public employer searches of their employees' offices presents a more difficult issue. For the most part, we have required that a search be based upon probable cause, but as we noted in *New Jersey v. T.L.O.,* "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, ... in certain limited circumstances neither is required.' " 469 U.S., at 340, 105 S.Ct., at 742 (quoting *Almeida-Sanchez v. United States,* 413 U.S. 266, 277, 93 S.Ct. 2535, 2541, 37 L.Ed.2d 596 (1973) (POWELL, J., concurring)). Thus, "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to ***723** adopt such a standard." 469 U.S., at 341, 105 S.Ct., at 742. We have concluded, for example, that the appropriate standard for administrative searches is not probable cause

in its traditional meaning. Instead, an administrative warrant can be obtained if there is a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied. See *Marshall v. Barlow's, Inc.,* 436 U.S., at 320, 98 S.Ct., at 1824; *Camara v. Municipal Court,* 387 U.S., at 538, 87 S.Ct., at 1735.

As an initial matter, it is important to recognize the plethora of contexts in which employers will have an occasion to intrude to some extent on an employee's expectation of privacy. Because the parties in this case have alleged that the search was either a noninvestigatory work-related intrusion or an investigatory search for evidence of suspected work-related employee misfeasance, we undertake to determine the appropriate Fourth Amendment standard of reasonableness *only* for these two types of employer intrusions and leave for another day inquiry into other circumstances.

The governmental interest justifying work-related intrusions by public employers is the efficient and proper operation of the workplace. Government agencies provide myriad services to the public, and the work of these agencies would suffer if employers were required to have probable cause before they entered an employee's desk for the purpose of finding a file or ****1501** piece of office correspondence. Indeed, it is difficult to give the concept of probable cause, rooted as it is in the criminal investigatory context, much meaning when the purpose of a search is to retrieve a file for work-related reasons. Similarly, the concept of probable cause has little meaning for a routine inventory conducted by public employers for the purpose of securing state property. See *Colorado v. Bertine,* 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987); *Illinois v. Lafayette,* 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983). To ensure the efficient and proper operation of the agency, therefore, public employers must be given wide latitude to enter employee offices for work-related, noninvestigatory reasons.

***724** We come to a similar conclusion for searches conducted pursuant to an investigation of work-related employee misconduct. Even when employers conduct an investigation, they have an interest substantially different from "the normal need for law enforcement." *New Jersey v. T.L.O., supra,* 469 U.S., at 351, 105 S.Ct., at 748 (BLACKMUN, J., concurring in judgment). Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement, or other work-related misfeasance of its employees. Indeed, in many cases, public employees are entrusted with tremendous responsibility, and the consequences of their misconduct or incompetence to both the agency and the public interest can be severe. In contrast to law enforcement officials, therefore, public employers are not enforcers of the criminal law; instead, public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner. In our view, therefore, a probable cause requirement for searches of the type at issue here would impose intolerable burdens on public employers. The delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest. See 469 U.S., at 353, 105 S.Ct., at 749. ("The time required for a teacher to ask the questions or make the observations that are necessary to turn reasonable grounds into probable cause is time during which the teacher, and other students, are diverted from the essential task of education.") Additionally, while law enforcement officials are expected to "schoo[l] themselves in the niceties of probable cause," *id.,* at 343, 105 S.Ct., at 743, no such expectation is generally applicable to public employers, at least when the search is not used to gather evidence of a criminal offense. It is simply unrealistic to expect supervisors in most government agencies to learn the subtleties of ***725** the probable cause standard. As Justice BLACKMUN observed in *T.L.O.,* "[a] teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses, and is ill-equipped to make a quick judgment about the existence of probable cause." *Id.,* at 353, 105 S.Ct., at 749. We believe that this observation is an equally apt description of the public employer and supervisors at the Hospital, and we conclude that a reasonableness standard will permit regulation of the employer's conduct "according to the dictates of reason and common sense." *Id.,* at 343, 105 S.Ct., at 743.

Balanced against the substantial government interests in the efficient and proper operation of the workplace are the privacy interests of government employees in their place of work which, while not insubstantial, are far less than those found at home or in some other contexts. As with the building inspections in *Camara,* the employer intrusions at issue here "involve a relatively limited invasion" of employee privacy. 387 U.S., at 537, 87 S.Ct., at 1735. Government offices are provided to employees for

the sole purpose of facilitating the work of an agency. The employee may **1502 avoid exposing personal belongings at work by simply leaving them at home.

In sum, we conclude that the "special needs, beyond the normal need for law enforcement make the ... probable-cause requirement impracticable," 469 U.S., at 351, 105 S.Ct., at 748 (BLACKMUN, J., concurring in judgment), for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct. A standard of reasonableness will neither unduly burden the efforts of government employers to ensure the efficient and proper operation of the workplace, nor authorize arbitrary intrusions upon the privacy of public employees. We hold, therefore, that public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness *726 under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable:

> "Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the ... action was justified at its inception,' *Terry v. Ohio,* 392 U.S. [1], at 20 [88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968)]; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,' *ibid.*" *New Jersey v. T.L.O., supra,* at 341, 105 S.Ct., at 742–743.

Ordinarily, a search of an employee's office by a supervisor will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file. Because petitioners had an "individualized suspicion" of misconduct by Dr. Ortega, we need not decide whether individualized suspicion is an essential element of the standard of reasonableness that we adopt today. See *New Jersey v. T.L.O., supra,* at 342, n. 8, 105 S.Ct., at 743, n. 8. The search will be permissible in its scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of ... the nature of the [misconduct]." 469 U.S., at 342, 105 S.Ct., at 743.

IV

In the procedural posture of this case, we do not attempt to determine whether the search of Dr. Ortega's office and the seizure of his personal belongings satisfy the standard of reasonableness we have articulated in this case. No evidentiary hearing was held in this case because the District Court acted on cross-motions for summary judgment, and granted petitioners summary judgment. The Court of Appeals, on the other hand, concluded that the record in this case justified *727 granting partial summary judgment on liability to Dr. Ortega.

We believe that both the District Court and the Court of Appeals were in error because summary judgment was inappropriate. The parties were in dispute about the actual justification for the search, and the record was inadequate for a determination on motion for summary judgment of the reasonableness of the search and seizure. Petitioners have consistently attempted to justify the search and seizure as required to secure the state property in Dr. Ortega's office. Mr. Friday testified in a deposition that he had ordered members of the investigative team to "check Dr. Ortega's office out in order to separate the business files from any personal files in order to ascertain what was in his office." App. 50. He further testified that the search was initiated because he "wanted to make sure that we had our state property identified, and in order to provide Dr. Ortega with his property and get what we had out of there, in order to make sure our **1503 resident's files were protected, and that sort of stuff." *Id.,* at 51.

In their motion for summary judgment in the District Court, petitioners alleged that this search to secure property was reasonable as "part of the established hospital policy to inventory property within offices of departing, terminated or separated employees." Record Doc. No. 24, p. 9. The District Court apparently accepted this characterization of the search because it applied *Chenkin v. Bellevue Hospital Center, New York City Health & Hospitals Corp.,* 479 F.Supp. 207 (SDNY 1979), a case involving a Fourth Amendment challenge to an inspection *policy.* At the time of the search, however, Dr. Ortega had not been terminated, but rather was still on administrative leave, and the record does not reflect whether the Hospital had a policy of inventorying the property of

investigated employees. Respondent, moreover, has consistently rejected petitioners' characterization of the search as motivated by a need to secure state property. ***728** Instead, Dr. Ortega has contended that the intrusion was an investigatory search whose purpose was simply to discover evidence that would be of use in administrative proceedings. He has pointed to the fact that no inventory was ever taken of the property in the office, and that seized evidence was eventually used in the administrative proceedings. Additionally, Dr. O'Connor stated in a deposition that one purpose of the search was "to look for contractural [*sic*] and other kinds of documents that might have been related to the issues" involved in the investigation. App. 38.

Under these circumstances, the District Court was in error in granting petitioners summary judgment. There was a dispute of fact about the character of the search, and the District Court acted under the erroneous assumption that the search was conducted pursuant to a Hospital policy. Moreover, no findings were made as to the scope of the search that was undertaken.

The Court of Appeals concluded that Dr. Ortega was entitled to partial summary judgment on liability. It noted that the Hospital had no policy of inventorying the property of employees on administrative leave, but it did not consider whether the search was otherwise reasonable. Under the standard of reasonableness articulated in this case, however, the absence of a Hospital policy did not necessarily make the search unlawful. A search to secure state property is valid as long as petitioners had a reasonable belief that there was government property in Dr. Ortega's office which needed to be secured, and the scope of the intrusion was itself reasonable in light of this justification. Indeed, petitioners have put forward evidence that they had such a reasonable belief; at the time of the search, petitioners knew that Dr. Ortega had removed the computer from the Hospital. The removal of the computer—together with the allegations of mismanagement of the residency program and sexual harassment—may have made the search reasonable at its inception under the standard we have put forth in this case. As with the ***729** District Court order, therefore, the Court of Appeals conclusion that summary judgment was appropriate cannot stand.

On remand, therefore, the District Court must determine the justification for the search and seizure, and evaluate the reasonableness of both the inception of the search and its scope. [*]

****1504** Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring in the judgment.
Although I share the judgment that this case must be reversed and remanded, I disagree with the reason for the reversal given by the plurality opinion, and with the standard it prescribes for the Fourth Amendment inquiry.

To address the latter point first: The plurality opinion instructs the lower courts that existence of Fourth Amendment protection for a public employee's business office is to be assessed "on a case-by-case basis," in light of whether the office is "so open to fellow employees or the public that no expectation of privacy is reasonable." *Ante,* at 1498. No clue is provided as to how open "so open" must be; much less ***730** is it suggested how police officers are to gather the facts necessary for this refined inquiry. As we observed in *Oliver v. United States,* 466 U.S. 170, 181, 104 S.Ct. 1735, 1743, 80 L.Ed.2d 214 (1984), "[t]his Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances." Even if I did not disagree with the plurality as to what result the proper legal standard should produce in the case before us, I would object to the formulation of a standard so devoid of content that it produces rather than eliminates uncertainty in this field.

Whatever the plurality's standard means, however, it must be wrong if it leads to the conclusion on the present facts that if Hospital officials had extensive "work-related reasons to enter Dr. Ortega's office" no Fourth Amendment protection existed. *Ante,* at 1498. It is privacy that is protected by the Fourth Amendment, not solitude. A man enjoys Fourth Amendment protection in his home, for example, even though his wife and children have the run of the place—and indeed, even though his landlord

has the right to conduct unannounced inspections at any time. Similarly, in my view, one's personal office is constitutionally protected against warrantless intrusions by the police, even though employer and co-workers are not excluded. I think we decided as much many years ago. In *Mancusi v. DeForte,* 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968), we held that a union employee had Fourth Amendment rights with regard to an office at union headquarters that he shared with two other employees, even though we acknowledged that those other employees, their personal or business guests, and (implicitly) "union higher-ups" could enter the office. *Id.,* at 369, 88 S.Ct. at 2124. Just as the secretary working for a corporation in an office frequently entered by the corporation's other employees is protected against unreasonable searches of that office by the government, so also is the government secretary working in an office frequently entered by other government employees. There is no reason why this ***731** determination that a legitimate expectation of privacy exists should be affected by the fact that the government, rather than a private entity, is the employer. Constitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer.

I cannot agree, moreover, with the plurality's view that the reasonableness of the expectation of privacy (and thus the existence of Fourth Amendment protection) changes "when an intrusion is by a supervisor rather than a law enforcement official." *Ante,* at 1498. The identity of the searcher (police v. employer) is relevant not to whether Fourth Amendment protections ****1505** apply, but only to whether the search of a protected area is reasonable. Pursuant to traditional analysis the former question must be answered on a more "global" basis. Where, for example, a fireman enters a private dwelling in response to an alarm, we do not ask whether the occupant has a reasonable expectation of privacy (and hence Fourth Amendment protection) vis-à-vis firemen, but rather whether—given the fact that the Fourth Amendment covers private dwellings—intrusion for the purpose of extinguishing a fire is reasonable. Cf. *Michigan v. Tyler,* 436 U.S. 499, 509, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978). A similar analysis is appropriate here.

I would hold, therefore, that the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter. (The qualifier is necessary to cover such unusual situations as that in which the office is subject to unrestricted public access, so that it is "expose[d] to the public" and therefore "not a subject of Fourth Amendment protection." *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).) Since it is unquestioned that the office here was assigned to Dr. Ortega, and since no special circumstances are suggested that would call for an exception to the ordinary rule, I would ***732** agree with the District Court and the Court of Appeals that Fourth Amendment protections applied.

The case turns, therefore, on whether the Fourth Amendment was violated—*i.e.,* whether the governmental intrusion was reasonable. It is here that the government's status as employer, and the employment-related character of the search, become relevant. While as a general rule warrantless searches are *per se* unreasonable, we have recognized exceptions when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable...." *New Jersey v. T.L.O.,* 469 U.S. 325, 351, 105 S.Ct. 733, 749, 83 L.Ed.2d 720 (BLACKMUN, J., concurring in judgment). Such "special needs" are present in the context of government employment. The government, like any other employer, needs frequent and convenient access to its desks, offices, and file cabinets for work-related purposes. I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment. Because the conflicting and incomplete evidence in the present case could not conceivably support summary judgment that the search did not have such a validating purpose, I agree with the plurality that the decision must be reversed and remanded.

Justice BLACKMUN, with whom Justice BRENNAN, Justice MARSHALL, and Justice STEVENS join, dissenting.
The facts of this case are simple and straightforward. Dr. Ortega had an expectation of privacy in his office, desk, and file cabinets, which were the target of a search by petitioners that can be characterized only as investigatory in nature. Because there was no "special need," see *New Jersey v. T.L.O.,* 469 U.S. 325, 351, 105 S.Ct. 733, 748, 83 L.Ed.2d 720 (1985) (opinion concurring in judgment), to dispense with the warrant and probable-cause requirements of the Fourth Amendment, I would

evaluate the search by applying this traditional standard. Under that ***733** standard, this search clearly violated Dr. Ortega's Fourth Amendment rights.

The problems in the plurality's opinion all arise from its failure or unwillingness to realize that the facts here are clear. The plurality, however, discovers what it feels is a factual dispute: the plurality is not certain whether the search was routine or investigatory. Accordingly, it concludes that a remand is the appropriate course of action. Despite the remand, the plurality assumes it must announce a standard concerning the reasonableness of a public employer's search of the workplace. Because the plurality treats the facts as in dispute, ****1506** it formulates this standard at a distance from the situation presented by this case.

This does not seem to me to be the way to undertake Fourth Amendment analysis, especially in an area with which the Court is relatively unfamiliar. [1] Because this analysis, when conducted properly, is always fact specific to an extent, it is inappropriate that the plurality's formulation of a standard does not arise from a sustained consideration of a particular factual situation. [2] Moreover, given that *any* standard ***734** ultimately rests on judgments about factual situations, it is apparent that the plurality has assumed the existence of hypothetical facts from which its standard follows. These "assumed" facts are weighted in favor of the public employer, [3] and, as a result, the standard that emerges makes reasonable almost any workplace search by a public employer.

I

It is necessary to review briefly the factual record in this case because of the plurality's assertion, *ante,* at 1504, that ***735** "[t]here was a dispute of fact about the character of the search." The plurality considers it to be either an inventory search to secure government property or an investigative search to gather evidence concerning Dr. Ortega's alleged misdeeds. *Ante,* at 1503–1504. It is difficult to comprehend how, on the facts of this case, the search in any way could be seen as one for inventory purposes. As the plurality concedes, the search could not have been made pursuant to the Hospital's policy of routinely ****1507** inventorying state property in an office of a terminated employee, because at the time of the search Dr. Ortega was on administrative leave and had not been terminated. *Ante,* at 1496, 1504). [4] Napa had no policy of inventorying the office of an employee placed on administrative leave. *Ante,* at 1504.

The plurality, however, observes that the absence of the policy does not dispositively eliminate inventorying or securing state property as a possible purpose for conducting the search. *Ante,* at 1504. As evidence suggesting such a purpose, the plurality points to petitioners' concern that Dr. Ortega may have removed from the Hospital's grounds a computer owned by the Hospital and to their desire to secure such items as files located in Dr. Ortega's office. See *ante,* at 1503–1504.

The record evidence demonstrates, however, that ensuring that the computer had not been removed from the Hospital was not a reason for the search. Mr. Friday, the leader of the "investigative team," stated that the alleged removal of the computer had nothing to do with the decision to enter Dr. Ortega's office. App. 59. Dr. O'Connor himself admitted that there was little connection between the entry and an attempt ***736** by petitioners to ascertain the location of the computer. *Id.,* at 39. The search had the computer as its focus only insofar as the team was investigating practices dealing with its acquisition. *Id.,* at 32.

In deposition testimony, petitioners did suggest that the search was inventory in character insofar as they aimed to separate Dr. Ortega's personal property from Hospital property in the office. *Id.,* at 38, 40, 50. Such a suggestion, however, is overwhelmingly contradicted by other remarks of petitioners and particularly by the character of the search itself. Dr. O'Connor spoke of the individuals involved in the search as "investigators," see *id.,* at 37, and, even where he described the search as inventory in nature, he observed that it was aimed primarily at furthering investigative purposes. See, *e.g., id.,* at 40 ("Basically what we were trying to do is to remove what was obviously State records or records that had to do with his program, his department, any of the materials that would be involved in running the residency program, around contracts, around the computer, around the areas that we were interested in investigating"). Moreover, as the plurality itself recognizes, *ante,* at 1496, the "investigators" never made

a formal inventory of what they found in Dr. Ortega's office. Rather, they rummaged through his belongings and seized highly personal items later used at a termination proceeding to impeach a witness favorable to him. *Ibid.* Furthermore, the search was conducted in the evening, App. 53, and it was undertaken only after the investigators had received legal advice, *id.,* at 51.

The search in question stemmed neither from a Hospital policy nor from a practice of routine entrances into Dr. Ortega's office. It was plainly exceptional and investigatory in nature. Accordingly, there is no significant factual dispute in this case.

II

Before examining the plurality's standard of reasonableness for workplace searches, I should like to state both my ***737** agreement and disagreement with the plurality's discussion of a public employee's expectation of privacy. What is most important, of course, is that in this case the plurality acknowledges that Dr. Ortega had an expectation of privacy in his desk and file cabinets, *ante,* at 1499, and that, as the plurality concedes, *ante,* at 1498, the majority of this Court holds that he had a similar expectation in his office. With respect to the plurality's general comments, I ****1508** am in complete agreement with its observation that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *Ante,* at 1498. Moreover, I would go along with the plurality's observation that, in certain situations, the "operational realities" of the workplace may remove some expectation of privacy on the part of the employee. *Ibid.* However, I am disturbed by the plurality's suggestion, see *ante,* at 1498, that routine entries by visitors might completely remove this expectation.

First, this suggestion is contrary to the traditional protection that this Court has recognized the Fourth Amendment accords to offices. See *Oliver v. United States,* 466 U.S. 170, 178, n. 8, 104 S.Ct. 1735, 1741, n. 8, 80 L.Ed.2d 214 (1984) ("The Fourth Amendment's protection of offices and commercial buildings, in which there may be legitimate expectations of privacy, is also based upon societal expectations that have deep roots in the history of the Amendment"); *Hoffa v. United States,* 385 U.S. 293, 301, 87 S.Ct. 408, 413, 17 L.Ed.2d 374 (1966) ("What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile"). The common understanding of an office is that it is a place where a worker receives an occasional business-related visitor. Thus, when the office has received traditional Fourth Amendment protection in our cases, it has been with the understanding that such routine visits occur there.

***738** Moreover, as the plurality appears to recognize, see *ante,* at 1504, the precise extent of an employee's expectation of privacy often turns on the nature of the search. This observation is in accordance with the principle that the Fourth Amendment may protect an individual's expectation of privacy in one context, even though this expectation may be unreasonable in another. See *New Jersey v. T.L.O.,* 469 U.S., at 339, 105 S.Ct., at 742. See also *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 329, 99 S.Ct. 2319, 2326, 60 L.Ed.2d 920 (1979) (the opening of a retail store to the public does not mean that "it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees"). As Justice SCALIA observes, "[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer." *Ante,* at 1505. Thus, although an employee might well have no reasonable expectation of privacy with respect to an occasional visit by a fellow employee, he would have such an expectation as to an afterhours search of his locked office by an investigative team seeking materials to be used against him at a termination proceeding. [5]

***739** ****1509** Finally and most importantly, the reality of work in modern time, whether done by public or private employees, reveals why a public employee's expectation of privacy in the workplace should be carefully safeguarded and not lightly set aside. It is, unfortunately, all too true that the workplace has become another home for most working Americans. Many employees spend the better part of their days and much of their evenings at work. See R. Kanter, Work and Family in the United States: A Critical Review and Agenda for Research and Policy 31–32 (1977); see also R. Bellah, R. Madsen, W. Sullivan, A. Swidler, & S. Tipton, Habits of the Heart: Individualism and Commitment in American Life 288–289 (1985) (a "less frantic

concern for advancement and a reduction of working hours" would make it easier for both men and women to participate fully in working and family life). Consequently, an employee's private life must intersect with the workplace, for example, when the employee takes advantage of work or lunch breaks to make personal telephone calls, to attend to personal business, or to receive personal visitors in the office. As a result, the tidy distinctions (to which the plurality alludes, see *ante,* at 1497) between the workplace and professional affairs, on the one hand, and personal possessions and private activities, on the other, do not exist in reality.[6] Not all of an employee's private ***740** possessions will stay in his or her briefcase or handbag. Thus, the plurality's remark that the "employee may avoid exposing personal belongings at work by simply leaving them at home," *ante,* at 1502, reveals on the part of the Members of the plurality a certain insensitivity to the "operational realities of the workplace," *ante,* at 1498, they so value.[7]

***741** Dr. Ortega clearly had an expectation of privacy in his office, desk, and file cabinets, particularly with respect to the type of investigatory search involved here. In ****1510** my view, when examining the facts of other cases involving searches of the workplace, courts should be careful to determine this expectation also in relation to the search in question.

III

A

At the outset of its analysis, the plurality observes that an appropriate standard of reasonableness to be applied to a public employer's search of the employee's workplace is arrived at from "balancing" the privacy interests of the employee against the public employer's interests justifying the intrusion. *Ante,* at 1499. Under traditional Fourth Amendment jurisprudence, however, courts abandon the warrant and probable-cause requirements, which constitute the standard of reasonableness for a government search that the Framers established, "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable...." *New Jersey v. T.L.O.,* 469 U.S., at 351, 105 S.Ct., at 748 (opinion concurring in the judgment); see *United States v. Place,* 462 U.S. 696, 721–722, and n. 1, 103 S.Ct. 2637, 2652–2653, and n. 1, 77 L.Ed.2d 110 (1983) (opinion concurring in judgment). In sum, only when the practical realities of a particular situation suggest that a government official cannot obtain a warrant based upon probable cause without sacrificing the ultimate goals to which a search would contribute, does the Court turn to a "balancing" test to formulate a standard of reasonableness for this context.

In *New Jersey v. T.L.O., supra,* I faulted the Court for neglecting this "crucial step" in Fourth Amendment analysis. See 469 U.S., at 351, 105 S.Ct., at 747. I agreed, however, with the *T.L.O.* Court's standard because of my conclusion that this step, had ***742** it been taken, would have revealed that the case presented a situation of "special need." *Id.,* at 353, 105 S.Ct., at 749. I recognized that discipline in this country's secondary schools was essential for the promotion of the overall goal of education, and that a teacher could not maintain this discipline if, every time a search was called for, the teacher would have to procure a warrant based on probable cause. *Id.,* at 352–353, 105 S.Ct., at 748–749. Accordingly, I observed: "The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirements, and in applying a standard determined by balancing the relevant interests." *Id.,* at 353, 105 S.Ct., at 749.

The plurality repeats here the *T.L.O.* Court's error in analysis. Although the plurality mentions the "special need" step, *ante,* at 1499–1500, it turns immediately to a balancing test to formulate its standard of reasonableness. This error is significant because, given the facts of this case, no "special need" exists here to justify dispensing with the warrant and probable-cause requirements. As observed above, the facts suggest that this was an investigatory search undertaken to obtain evidence of charges of mismanagement at a time when Dr. Ortega was on administrative leave and not permitted to enter the Hospital's grounds. There was no special practical need that might have justified dispensing with the warrant and probable-cause requirements. Without sacrificing their ultimate goal of maintaining an effective institution devoted to training and healing, to which the

disciplining of Hospital employees contributed, petitioners could have taken any evidence of Dr. Ortega's alleged improprieties to a magistrate in order to obtain a warrant.

Furthermore, this seems to be exactly the kind of situation where a neutral magistrate's involvement would have been helpful in curtailing the infringement upon Dr. Ortega's privacy. See ***743** *United States v. United States District Court,* 407 U.S. 297, 317, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752 (1972) ("The historical judgment, which ****1511** the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech"). Petitioners would have been forced to articulate their exact reasons for the search and to specify the items in Dr. Ortega's office they sought, which would have prevented the general rummaging through the doctor's office, desk, and file cabinets. Thus, because no "special need" in this case demanded that the traditional warrant and probable-cause requirements be dispensed with, petitioners' failure to conduct the search in accordance with the traditional standard of reasonableness should end the analysis, and the judgment of the Court of Appeals should be affirmed.

B

Even were I to accept the proposition that this case presents a situation of "special need" calling for an exception to the warrant and probable-cause standard, I believe that the plurality's balancing of the public employer's and the employee's respective interests to arrive at a different standard is seriously flawed. Once again, the plurality fails to focus on the facts. Instead, it arrives at its conclusion on the basis of "assumed" facts. First, sweeping with a broad brush, the plurality announces a rule that dispenses with the warrant requirement in every public employer's search of an employee's office, desk, or file cabinets because it "would seriously disrupt the routine conduct of business and would be unduly burdensome." *Ante,* at 1500. The plurality reasons that a government agency could not conduct its work in an efficient manner if an employer needed a warrant for every routine entry into an employee's office in search of a file or correspondence, or for every investigation of suspected employee misconduct. In addition, it argues that the warrant requirement, if imposed on an employer who would be unfamiliar with this procedure, would prove "unwieldy." *Ibid.*

***744** The danger in formulating a standard on the basis of "assumed" facts becomes very clear at this stage of the plurality's opinion. Whenever the Court has arrived at a standard of reasonableness other than the warrant and probable-cause requirements, it has first found, through analysis of a factual situation, that there is a nexus between this other standard, the employee's privacy interests, and the government purposes to be served by the search. Put another way, the Court adopts a new standard only when it is satisfied that there is no alternative in the particular circumstances. [8] In *Terry v. Ohio,* 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968), the Court concluded that, as a practical matter, brief, on-the-spot stops of individuals by police officers need not be subject to a warrant. Still concerned, however, with the import of the warrant requirement, which provides the "neutral scrutiny of a judge," *id.,* at 21, 88 S.Ct., at 1880, the Court weighed in detail the law enforcement and the suspect's interests in the circumstances of the protective search. The resulting standard constituted the equivalent of the warrant: judging the officer's behavior from a reasonable or objective standard, *id.,* at 21, 27, 88 S.Ct., at 1879, 1883. In *Camara v. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), on the other hand, the Court declined to abandon the warrant as a standard in the case of a municipal health inspection in light of the interests of the ****1512** target of the health investigation and those of the government in enforcing health standards. *Id.,* at 532–533, 87 S.Ct., at 1732–1733.

***745** A careful balancing with respect to the warrant requirement is absent from the plurality's opinion, an absence that is inevitable in light of the gulf between the plurality's analysis and any concrete factual setting. It is certainly correct that a public employer cannot be expected to obtain a warrant for every routine entry into an employee's workplace. [9] This situation, however, should not justify dispensing with a warrant in *all* searches by the employer. The warrant requirement is perfectly suited for many work-related searches, including the instant one. [10] Moreover, although the plurality abandons the warrant requirement, it does not explain what it will substitute or how the standard it adopts retains anything of the normal "neutral scrutiny of the judge." [11] In sum, the plurality's general result is preordained because, cut off from a particular factual setting, it cannot make

the necessary distinctions among types of searches, or formulate an alternative to the warrant requirement that derives from a precise weighing of competing interests.

***746** When the plurality turns to the balancing that will produce an alternative to probable cause, it states that it is limiting its analysis to the two situations arguably presented by the facts of this case—the "noninvestigatory work-related intrusion" (*i.e.,* inventory search) and the "investigatory search for evidence of suspected work-related employee misfeasance" (*i.e.,* investigatory search). *Ante,* at 1501. This limitation, however, is illusory. The plurality describes these searches in such a broad fashion that it is difficult to imagine a search that would *not* fit into one or the other of the categories. Moreover, it proposes the *same* standard, one taken from *New Jersey v. T.L.O.,* for both inventory and investigatory searches. See *ante,* at 1502. Therefore, in the context of remanding a case because the facts are unclear, the plurality is announcing a standard to apply to *all* public employer searches.

Moreover, the plurality also abandons any effort at careful balancing in arriving at its substitute for probable cause. Just as the elimination of the warrant requirement requires some nexus between its absence, the employee's privacy interests, and the government interests to be served by the search, so also does the formulation of a standard less than probable cause for a particular search demand a similar connection between these factors. See, *e.g., United States v. Brignoni-Ponce,* 422 U.S. 873, 881, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975). The plurality's discussion of investigatory searches reveals no attempt to set forth the appropriate nexus. [12] It is certainly true, as the plurality observes, that a ****1513** public employer has an interest in eliminating incompetence and work-related misconduct in order to enable the government agency to accomplish its tasks in an efficient manner. It is also conceivable that a public employee's privacy interests are somewhat limited in the workplace, although, as noted above, not to the extent suggested by the plurality. The plurality, however, fails to ***747** explain why the balancing of these interests *necessarily* leads to the standard borrowed from *New Jersey v. T.L.O.,* as opposed to other imaginable standards. Indeed, because the balancing is simply asserted rather than explicated, [13] the plurality never really justifies why probable cause, characterized by this Court as a "practical, nontechnical conception," *Brinegar v. United States,* 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949), would not protect adequately the public employer's interests in the situation presented by this case. See *New Jersey v. T.L.O.,* 469 U.S., at 363–364, 105 S.Ct., at 754–755 (BRENNAN, J., concurring in part and dissenting in part). [14]

***748** IV

I have reviewed at too great length the plurality's opinion because the question of public employers' searches of their employees' workplaces, like any relatively unexplored area of Fourth Amendment law, demands careful analysis. These searches appear in various factual settings, some of which courts are only now beginning to face, and present different problems. [15] Accordingly, I believe that the Court should examine closely the practical realities of a particular situation and the interests implicated there before replacing the traditional warrant and probable-cause requirements with some other standard of reasonableness derived from a balancing test. The ****1514** Fourth Amendment demands no less. By ignoring the specific facts of this case, and by announcing in the abstract a standard as to the reasonableness of an employer's workplace searches, the plurality undermines not only the Fourth Amendment rights of public employees but also any further analysis of the constitutionality of public employer searches.

I respectfully dissent.

All Citations

480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714, 42 Empl. Prac. Dec. P 36,891, 55 USLW 4405, 1 IER Cases 1617

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

* We have no occasion in this case to reach the issue of the appropriate standard for the evaluation of the Fourth Amendment reasonableness of the seizure of Dr. Ortega's personal items. Neither the District Court nor the Court of Appeals addressed this issue, and the *amicus curiae* brief filed on behalf of respondent did not discuss the legality of the seizure separate from that of the search. We also have no occasion in this case to address whether qualified immunity should protect petitioners from damages liability under § 1983. See *Davis v. Scherer,* 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984); *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The qualified immunity issue was not raised below and was not addressed by either the District Court or the Court of Appeals. Nor do we address the proper Fourth Amendment analysis for drug and alcohol testing of employees. Finally, we do not address the appropriate standard when an employee is being investigated for criminal misconduct or breaches of other nonwork-related statutory or regulatory standards.

1 Although there has been some development on these issues in federal courts, see *ante,* at 1500, this Court has not yet squarely faced them.

2 It is true that this Court has expressed concern about the workability of " 'an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances.' " *Ante,* at 1505 (SCALIA, J., concurring in judgment), quoting *Oliver v. United States,* 466 U.S. 170, 181, 104 S.Ct. 1735, 1743, 80 L.Ed.2d 214 (1984). Given, however, the number and types of workplace searches by public employers that can be imagined-ranging all the way from the employer's routine entry for retrieval of a file to a planned investigatory search into an employee's suspected criminal misdeeds-development of a jurisprudence in this area might well require a case-by-case approach. See *California v. Carney,* 471 U.S. 386, 400, 105 S.Ct. 2066, 2074, 85 L.Ed.2d 406 (1985) (STEVENS, J., dissenting) ("The only true rules governing search and seizure have been formulated and refined in the painstaking scrutiny of case-by-case adjudication"); *New Jersey v. T.L.O.,* 469 U.S. 325, 366–367, 105 S.Ct. 733, 755–756, 83 L.Ed.2d 720 (1985) (BRENNAN, J., concurring in part and dissenting in part) ("I would not think it necessary to develop a single standard to govern all school searches, any more than traditional Fourth Amendment law applies even the probable-cause standard to *all* searches and seizures" (emphasis in original)). Under a case-by-case approach, a rule governing a particular type of workplace search, unlike the standard of the plurality here, should emerge from a concrete set of facts and possess the precision that only the exploration of "every aspect of a multifaced situation embracing conflicting and demanding interests" can produce. See *United States v. Fruehauf,* 365 U.S. 146, 157, 81 S.Ct. 547, 554, 5 L.Ed.2d 476 (1961). The manner in which the plurality arrives at its standard, it seems to me, thus not only harms Dr. Ortega and other public employees, but also does a disservice to Fourth Amendment analysis.

3 It could be argued that the plurality removes its analysis from the facts of this case in order to arrive at a result unfavorable to public employees, whose position members of the plurality do not look upon with much sympathy. As Justice Cardozo long ago explained, judges are never free from the feelings of the times or those emerging from their own personal lives:

"I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge." B. Cardozo, The Nature of the Judicial Process 167 (1921).

It seems to me that whenever, as here, courts fail to concentrate on the facts of a case, these predilections inevitably surface, no longer held in check by the "discipline" of the facts, and shape, more than they ever should and even to an extent unknown to the judges themselves, any legal standard that is then articulated. This, I believe, is the central problem of the opinion of the plurality and, indeed, of the concurrence.

4 The plurality is correct in pointing out that the District Court erred in its conclusion that there was a Hospital policy that would have justified this search. *Ante,* at 1504. This was not the only error on the District Court's part. That court also concluded that Dr. Ortega was notified of the search and could have participated in it, see App. 23, a conclusion at odds with the record, see *id.,* at 24, 40.

5 This common-sense notion that public employees have some expectation of privacy in the workplace, particularly with respect to private documents or papers kept there, was exemplified by recent remarks of the Attorney General. In responding to questions concerning the possibility of a search and seizure of papers and offices of Government employees in connection with an investigation into allegedly illegal diversion of funds to Central American recipients, he is reported to have stated: "I'm not sure we would have any opportunity or any legal right to get into those personal papers.... There was certainly no evidence of any criminality that would have supported a search warrant at that time.... I don't think public employees' private documents belong to the Government." N.Y.Times, Dec. 3, 1986, p. A11, col. 3.

Moreover, courts have recognized that a public employee has a legitimate expectation of privacy as to an employer's search and seizure at the workplace. See, *e.g., Gillard v. Schmidt,* 579 F.2d 825, 829 (CA3 1978) (search of desk); *United States v. McIntyre,* 582 F.2d 1221, 1224 (CA9 1978) (monitoring conversations at office desk). But see *Williams v. Collins,* 728 F.2d 721, 728 (CA5 1984) (search of desk). In some cases, courts have decided that an employee had no such expectation with respect to a workplace search because an established regulation permitted the search. See *United States v. Speights,* 557 F.2d 362, 364–365 (CA3 1977) (describing cases); *United States v. Donato,* 269 F.Supp. 921 (ED Pa.), aff'd, 379 F.2d 288 (CA3 1967) (Government regulation notified employees that lockers in the United States Mint were not to be viewed by employees as private lockers). The question of such a search pursuant to regulations is not now before this Court.

6 Perhaps the greatest sign of the disappearance of the distinction between work and private life is the fact that women—the traditional representatives of the private sphere and family life—have entered the work force in increasing numbers. See BNA Special Report, Work & Family: A Changing Dynamic, 1, 3, 13–15 (1986). It is therein noted:

"The myth of 'separate worlds'—one of work and the other of family life—long harbored by employers, unions, and even workers themselves has been effectively laid to rest. Their inseparability is undeniable, particularly as two-earner families have become the norm where they once were the exception and as a distressing number of single parents are required to raise children on their own. The import of work-family conflicts-for the family, for the workplace, and, indeed, for the whole of society-will grow as these demographic and social transformations in the roles of men and women come to be more fully clarified and appreciated." *Id.,* at 217 (remarks of Professor Phyllis Moen).

As a result of this disappearance, moreover, the employee must attempt to maintain the difficult balance between work and personal life. *Id.,* at 227 (remarks of Barney Olmsted and Suzanne Smith).

7 I am also troubled by the plurality's implication that a public employee is entitled to a lesser degree of privacy in the workplace because the public agency, not the employee, *owns* much of what constitutes the workplace. This implication emerges in the distinction the plurality draws between the workplace "context," which includes "the hallways, cafeteria, offices, desks, and file cabinets," and an employee's "closed personal luggage, a handbag, or a briefcase." *Ante,* at 1497. This Court, however, has made it clear that privacy interests protected by the Fourth Amendment do not turn on ownership of particular premises. See, *e.g., Rakas v. Illinois,* 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978) ("[T]he protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place"); *Katz v. United States,* 389 U.S. 347, 353, 88 S.Ct. 507, 512, 19 L.Ed.2d 576 (1967) (Fourth Amendment protects people and not simply "areas"). To be sure, the public employer's ownership of the premises is relevant in determining an employee's expectation of privacy, for often it is the main reason for the routine visits into an employee's office. The employee is assigned an office for work purposes; it is expected that the employee will receive work-related visitors and that the employer will maintain the office. This fact of ownership, however, like the routine visits, does not abrogate the employee's expectation of privacy.

8 This part of the analysis is related to the "special need" step. Courts turn to the balancing test only when they conclude that the traditional warrant and probable-cause requirements are not a practical alternative. Through the balancing test, they then try to identify a standard of reasonableness, other than the traditional one, suitable for the circumstances. The warrant and probable-cause requirements, however, continue to serve as a model in the formulation of the new standard. It is conceivable, moreover, that a court, having initially decided that it is faced with a situation of "special need" that calls for balancing, may conclude after application of the balancing test that the traditional standard is a suitable one for the context after all.

9 In some workplace investigations, the particular goals of the government agency coupled with a need for special employee discipline may justify dispensing with the warrant requirement. See, *e.g., Security and Law Enforcement Employees Dist. Council 82, American Federation of State, County and Municipal Employees, AFL–CIO v. Carey,* 737 F.2d 187, 203–204 (CA2 1984) (government interest in maintaining security of a correctional facility justifies strip searches of correctional officers, in certain circumstances, in absence of a warrant).

10 While the warrant requirement might be "unwieldy" for public employers if it was required for every workplace search, the plurality has failed to explain why, on the facts of this case, obtaining a warrant would have been burdensome for petitioners, even if one assumes that they were unfamiliar with this requirement. In fact, the opposite seems true. Moreover, contrary to the plurality's suggestion, see *ante,* at 1500, the warrant requirement is not limited to the criminal context. See *Camara v. Municipal Court,* 387 U.S. 523, 530–531, 87 S.Ct. 1727, 1731–1732, 18 L.Ed.2d 930 (1967).

11 The plurality adopts a "standard of reasonableness under all the circumstances." *Ante,* at 1502. It fails completely to suggest how this standard captures any of the protection of the traditional warrant requirement; indeed, the standard appears to be simply an alternative to probable cause.

12 The same holds true for the plurality's discussion of inventory searches.

13 The plurality's attempt at explication consists of little more than a series of assertions: that the probable-cause requirement "would impose intolerable burdens on public employers"; that the delay caused by such a requirement would result in "tangible and often

irreparable damage" to a government agency; and that public employers cannot be expected "to learn the subtleties of the probable cause standard." See *ante,* at 1501–1502. Such assertions cannot pass for careful balancing on the facts of this case, given that the search was conducted during Dr. Ortega's administrative leave from the Hospital, with the advice of counsel, and by an investigating party that included a security officer. My observation that a particular Fourth Amendment standard of reasonableness should be developed from a specific context bears repeating here.

14 Even if I believed that this case were an appropriate vehicle for development of a standard on public-employer searches, I would fault the plurality for its failure to give much substance to the standard it has borrowed almost verbatim from *New Jersey v. T.L.O.* See *ante,* at 1502–1503. The *T.L.O.* Court described in some detail the substance of its test, which was tailored to the circumstances of the case before it and thus is not directly transferable from the halls of a high school to the offices of government. In any event, were I to apply the rather stark standard of reasonableness announced by the plurality, I would conclude that petitioners here did not satisfy it. Assuming, without deciding, that petitioners had an individualized suspicion that Dr. Ortega was mismanaging the psychiatric residency program, I believe the scope of the search was not reasonably related to this concern. If petitioners were truly in search of evidence of respondent's mismanagement, it is difficult to understand why they looked through the personal belongings of Dr. Ortega, a search that resulted in the seizure of a Valentine's Day card, a photograph, and a book of poetry, which could have no conceivable relation to the claimed purpose of the search. Although, in the plurality's view, the seizure of these items is not an issue in this case, see *ante,* at 1504, n., I would think that this seizure is relevant to determining the reasonableness of the scope of the search. Accordingly, under the plurality's own standard, this search was unreasonable.

15 One example is the Fourth Amendment problem associated with drug and alcohol testing of employees. See, *e.g., Shoemaker v. Handel,* 795 F.2d 1136, 1141–1143 (CA3) (administrative-search exception extended to warrantless breath and urine testing of jockeys, given the heavily regulated nature of the horse-racing industry), cert. denied, 479 U.S. 986, 107 S.Ct. 577, 93 L.Ed.2d 580 (1986); *National Treasury Employees Union v. Von Raab,* 649 F.Supp. 380 (ED La.1986) (wide-scale urinalysis of United States Customs Service employees without probable cause or reasonable suspicion struck down as violative of the Fourth Amendment).

Attachment 2
City of Ontario v. Quon

130 S.Ct. 2619
Supreme Court of the United States

CITY OF ONTARIO, CALIFORNIA, et al., Petitioners,
v.
Jeff QUON et al.

No. 08–1332.
|
Argued April 19, 2010.
|
Decided June 17, 2010.

Synopsis
Background: City police officer brought § 1983 action against city, police department, police chief, alleging that police department's review of officer's text messages violated Fourth Amendment, and asserted claim against wireless communications provider under Stored Communications Act (SCA). The United States District Court for the Central District of California, Stephen G. Larson, J., 445 F.Supp.2d 1116, granted summary judgment for wireless provider on SCA claim, and, following jury determination as to chief's intent in ordering review of text messages, entered judgment in favor of remaining defendants on Fourth Amendment and related state-law claims. Officer appealed. The Ninth Circuit Court of Appeals, Wardlaw, Circuit Judge, 529 F.3d 892, affirmed in part and reversed in part, holding that officer had reasonable expectation of privacy in text messages but that search was not reasonable. City's petition for certiorari was granted.

The Supreme Court, Justice Kennedy, held that city's review of officer's text messages was reasonable, and thus did not violate Fourth Amendment.

Reversed and remanded.

Justice Stevens filed concurring opinion.

Justice Scalia filed opinion concurring in part and concurring in judgment.

****2621** *Syllabus* [*]

Petitioner Ontario (hereinafter City) acquired alphanumeric pagers able to send and receive text messages. Its contract with its service provider, Arch Wireless, provided for a monthly limit on the number of characters each pager could send or receive, and specified that usage exceeding that number would result in an additional fee. The City issued the pagers to respondent Quon and other officers in its police department (OPD), also a petitioner here. When Quon and others exceeded their monthly character limits for several months running, petitioner Scharf, OPD's chief, sought to determine whether the ****2622** existing limit was too low, *i.e.,* whether the officers had to pay fees for sending work-related messages or, conversely, whether the overages were for personal messages. After Arch Wireless provided transcripts of Quon's and another employee's August and September 2002 text messages, it was discovered that many of Quon's messages were not work related, and some were sexually explicit. Scharf referred the matter to OPD's internal affairs division. The investigating officer used Quon's work schedule to redact from his transcript any messages he sent while off duty, but the transcript showed that few of his on-duty messages related to police business. Quon was disciplined for violating OPD rules.

He and the other respondents—each of whom had exchanged text messages with Quon during August and September—filed this suit, alleging, *inter alia,* that petitioners violated their Fourth Amendment rights and the federal Stored Communications Act (SCA) by obtaining and reviewing the transcript of Quon's pager messages, and that Arch Wireless violated the SCA by giving the City the transcript. The District Court denied respondents summary judgment on the constitutional claims, relying on the plurality opinion in *O'Connor v. Ortega,* 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714, to determine that Quon had a reasonable expectation of privacy in the content of his messages. Whether the audit was nonetheless reasonable, the court concluded, turned on whether Scharf used it for the improper purpose of determining if Quon was using his pager to waste time, or for the legitimate purpose of determining the efficacy of existing character limits to ensure that officers were not paying hidden work-related costs. After the jury concluded that Scharf's intent was legitimate, the court granted petitioners summary judgment on the ground they did not violate the Fourth Amendment. The Ninth Circuit reversed. Although it agreed that Quon had a reasonable expectation of privacy in his text messages, the appeals court concluded that the search was not reasonable even though it was conducted on a legitimate, work-related rationale. The opinion pointed to a host of means less intrusive than the audit that Scharf could have used. The court further concluded that Arch Wireless had violated the SCA by giving the City the transcript.

Held: Because the search of Quon's text messages was reasonable, petitioners did not violate respondents' Fourth Amendment rights, and the Ninth Circuit erred by concluding otherwise. Pp. 2627 – 2633.

(a) The Amendment guarantees a person's privacy, dignity, and security against arbitrary and invasive governmental acts, without regard to whether the government actor is investigating crime or performing another function. *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 613–614, 109 S.Ct. 1402, 103 L.Ed.2d 639. It applies as well when the government acts in its capacity as an employer. *Treasury Employees v. Von Raab,* 489 U.S. 656, 665, 109 S.Ct. 1384, 103 L.Ed.2d 685. The Members of the *O'Connor* Court disagreed on the proper analytical framework for Fourth Amendment claims against government employers. A four-Justice plurality concluded that the correct analysis has two steps. First, because "some government offices may be so open ... that no expectation of privacy is reasonable," a court must consider "[t]he operational realities of the workplace" to determine if an employee's constitutional rights are implicated. 480 U.S., at 718, 717, 107 S.Ct. 1492. Second, where an employee has a legitimate privacy expectation, an employer's intrusion on that expectation "for noninvestigatory, work-related purposes, as well as for investigations ****2623** of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." *Id.,* at 725–726, 107 S.Ct. 1492. Justice SCALIA, concurring in the judgment, would have dispensed with the "operational realities" inquiry and concluded "that the offices of government employees ... are [generally] covered by Fourth Amendment protections," *id.,* at 731, 107 S.Ct. 1492, but he would also have held "that government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the ... Amendment," *id.,* at 732, 107 S.Ct. 1492. Pp. 2627 – 2629.

(b) Even assuming that Quon had a reasonable expectation of privacy in his text messages, the search was reasonable under both *O'Connor* approaches, the plurality's and Justice SCALIA's. Pp. 2629 – 2633.

(1) The Court does not resolve the parties' disagreement over Quon's privacy expectation. Prudence counsels caution before the facts in this case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations of employees using employer-provided communication devices. Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve. Because it is therefore preferable to dispose of this case on narrower grounds, the Court assumes, *arguendo,* that: (1) Quon had a reasonable privacy expectation; (2) petitioners' review of the transcript constituted a Fourth Amendment search; and (3) the principles applicable to a government employer's search of an employee's physical office apply as well in the electronic sphere. Pp. 2629 – 2630.

(2) Petitioners' warrantless review of Quon's pager transcript was reasonable under the *O'Connor* plurality's approach because it was motivated by a legitimate work-related purpose, and because it was not excessive in scope. See 480 U.S., at 726, 107 S.Ct. 1492. There were "reasonable grounds for [finding it] necessary for a noninvestigatory work-related purpose," *ibid.,* in that Chief Scharf had ordered the audit to determine whether the City's contractual character limit was sufficient to meet the City's needs. It was also " 'reasonably related to the objectives of the search,' " *ibid.,* because both the City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or, on the other hand, that the City was not paying for extensive personal communications. Reviewing the transcripts was an efficient and expedient way to determine whether either of these factors caused Quon's overages. And the review was also not " 'excessively intrusive.' " *Ibid.* Although Quon had exceeded his monthly allotment a number of times, OPD requested transcripts for only August and September 2002 in order to obtain a large enough sample to decide the character limits' efficaciousness, and all the messages that Quon sent while off duty were redacted. And from OPD's perspective, the fact that Quon likely had only a limited privacy expectation lessened the risk that the review would intrude on highly private details of Quon's life. Similarly, because the City had a legitimate reason for the search and it was not excessively intrusive in light of that justification, the search would be "regarded as reasonable and normal in the private-employer context" and thereby satisfy the approach of Justice SCALIA's concurrence, ****2624** *id.,* at 732, 107 S.Ct. 1492. Conversely, the Ninth Circuit's "least intrusive" means approach was inconsistent with controlling precedents. See, *e.g., Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 663, 115 S.Ct. 2386, 132 L.Ed.2d 564. Pp. 2630 – 2633.

(c) Whether the other respondents can have a reasonable expectation of privacy in their text messages to Quon need not be resolved. They argue that because the search was unreasonable as to Quon, it was also unreasonable as to them, but they make no corollary argument that the search, if reasonable as to Quon, could nonetheless be unreasonable as to them. Given this litigating position and the Court's conclusion that the search was reasonable as to Quon, these other respondents cannot prevail. P. 2633.

529 F.3d 892, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and STEVENS, THOMAS, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined, and in which SCALIA, J., joined except for Part III–A. STEVENS, J., filed a concurring opinion, *post*, pp. 2633 – 2634. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, pp. 2634 – 2635.

Attorneys and Law Firms

Kent L. Richland (argued), Los Angeles, CA, for the petitioners.

Neal K. Katyal, for the U.S. as amicus curiae, by special leave of the Court, supporting the petitioners.

Dieter Dammeier, Upland, CA, for respondents.

Dimitrios C. Rinos, Rinos & Martin, LLP, Tustin, CA, Kent L. Richland, Kent J. Bullard, Greines, Martin, Stein & Richland LLP, Los Angeles, CA, for Petitioners.

Dimitrios C. Rinos, Rinos & Martin, LLP, Tustin, CA, Kent L. Richland, Kent J. Bullard, Greines, Martin, Stein & Richland LLP, Los Angeles, CA, for Petitioners.

Dieter C. Dammeier, Michael A. McGill, Lackie, Dammeier & McGill, Upland, CA, for Respondents Jerilyn Quon, April Florio, Jeff Quon and Steve Trujillo.

Opinion

Justice KENNEDY delivered the opinion of the Court.

***750** This case involves the assertion by a government employer of the right, in circumstances to be described, to read text messages sent and received on a pager the employer owned and issued to an employee. The employee contends that the privacy of the messages is protected by the ban on "unreasonable searches and seizures" found in the Fourth Amendment to the United States Constitution, made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Though the case touches issues of far-reaching significance, the Court concludes it can be resolved by settled principles determining when a search is reasonable.

I

A

The city of Ontario (City) is a political subdivision of the State of California. The case arose out of incidents in 2001 and 2002 when respondent Jeff Quon was employed by the Ontario Police Department (OPD). He was a police sergeant and member of OPD's Special Weapons and Tactics (SWAT) Team. The City, OPD, and OPD's Chief, Lloyd Scharf, are petitioners ****2625** here. As will be discussed, two respondents share the last name Quon. In this opinion "Quon" refers to Jeff Quon, for the relevant events mostly revolve around him.

In October 2001, the City acquired 20 alphanumeric pagers capable of sending and receiving text messages. Arch Wireless Operating Company provided wireless service for the pagers. Under the City's service contract with Arch Wireless, each pager was allotted a limited number of characters ***751** sent or received each month. Usage in excess of that amount would result in an additional fee. The City issued pagers to Quon and other SWAT Team members in order to help the SWAT Team mobilize and respond to emergency situations.

Before acquiring the pagers, the City announced a "Computer Usage, Internet and E–Mail Policy" (Computer Policy) that applied to all employees. Among other provisions, it specified that the City "reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." App. to Pet. for Cert. 151, 152. In March 2000, Quon signed a statement acknowledging that he had read and understood the Computer Policy.

The Computer Policy did not apply, on its face, to text messaging. Text messages share similarities with e-mails, but the two differ in an important way. In this case, for instance, an e-mail sent on a City computer was transmitted through the City's own data servers, but a text message sent on one of the City's pagers was transmitted using wireless radio frequencies from an individual pager to a receiving station owned by Arch Wireless. It was routed through Arch Wireless' computer network, where it remained until the recipient's pager or cellular telephone was ready to receive the message, at which point Arch Wireless transmitted the message from the transmitting station nearest to the recipient. After delivery, Arch Wireless retained a copy on its computer servers. The message did not pass through computers owned by the City.

Although the Computer Policy did not cover text messages by its explicit terms, the City made clear to employees, including Quon, that the City would treat text messages the same way as it treated e-mails. At an April 18, 2002, staff meeting at which Quon was present, Lieutenant Steven Duke, the OPD officer responsible for the City's contract ***752** with Arch Wireless, told officers that messages sent on the pagers "are considered e-mail messages. This means that [text] messages would fall under the City's policy as public information and [would be] eligible for auditing." App. 30. Duke's comments were put in writing in a memorandum sent on April 29, 2002, by Chief Scharf to Quon and other City personnel.

Within the first or second billing cycle after the pagers were distributed, Quon exceeded his monthly text message character allotment. Duke told Quon about the overage, and reminded him that messages sent on the pagers were "considered e-mail and could be audited." *Id.,* at 40. Duke said, however, that "it was not his intent to audit [an] employee's text messages to see if the overage [was] due to work related transmissions." *Ibid.* Duke suggested that Quon could reimburse the City for the overage fee

rather than have Duke audit the messages. Quon wrote a check to the City for the overage. Duke offered the same arrangement to other employees who incurred overage fees.

Over the next few months, Quon exceeded his character limit three or four times. Each time he reimbursed the City. Quon **2626 and another officer again incurred overage fees for their pager usage in August 2002. At a meeting in October, Duke told Scharf that he had become " 'tired of being a bill collector.' " *Id.,* at 91. Scharf decided to determine whether the existing character limit was too low—that is, whether officers such as Quon were having to pay fees for sending work-related messages—or if the overages were for personal messages. Scharf told Duke to request transcripts of text messages sent in August and September by Quon and the other employee who had exceeded the character allowance.

At Duke's request, an administrative assistant employed by OPD contacted Arch Wireless. After verifying that the City was the subscriber on the accounts, Arch Wireless provided the desired transcripts. Duke reviewed the transcripts *753 and discovered that many of the messages sent and received on Quon's pager were not work related, and some were sexually explicit. Duke reported his findings to Scharf, who, along with Quon's immediate supervisor, reviewed the transcripts himself. After his review, Scharf referred the matter to OPD's internal affairs division for an investigation into whether Quon was violating OPD rules by pursuing personal matters while on duty.

The officer in charge of the internal affairs review was Sergeant Patrick McMahon. Before conducting a review, McMahon used Quon's work schedule to redact the transcripts in order to eliminate any messages Quon sent while off duty. He then reviewed the content of the messages Quon sent during work hours. McMahon's report noted that Quon sent or received 456 messages during work hours in the month of August 2002, of which no more than 57 were work related; he sent as many as 80 messages during a single day at work; and on an average workday, Quon sent or received 28 messages, of which only 3 were related to police business. The report concluded that Quon had violated OPD rules. Quon was allegedly disciplined.

B

Raising claims under Rev. Stat. § 1979, 42 U.S.C. § 1983; 18 U.S.C. § 2701 *et seq.,* popularly known as the Stored Communications Act (SCA); and California law, Quon filed suit against petitioners in the United States District Court for the Central District of California. Arch Wireless and an individual not relevant here were also named as defendants. Quon was joined in his suit by another plaintiff who is not a party before this Court and by the other respondents, each of whom exchanged text messages with Quon during August and September 2002: Jerilyn Quon, Jeff Quon's then-wife, from whom he was separated; April Florio, an OPD employee with whom Jeff Quon was romantically involved; and Steve Trujillo, another member of the OPD SWAT Team. *754 Among the allegations in the complaint was that petitioners violated respondents' Fourth Amendment rights and the SCA by obtaining and reviewing the transcript of Jeff Quon's pager messages and that Arch Wireless had violated the SCA by turning over the transcript to the City.

The parties filed cross-motions for summary judgment. The District Court granted Arch Wireless' motion for summary judgment on the SCA claim but denied petitioners' motion for summary judgment on the Fourth Amendment claims. *Quon v. Arch Wireless Operating Co.,* 445 F.Supp.2d 1116 (C.D.Cal.2006). Relying on the plurality opinion in *O'Connor v. Ortega,* 480 U.S. 709, 711, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987), the District Court determined that Quon had a reasonable expectation of privacy in the content of his text messages. Whether the audit of the **2627 text messages was nonetheless reasonable, the District Court concluded, turned on Chief Scharf's intent: "[I]f the purpose for the audit was to determine if Quon was using his pager to 'play games' and 'waste time,' then the audit was not constitutionally reasonable"; but if the audit's purpose "was to determine the efficacy of the existing character limits to ensure that officers were not paying hidden work-related costs, ... no constitutional violation occurred." 445 F.Supp.2d, at 1146.

The District Court held a jury trial to determine the purpose of the audit. The jury concluded that Scharf ordered the audit to determine the efficacy of the character limits. The District Court accordingly held that petitioners did not violate the Fourth Amendment. It entered judgment in their favor.

The United States Court of Appeals for the Ninth Circuit reversed in part. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (2008). The panel agreed with the District Court that Jeff Quon had a reasonable expectation of privacy in his text messages but disagreed with the District Court about whether the search was reasonable. Even though the search was conducted for "a legitimate work-related rationale," ***755** the Court of Appeals concluded, it "was not reasonable in scope." *Id.,* at 908. The panel disagreed with the District Court's observation that "there were no less-intrusive means" that Chief Scharf could have used "to verify the efficacy of the 25,000 character limit ... without intruding on [respondents'] Fourth Amendment rights." *Id.,* at 908–909. The opinion pointed to a "host of simple ways" that the chief could have used instead of the audit, such as warning Quon at the beginning of the month that his future messages would be audited, or asking Quon himself to redact the transcript of his messages. *Id.,* at 909. The Court of Appeals further concluded that Arch Wireless had violated the SCA by turning over the transcript to the City.

The Ninth Circuit denied a petition for rehearing en banc. *Quon v. Arch Wireless Operating Co.,* 554 F.3d 769 (2009). Judge Ikuta, joined by six other Circuit Judges, dissented. *Id.,* at 774–779. Judge Wardlaw concurred in the denial of rehearing, defending the panel's opinion against the dissent. *Id.,* at 769–774.

This Court granted the petition for certiorari filed by the City, OPD, and Chief Scharf challenging the Court of Appeals' holding that they violated the Fourth Amendment. 558 U.S. 1090, 130 S.Ct. 1011, 175 L.Ed.2d 617 (2009). The petition for certiorari filed by Arch Wireless challenging the Ninth Circuit's ruling that Arch Wireless violated the SCA was denied. *USA Mobility Wireless, Inc. v. Quon,* 558 U.S. 1091, 130 S.Ct. 1011, 175 L.Ed.2d 618 (2009).

II

The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...." It is well settled that the Fourth Amendment's protection extends beyond the sphere of criminal investigations. *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523, 530, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). "The Amendment guarantees the privacy, dignity, and security of ***756** persons against certain arbitrary and invasive acts by officers of the Government," without regard to whether the government actor is investigating crime or performing another function. *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 613–614, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). The Fourth Amendment applies as well when the Government acts in its capacity as an employer. *Treasury* ****2628** *Employees v. Von Raab,* 489 U.S. 656, 665, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989).

The Court discussed this principle in *O'Connor.* There a physician employed by a state hospital alleged that hospital officials investigating workplace misconduct had violated his Fourth Amendment rights by searching his office and seizing personal items from his desk and filing cabinet. All Members of the Court agreed with the general principle that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." 480 U.S., at 717, 107 S.Ct. 1492 (plurality opinion); see also *id.,* at 731, 107 S.Ct. 1492 (SCALIA, J., concurring in judgment); *id.,* at 737, 107 S.Ct. 1492 (Blackmun, J., dissenting). A majority of the Court further agreed that " 'special needs, beyond the normal need for law enforcement,' " make the warrant and probable-cause requirement impracticable for government employers. *Id.,* at 725, 107 S.Ct. 1492 (plurality opinion) (quoting *New Jersey v. T.L. O.,* 469 U.S. 325, 351, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985)) (Blackmun, J., concurring in judgment)); 480 U.S., at 732, 107 S.Ct. 1492 (opinion of SCALIA, J.) (quoting same).

The *O'Connor* Court did disagree on the proper analytical framework for Fourth Amendment claims against government employers. A four-Justice plurality concluded that the correct analysis has two steps. First, because "some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable," *id.,* at 718, 107 S.Ct. 1492, a court

must consider "[t]he operational realities of the workplace" in order to determine whether an employee's Fourth Amendment rights are implicated, *id.,* at 717, 107 S.Ct. 1492. On this view, "the question whether an employee has a reasonable ***757** expectation of privacy must be addressed on a case-by-case basis." *Id.,* at 718, 107 S.Ct. 1492. Next, where an employee has a legitimate privacy expectation, an employer's intrusion on that expectation "for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." *Id.,* at 725–726, 107 S.Ct. 1492.

Justice SCALIA, concurring in the judgment, outlined a different approach. His opinion would have dispensed with an inquiry into "operational realities" and would conclude "that the offices of government employees ... are covered by Fourth Amendment protections as a general matter." *Id.,* at 731, 107 S.Ct. 1492. But he would also have held "that government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment." *Id.,* at 732, 107 S.Ct. 1492.

Later, in the *Von Raab* decision, the Court explained that "operational realities" could diminish an employee's privacy expectations, and that this diminution could be taken into consideration when assessing the reasonableness of a workplace search. 489 U.S., at 671, 109 S.Ct. 1384. In the two decades since *O'Connor,* however, the threshold test for determining the scope of an employee's Fourth Amendment rights has not been clarified further. Here, though they disagree on whether Quon had a reasonable expectation of privacy, both petitioners and respondents start from the premise that the *O'Connor* plurality controls. See Brief for Petitioners 22–28; Brief for Respondents 25–32. It is not necessary to resolve whether that premise is correct. The case can be decided by determining that the search was ****2629** reasonable even assuming Quon had a reasonable expectation of privacy. The two *O'Connor* approaches—the plurality's and Justice SCALIA's—therefore lead to the same result here.

***758** III

A

Before turning to the reasonableness of the search, it is instructive to note the parties' disagreement over whether Quon had a reasonable expectation of privacy. The record does establish that OPD, at the outset, made it clear that pager messages were not considered private. The City's Computer Policy stated that "[u]sers should have no expectation of privacy or confidentiality when using" City computers. App. to Pet. for Cert. 152. Chief Scharf's memo and Duke's statements made clear that this official policy extended to text messaging. The disagreement, at least as respondents see the case, is over whether Duke's later statements overrode the official policy. Respondents contend that because Duke told Quon that an audit would be unnecessary if Quon paid for the overage, Quon reasonably could expect that the contents of his messages would remain private.

At this point, were we to assume that inquiry into "operational realities" were called for, compare *O'Connor,* 480 U.S., at 717, 107 S.Ct. 1492 (plurality opinion), with *id.,* at 730–731, 107 S.Ct. 1492 (opinion of SCALIA, J.); see also *id.,* at 737–738, 107 S.Ct. 1492 (BLACKMUN, J., dissenting), it would be necessary to ask whether Duke's statements could be taken as announcing a change in OPD policy, and if so, whether he had, in fact or appearance, the authority to make such a change and to guarantee the privacy of text messaging. It would also be necessary to consider whether a review of messages sent on police pagers, particularly those sent while officers are on duty, might be justified for other reasons, including performance evaluations, litigation concerning the lawfulness of police actions, and perhaps compliance with state open records laws. See Brief for Petitioners 35–40 (citing Cal. Public Records Act, Cal. Govt.Code Ann. § 6250 *et seq.* (West 2008)). These matters would all bear on the legitimacy of an employee's privacy expectation.

***759** The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. See, *e.g., Olmstead v. United States,* 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), overruled by *Katz v. United States,* 389 U.S. 347, 353, 88 S.Ct. 507,

19 L.Ed.2d 576 (1967). In *Katz,* the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth. See *id.,* at 360–361, 88 S.Ct. 507 (Harlan, J., concurring). It is not so clear that courts at present are on so sure a ground. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.

Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one *amici* brief notes, many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency. See Brief for Electronic Frontier ****2630** Foundation et al. 16–20. Another *amicus* points out that the law is beginning to respond to these developments, as some States have recently passed statutes requiring employers to notify employees when monitoring their electronic communications. See Brief for New York Intellectual Property Law Association 22 (citing Del.Code Ann., Tit. 19, § 705 (2005); Conn. Gen.Stat. Ann. § 31–48d (West 2003)). At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.

Even if the Court were certain that the *O'Connor* plurality's approach were the right one, the Court would have difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society ***760** will be prepared to recognize those expectations as reasonable. See 480 U.S., at 715, 107 S.Ct. 1492. Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.

A broad holding concerning employees' privacy expectations vis–à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower grounds. For present purposes we assume several propositions, *arguendo:* First, Quon had a reasonable expectation of privacy in the text messages sent on the pager provided to him by the City; second, petitioners' review of the transcript constituted a search within the meaning of the Fourth Amendment; and third, the principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere.

B

Even if Quon had a reasonable expectation of privacy in his text messages, petitioners did not necessarily violate the Fourth Amendment by obtaining and reviewing the transcripts. Although as a general matter, warrantless searches "are *per se* unreasonable under the Fourth Amendment," there are "a few specifically established and well-delineated exceptions" to that general rule. *Katz, supra,* at 357, 88 S.Ct. 507. The Court has held that the " 'special needs' " of the workplace ***761** justify one such exception. *O'Connor,* 480 U.S., at 725, 107 S.Ct. 1492 (plurality opinion); *id.,* at 732, 107 S.Ct. 1492 (SCALIA, J., concurring in judgment); *Von Raab,* 489 U.S., at 666–667, 109 S.Ct. 1384.

Under the approach of the *O'Connor* plurality, when conducted for a "noninvestigatory, work-related purpos[e]" or for the "investigatio[n] of work-related misconduct," a government employer's warrantless search is reasonable if it is " 'justified at its inception' " and if " 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of' " the circumstances giving rise to the search. 480 U.S., at 725–726, 107 S.Ct. 1492. The search here satisfied the standard of the *O'Connor* plurality and was reasonable under that approach.

****2631** The search was justified at its inception because there were "reasonable grounds for suspecting that the search [was] necessary for a noninvestigatory work-related purpose." *Id.,* at 726, 107 S.Ct. 1492. As a jury found, Chief Scharf ordered the search in order to determine whether the character limit on the City's contract with Arch Wireless was sufficient to meet the

City's needs. This was, as the Ninth Circuit noted, a "legitimate work-related rationale." 529 F.3d, at 908. The City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand that the City was not paying for extensive personal communications.

As for the scope of the search, reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use. The review was also not " 'excessively intrusive.' " *O'Connor, supra,* at 726, 107 S.Ct. 1492 (plurality opinion). Although Quon had gone over his monthly allotment a number of times, OPD requested transcripts for only the months of August and September 2002. While it may have been reasonable as well for OPD to review transcripts of all the months in which Quon exceeded his ***762** allowance, it was certainly reasonable for OPD to review messages for just two months in order to obtain a large enough sample to decide whether the character limits were efficacious. And it is worth noting that during his internal affairs investigation, McMahon redacted all messages Quon sent while off duty, a measure which reduced the intrusiveness of any further review of the transcripts.

Furthermore, and again on the assumption that Quon had a reasonable expectation of privacy in the contents of his messages, the extent of an expectation is relevant to assessing whether the search was too intrusive. See *Von Raab, supra,* at 671, 109 S.Ct. 1384; cf. *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 654–657, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). Even if he could assume some level of privacy would inhere in his messages, it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny. Quon was told that his messages were subject to auditing. As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications. Under the circumstances, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used. Given that the City issued the pagers to Quon and other SWAT Team members in order to help them more quickly respond to crises—and given that Quon had received no assurances of privacy—Quon could have anticipated that it might be necessary for the City to audit pager messages to assess the SWAT Team's performance in particular emergency situations.

From OPD's perspective, the fact that Quon likely had only a limited privacy expectation, with boundaries that we need not here explore, lessened the risk that the review would intrude on highly private details of Quon's life. OPD's audit of messages on Quon's employer-provided pager was not nearly as intrusive as a search of his personal e-mail account ***763** or pager, or a wiretap on his home phone line, would have been. That the search did reveal intimate details of Quon's life does not make it unreasonable, for under the circumstances a reasonable employer would not expect that such a review would intrude ****2632** on such matters. The search was permissible in its scope.

The Court of Appeals erred in finding the search unreasonable. It pointed to a "host of simple ways to verify the efficacy of the 25,000 character limit ... without intruding on [respondents'] Fourth Amendment rights." 529 F.3d, at 909. The panel suggested that Scharf "could have warned Quon that for the month of September he was forbidden from using his pager for personal communications, and that the contents of all of his messages would be reviewed to ensure the pager was used only for work-related purposes during that timeframe. Alternatively, if [OPD] wanted to review past usage, it could have asked Quon to count the characters himself, or asked him to redact personal messages and grant permission to [OPD] to review the redacted transcript." *Ibid.*

This approach was inconsistent with controlling precedents. This Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *Vernonia, supra,* at 663, 115 S.Ct. 2386; see also, *e.g., Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls,* 536 U.S. 822, 837, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002); *Illinois v. Lafayette,* 462 U.S. 640, 647, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983). That rationale "could raise insuperable barriers to the exercise of virtually all search-and-seizure powers," *United States v. Martinez–Fuerte,* 428 U.S. 543, 557, n. 12, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), because "judges engaged in *post hoc* evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished," *Skinner,* 489 U.S., at 629, n. 9, 109 S.Ct. 1402 (internal quotation marks and brackets omitted). The analytic errors of the Court

of Appeals in this case illustrate the necessity of ***764** this principle. Even assuming there were ways that OPD could have performed the search that would have been less intrusive, it does not follow that the search as conducted was unreasonable.

Respondents argue that the search was *per se* unreasonable in light of the Court of Appeals' conclusion that Arch Wireless violated the SCA by giving the City the transcripts of Quon's text messages. The merits of the SCA claim are not before us. But even if the Court of Appeals was correct to conclude that the SCA forbade Arch Wireless from turning over the transcripts, it does not follow that petitioners' actions were unreasonable. Respondents point to no authority for the proposition that the existence of statutory protection renders a search *per se* unreasonable under the Fourth Amendment. And the precedents counsel otherwise. See *Virginia v. Moore,* 553 U.S. 164, 168, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008) (search incident to an arrest that was illegal under state law was reasonable); *California v. Greenwood,* 486 U.S. 35, 43, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988) (rejecting argument that if state law forbade police search of individual's garbage the search would violate the Fourth Amendment). Furthermore, respondents do not maintain that any OPD employee either violated the law himself or herself or knew or should have known that Arch Wireless, by turning over the transcript, would have violated the law. The otherwise reasonable search by OPD is not rendered unreasonable by the assumption that Arch Wireless violated the SCA by turning over the transcripts.

Because the search was motivated by a legitimate work-related purpose, and because it was not excessive in scope, the search was reasonable under the approach of the *O'Connor* plurality. ****2633** 480 U.S., at 726, 107 S.Ct. 1492. For these same reasons —that the employer had a legitimate reason for the search, and that the search was not excessively intrusive in light of that justification—the Court also concludes that the search would be "regarded as reasonable and normal in the private-employer context" and would satisfy the approach of Justice ***765** SCALIA's concurrence. *Id.,* at 732, 107 S.Ct. 1492. The search was reasonable, and the Court of Appeals erred by holding to the contrary. Petitioners did not violate Quon's Fourth Amendment rights.

C

Finally, the Court must consider whether the search violated the Fourth Amendment rights of Jerilyn Quon, Florio, and Trujillo, the respondents who sent text messages to Jeff Quon. Petitioners and respondents disagree whether a sender of a text message can have a reasonable expectation of privacy in a message he knowingly sends to someone's employer-provided pager. It is not necessary to resolve this question in order to dispose of the case, however. Respondents argue that because "the search was unreasonable as to Sergeant Quon, it was also unreasonable as to his correspondents." Brief for Respondents 60 (some capitalization omitted; boldface deleted). They make no corollary argument that the search, if reasonable as to Quon, could nonetheless be unreasonable as to Quon's correspondents. See *id.,* at 65–66. In light of this litigating position and the Court's conclusion that the search was reasonable as to Jeff Quon, it necessarily follows that these other respondents cannot prevail.

* * *

Because the search was reasonable, petitioners did not violate respondents' Fourth Amendment rights, and the court below erred by concluding otherwise. The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, concurring.
Although I join the Court's opinion in full, I write separately to highlight that the Court has sensibly declined to resolve whether the plurality opinion in ***766** *O'Connor v. Ortega,* 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987), provides the correct

approach to determining an employee's reasonable expectation of privacy. See *ante,* at 2628 – 2629. Justice Blackmun, writing for the four dissenting Justices in *O'Connor,* agreed with Justice SCALIA that an employee enjoys a reasonable expectation of privacy in his office. 480 U.S., at 737, 107 S.Ct. 1492. But he advocated a third approach to the reasonable expectation of privacy inquiry, separate from those proposed by the *O'Connor* plurality and by Justice SCALIA, see *ante,* at 2628. Recognizing that it is particularly important to safeguard "a public employee's expectation of privacy in the workplace" in light of the "reality of work in modern time," 480 U.S., at 739, 107 S.Ct. 1492, which lacks "tidy distinctions" between workplace and private activities, *ibid.,* Justice Blackmun argued that "the precise extent of an employee's expectation of privacy often turns on the nature of the search," *id.,* at 738, 107 S.Ct. 1492. And he emphasized that courts should determine this expectation in light of the specific facts of each particular search, rather than by announcing a categorical standard. See *id.,* at 741, 107 S.Ct. 1492.

For the reasons stated at page 2631 of the Court's opinion, it is clear that respondent Jeff Quon, as a law enforcement officer who served on a SWAT Team, should ****2634** have understood that all of his work-related actions—including all of his communications on his official pager—were likely to be subject to public and legal scrutiny. He therefore had only a limited expectation of privacy in relation to this particular audit of his pager messages. Whether one applies the reasoning from Justice O'Connor's opinion, Justice SCALIA's concurrence, or Justice Blackmun's dissent * in *O'Connor,* the result ***767** is the same: The judgment of the Court of Appeals in this case must be reversed.

Justice SCALIA, concurring in part and concurring in the judgment.
I join the Court's opinion except for Part III–A. I continue to believe that the "operational realities" rubric for determining the Fourth Amendment's application to public employees invented by the plurality in *O'Connor v. Ortega,* 480 U.S. 709, 717, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987), is standardless and unsupported. *Id.,* at 729–732, 107 S.Ct. 1492 (SCALIA, J., concurring in judgment). In this case, the proper threshold inquiry should be not whether the Fourth Amendment applies to messages on *public* employees' employer-issued pagers, but whether it applies *in general* to such messages on employer-issued pagers. See *id.,* at 731, 107 S.Ct. 1492.

Here, however, there is no need to answer that threshold question. Even accepting at face value Quon's and his co-plaintiffs' claims that the Fourth Amendment applies to their messages, the city's search was reasonable, and thus did not violate the Amendment. See *id.,* at 726, 107 S.Ct. 1492 (plurality opinion); *id.,* at 732, 107 S.Ct. 1492 (SCALIA, J., concurring in judgment). Since it is unnecessary to decide whether the Fourth Amendment applies, it is unnecessary to resolve which approach in *O'Connor* controls: the plurality's or mine. † That should end the matter.

***768** The Court concedes as much, *ante,* at 2628 – 2629, 2630 – 2633, yet it inexplicably interrupts its analysis with a recitation of the parties' arguments concerning, and an ****2635** excursus on the complexity and consequences of answering, that admittedly irrelevant threshold question, *ante,* at 2629 – 2630. That discussion is unnecessary. (To whom do we owe an *additional* explanation for declining to decide an issue, once we have explained that it makes no difference?) It also seems to me exaggerated. Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. The Court's implication, *ante,* at 2629, that where electronic privacy is concerned we should decide less than we otherwise would (that is, less than the principle of law necessary to resolve the case and guide private action)—or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions—is in my view indefensible. The-times-they-are-a-changin' is a feeble excuse for disregard of duty.

Worse still, the digression is self-defeating. Despite the Court's insistence that it is agnostic about the proper test, lower courts will likely read the Court's self-described "instructive" expatiation on how the *O'Connor* plurality's approach would apply here (if it applied), *ante,* at 2629 – 2630, as a heavy-handed hint about how *they* should proceed. Litigants will do likewise, using the threshold question whether the Fourth Amendment is even implicated as a basis for bombarding lower courts with arguments about employer policies, how they were communicated, and whether they were authorized, as well as the latest trends in employees' use of ***769** electronic media. In short, in saying why it is not saying more, the Court says much more than it should.

The Court's inadvertent boosting of the *O'Connor* plurality's standard is all the more ironic because, in fleshing out its fears that applying that test to new technologies will be too hard, the Court underscores the unworkability of that standard. Any rule that requires evaluating whether a given gadget is a "necessary instrumen[t] for self-expression, even self-identification," on top of assessing the degree to which "the law's treatment of [workplace norms has] evolve[d]," *ante,* at 2629 – 2630, is (to put it mildly) unlikely to yield objective answers.

I concur in the Court's judgment.

All Citations

560 U.S. 746, 130 S.Ct. 2619, 177 L.Ed.2d 216, 93 Empl. Prac. Dec. P 43,907, 78 USLW 4591, 159 Lab.Cas. P 61,011, 30 IER Cases 1345, 10 Cal. Daily Op. Serv. 7565, 2010 Daily Journal D.A.R. 9072, 22 Fla. L. Weekly Fed. S 470

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* I do not contend that Justice Blackmun's opinion is controlling under *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), but neither is his approach to evaluating a reasonable expectation of privacy foreclosed by *O'Connor*. Indeed, his approach to that inquiry led to the conclusion, shared by Justice SCALIA but not adopted by the *O'Connor* plurality, that an employee had a reasonable expectation of privacy in his office. See *O'Connor v. Ortega,* 480 U.S. 709, 718, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (plurality opinion). But Justice Blackmun would have applied the Fourth Amendment's warrant and probable-cause requirements to workplace investigatory searches, *id.,* at 732, 107 S.Ct. 1492 (dissenting opinion), whereas a majority of the Court rejected that view, see *id.,* at 722, 725, 107 S.Ct. 1492 (plurality opinion); *id.,* at 732, 107 S.Ct. 1492 (SCALIA, J., concurring in judgment). It was that analysis—regarding the proper standard for evaluating a search when an employee has a reasonable expectation of privacy—that produced the opposite result in the case. This case does not implicate that debate because it does not involve an investigatory search. The jury concluded that the purpose of the audit was to determine whether the character limits were sufficient for work-related messages. See *ante,* at 2627.

† Despite his disclaimer, *ante,* at 2634, n. (concurring opinion), Justice STEVENS' concurrence implies, *ante,* at 2633 – 2634, that it is also an open question whether the approach advocated by Justice Blackmun in his *dissent* in *O'Connor* is the proper standard. There is room for reasonable debate as to which of the two approaches advocated by Justices whose votes supported the judgment in *O'Connor*—the plurality's and mine—is controlling under *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). But unless *O'Connor* is overruled, it is assuredly false that a test that would have produced the *opposite* result in that case is still in the running.

Attachment 3
Sollenberger v. Sollenberger

173 F.Supp.3d 608
United States District Court, S.D. Ohio, Western Division,
at Dayton.

Michael J. SOLLENBERGER, Plaintiff,
v.
Jennifer A. SOLLENBERGER, et al., Defendants.

Case No.: 3:15-CV-00213
|
Signed March 25, 2016

Synopsis

Background: Former employee of sheriff's office brought action in state court against, among others, the sheriff and former employee's estranged wife, alleging violations of the Fourth Amendment and various state law torts including invasion of privacy. Following removal, defendants moved to dismiss for failure to state a claim.

Holdings: The District Court, Thomas M. Rose, J., held that:

search was reasonable;

scope of search was reasonable;

employee's right was not clearly established;

allegations were sufficient to plead training or supervision was inadequate;

allegations were insufficient plead deliberate indifference;

under Ohio law, allegations were insufficient to plead reckless or wanton conduct; and

allegations were insufficient to plead a reasonable expectation of privacy in old cell phone.

Motion granted.

Attorneys and Law Firms

***613** John David Smith, John D. Smith Co. LPA, Andrew P. Meier, Springboro, OH, for Plaintiff.

Jennifer A. Sollenberger, Dayton, OH, pro se.

Christina Michele Flanagan, Bieser Greer & Landis LLP, Jade K. Smarda, Jeffrey S. Sharkey, Charles Joseph Faruki, Faruki Ireland & Cox PLL, Dayton, OH, Curtis G. Moore, Fisher & Phillips, LLP, Columbus, OH, for Defendants.

DECISION AND ENTRY GRANTING DEFENDANT PLUMMER AND SHERIFF DEFENDANTS' MOTION TO DISMISS (DOC. 13), GRANTING DEFENDANT SOLLENBERGER'S MOTION TO DISMISS (DOC. 2-1, at PageID# 126–27), GRANTING DEFENDANT ESTRIDGE'S MOTIONS TO DISMISS (DOC. 17), AND TERMINATING CASE.

Thomas M. Rose, Judge, United States District Court

Plaintiff Michael J. Sollenberger ("Plaintiff Sollenberger") filed suit against Jennifer A. Sollenberger ("Defendant Sollenberger") and Dannelle Estridge ("Defendant Estridge") [1], as well as Sheriff Phil Plummer ***614** ("Defendant Plummer"), Sergeant David Parin ("Defendant Parin"), Detective Bryan Cavender ("Defendant Cavender"), and Detective Tony Hutson ("Defendant Hutson"), alleging deprivation of his constitutional rights under 42 U.S.C. § 1983 and various Ohio common law tort claims. The Court has original jurisdiction over Plaintiff Sollenberger's federal claims pursuant to 28 U.S.C. § 1343(a)(3), and supplemental jurisdiction over his state law claims pursuant to 28 U.S.C. § 1367(a).

Pending before the Court is Defendant Plummer and Sheriff Defendants' [2] Motion to Dismiss (Doc. 13), brought pursuant to Fed. R. Civ. P. 12(b)(6), Defendant Estridge's Motion to Dismiss (Doc. 17), brought pursuant to Fed. R. Civ. P. 8, 12(c), and Defendant Sollenberger's Motion to Dismiss (Doc. 2-1, at PageID# 126–27.). These Motions are now fully briefed and ripe for decision. A relevant factual background will first be set forth, followed by the applicable legal standard and analysis of the motions to dismiss.

I. FACTUAL AND PROCEDURAL HISTORY

In the context of a motion to dismiss, the Court must accept as true all of the factual allegations contained in the complaint. In the context of a motion for judgment on the pleadings, the Court may also consider court decisions and other public records. Plaintiff's Complaint includes the following factual allegations:

Plaintiff Sollenberger is a resident of Montgomery County, Ohio, and was formerly employed by the Montgomery County Sheriff's Office in Dayton, Ohio. (Doc. 2-1, at PageID# 88–89.) Plaintiff Sollenberger and Defendant Sollenberger are currently married, but in the process of finalizing divorce proceedings in the Court of Common Pleas of Montgomery County, Ohio. (*Id.*, at PageID# 89.) Plaintiff Sollenberger and Defendant Sollenberger were physically separated during the divorce proceedings. (*Id.*)

On or about April or May 2014, Defendant Sollenberger noticed their son—who was staying at her residence for the week—looking through her bedroom dresser drawers. [3] (Doc. 11-2, at 18.) Sollenbergers' son was looking for one of Defendant Sollenberger's old cell phones, which was in Defendant Sollenberger's possession, so that the son could use it. (*Id.*; Doc. 2-1, at PageID# 89.) At this point, Defendant Sollenberger had been in possession of at least two old cell phones "for an extended and continuous period of time[,]" as they had been left at her residence since Plaintiff Sollenberger moved out. [4] (Doc. 2-1, at PageID# 90; Doc. 8, at 9, 31.) The cell phone in question was one of Plaintiff Sollenberger's old cell phones, it was located in Defendant Sollenberger's bedroom dresser drawers, and it was not password protected. (Doc. 11-2, at 18; Doc. 8, at 9.)

Following a discussion with friends, Defendant Sollenberger suspected Plaintiff Sollenberger's old cell phone might contain certain information regarding Plaintiff Sollenberger. (Doc. 2-1, at PageID# 89.) In May 2014, Defendant Sollenberger gave possession of Plaintiff Sollenberger's old ***615** cell phone to Defendant Estridge, who accessed and extracted digital information from the cell phone. (*Id.*) The extracted information, included, but was not limited to, text messages between Plaintiff Sollenberger and his co-workers, pictures, and other deleted, digital information. (*Id.*) Defendant Estridge used a computer program to access and extract this information; storing the information on the hard drive of her personal computer. (*Id.*) Defendants Sollenberger and Estridge reviewed the information. (*Id.*)

In August 2014, Defendant Sollenberger sent some, but not all, of the information stored by Defendant Estridge to the National Association for the Advancement of Colored People ("NAACP"). (*Id.*) In December 2014, a representative from the NAACP provided the Montgomery County Sheriff's Office with 105-copied pages of text messages. (*Id.*) Upon review of these text messages, the Sheriff's Office initiated an administrative investigation into Plaintiff Sollenberger and other Sheriff's Office employees. (*Id.*) The pages contained statements by the Plaintiff that were derogatory and expressed a desire to harm minority members of the community. [5] (Doc. 13-2, at PageID# 358–406; Doc. 13-3, at PageID# 407–63.) These statements include, but are not limited to, the following:

1. "I'll stab a coon." (Doc. 13-2, at PageID# 457.)
2. "BTW the niggers are trying to take over Boston's." (*Id.*)
3. "I hate niggers. That is all." (Doc. 13-3, at PageID# 458.)
4. "Just because a nigger scammed the election and is pres. It does not give the G-damn right to shop at DLM." (*Id.*, at PageID# 453.)
5. "Thank you for stepping up and wanting to kill Muslim sand niggers when no one else would." (Doc. 13-2, at PageID# 367.)
6. "He's a half[-]breed. It's not his fault is [sic] mom was a mud shark communist whore." (*Id.*, at PageID# 375.)
7. "[H]ope he was screaming as he died and his negro friends were freaking out." (*Id.*, at PageID# 387.)
8. "Watching history channel on MLK. Showing old films of restaurants in the south. It would have been fun to beat up coloreds cause [sic] they came into your restaurant." (*Id.*, at PageID# 391.)
9. "I dislike coloreds." (*Id.*, at PageID# 396.)
10. "Did you see the niggers that made the news in Texas because they refused to pay the gratuity on a party of ten [?]"(Doc. 13-3, at PageID# 412.)
11. "U [sic] ever see that nigger reporting for Fox 45? The only thing he's missing is a blunt and a dew rag." (*Id.*, at PageID# 432.)

On December 16, 2014, Defendant Sollenberger met with an employee of the Sheriff's Office to discuss how she came into possession of the information extracted from Plaintiff Sollenberger's old cell phone. (Doc. 2-1, at PageID# 89.) At this point, Defendant Sollenberger provided one of Plaintiff Sollenberger's cell phones to the employee, and Defendant Hutson used the Sheriff's Office software for forensic imaging, and then, returned the cell phone to Defendant Sollenberger. (*Id.*, at PageID# 90.) The information provided to the Sheriff's Office by the NAACP was not contained on this cell phone. (*Id.*)

***616** On January 13, 2015, Defendant Estridge met with a Sheriff's Office employee to copy files from her personal computer onto a Sheriff's Office hard drive, but this task was unsuccessful. (*Id.*) Three days later, Defendant Estridge returned to the Sheriff's Office and transferred files from her personal computer to a flash drive as well as to a cell phone provided by the Sheriff's Office. (*Id.*) On January 20, 2015, Defendants Sollenberger and Estridge returned for a final time, providing Plaintiff Sollenberger's old cell phone that originally contained the digital information in question. (*Id.*) Defendant Hutson imaged the phone using the Sheriff's Office software, and employees conducted an examination of the information obtained therein. (*Id.*) The extracted digital information was determined to be "similar to or the same as the digital information [Defendants Sollenberger and Estridge] were able to extract," and the Sheriff's Office used the obtained information for the purposes of their investigation. (*Id.*)

The Sheriff's Office determined that Plaintiff Sollenberger violated the Sheriff's Office Professional Conduct Rules. (*Id.*) On December 1, 2014, Plaintiff Sollenberger was placed on administrative leave, and ultimately, terminated on February 6, 2015. (*Id.*)

Plaintiff Sollenberger filed suit on May 15, 2015, in the Court of Common Pleas of Montgomery County, Ohio, in which he alleged state law claims and violations of his federal constitutional rights and sought recovery under 42 U.S.C. § 1983. (Doc. 2-1, at PageID# 87–95.) Pursuant to 28 U.S.C. § 1441, Defendants removed the case to this Court. (Doc. 2, at PageID# 76–78; Doc. 2-1, at PageID# 79–156; Doc. 2-2, at PageID# 157.)

Plaintiff Sollenberger's Complaint presents six claims. (Doc. 2-1, at PageID# 87–95.) The first three and sixth causes of action allege claims under Ohio law, namely: invasion of privacy against all Defendants (First Claim); asserted civil claim for uncharged criminal act pursuant to O.R.C. § 2307.60 against all Defendants (Second Claim); tortious interference with an employment relationship against Defendants Sollenberger and Estridge (Third Claim); and civil conspiracy against all Defendants (Sixth Claim). (*Id.*, at PageID# 90–92, 94) Plaintiff Sollenberger's remaining claims arise under 42 U.S.C. § 1983: a claim for unlawful search and seizure against Sheriff Defendants (Fourth Claim); and a claim against Defendant Plummer, in his official capacity, for failure to train Sheriff Defendants (Fifth Claim). (*Id.*, at PageID# 92–94.)

Defendant Plummer and Sheriff Defendants filed a Motion to Dismiss [6] on July 24, 2015, arguing that Plaintiff Sollenberger failed to establish his state and federal claims asserted against them, as well as that they are entitled to the protections of qualified immunity on Plaintiff Sollenberger's federal law claims and statutory immunity on his state law claims. (Doc. 13, at PageID# 319–53.) Plaintiff Sollenberger filed a Memorandum in Opposition to Defendants' Motion to Dismiss (Doc. 19) on August 14, 2015, and Defendant Plummer and Sheriff Defendants filed a Reply Memorandum in Support of their Motion to Dismiss (Doc. 21) on August 31, 2015.

Defendant Estridge filed a Motion to Dismiss [7] on July 31, 2015, arguing that Plaintiff Sollenberger failed to state claims that are plausible on their face. (Doc. 17.) Plaintiff Sollenberger filed a Memorandum in Opposition to Defendant's Motion to ***617** Dismiss (Doc. 20) on August 21, 2015, and Defendant Estridge filed a Reply Memorandum in Support of her Motion to Dismiss (Doc. 22) on September 04, 2015.

Defendant Sollenberger filed a Motion to Dismiss on June 05, 2015 in the Court of Common Pleas of Montgomery County, Ohio. (Doc. 2-1, at PageID# 126–27.)

II. STANDARD OF REVIEW—MOTION TO DISMISS

"The standard of review for a Rule 12(c) motion is the same as for a motion under Rule 12(b)(6) for failure to state a claim upon which relief can be granted." *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir.2010) (citing *Ziegler v. IBP Hog Market, Inc.*, 249 F.3d 509, 511–12 (6th Cir.2001)).

The purpose of a Rule 12(b)(6) motion to dismiss is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true. *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir.1993) (citing *Nishiyama v. Dickson County, Tennessee*, 814 F.2d 277, 279 (6th Cir.1987)). Put another way, "the purpose of a motion under Federal Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief; the motion is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case." 5B CHARLES ALAN WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356 (3d ed. 2004). Further, for purposes of a motion to dismiss, the complaint must be construed in the light most favorable to the plaintiff and its allegations taken as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

To survive a 12(b)(6) motion to dismiss, a plaintiff must provide more than labels and conclusions, and a formulaic recitation of the elements of a cause of action is not enough. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929

(2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp.*, 550 U.S. at 563, 127 S.Ct. 1955. However, the factual allegations must be enough to raise a right to relief above the speculative level. *Id.* at 555, 127 S.Ct. 1955 (citing 5B C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 (3d ed. 2004)). The factual allegations in the complaint, even if doubtful in fact, must do something more than merely create a suspicion of a legally cognizable right. *Id.* at § 1216.

However, the Supreme Court has held that:

> [T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation"). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.* at 556, 127 S.Ct. 1955. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. [*Iqbal v. Hasty,*] 490 F.3d [143,] 157–58 [(2d Cir.2007)]. ***618** But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged —but it has not "show[n]"—"that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

Ashcroft v. Iqbal, 556 U.S. 662, 678–79, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

The Sixth Circuit has also noted that to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "a...complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory." *Columbia Nat. Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir.1995) (citation omitted), *cert. denied*, 516 U.S. 1158, 116 S.Ct. 1041, 134 L.Ed.2d 189 (1996). The Court "need not accept as true legal conclusions or unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir.1987). Put another way, bare assertions of legal conclusions are not sufficient. *Lillard v. Shelby Cty. Bd. of Educ.*, 76 F.3d 716, 726 (6th Cir.1996). It is only well-pleaded facts, which are construed liberally in favor of the party opposing the motion to dismiss. *Id.*

In evaluating whether the plaintiff has stated a cognizable claim, the court generally may not consider matters outside of the pleadings. *See Hammond v. Baldwin*, 866 F.2d 172, 175 (6th Cir.1989). To this effect, Rule 12(d) provides that if "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. All parties must be given a reasonable opportunity to present all material that is pertinent to the motion."

The Sixth Circuit has clarified the scope of what the court may consider without reaching "matters outside of the pleadings." Generally speaking, while a plaintiff is not required to attach to the complaint documents upon which his action is based, Fed. R. Civ. P. 10(c) considers "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." *See Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir.1997); *see also* Fed R. Civ. P. 10(c). The Court may consider the complaint, in addition to: (1) documents referenced in the complaint or central to plaintiff's claim; (2) matters where the Court may take judicial notice; (3) documents that are public record; and (4) decisions of a government agency. *Dye v. Wells Fargo Home Mortg.*, No. 13–CV–14854, 2014 WL 1908285, at *3, 2014 U.S. Dist. LEXIS 65419, at *10 (E.D.Mich. May 13, 2014) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007)); *see also Weiner*, 108 F.3d at 89 (finding documents attached to a motion to dismiss by a defendant as part of the pleadings if referred to in the complaint and central to its claims).

This acts as a protection for the defendant, without which "a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document upon which it relied." *Weiner*, 108 F.3d at 89 (citing *Pension Benefit*

Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir.1993)). Under these circumstances, the Court may consider the extraneous document without requiring the conversion of the motion to one for summary judgment. *See, e.g.*, *Weiner*, 108 F.3d at 89 (considering additional documents along with the complaint).

Notwithstanding, the ability of a court to consider supplementary documents is not without limitations. The Sixth Circuit has explained that "[w]hile documents integral to the complaint may be relied upon, even if they are not attached or incorporated by ***619** reference, it must also be clear that there exist no material disputed issues of fact regarding the relevance of the document." *Mediacom Se. LLC v. BellSouth Telecomms., Inc.*, 672 F.3d 396, 400 (6th Cir.2012) (citations, internal quotation marks, and alterations omitted). Put otherwise, if the authenticity, validity, or enforceability of a document is not in dispute, the court may consider it on a motion to dismiss; however, a genuine dispute as to the legal sufficiency of said document requires the court to consider the issue under a motion for summary judgment standard. *Id.*; *see also Ouwinga v. Benistar 419 Plan Servs.*, 694 F.3d 783, 796–97 (6th Cir.2012). Additionally, "[i]n ruling on a Rule 12(c) motion, the court considers all available pleadings, including the complaint and the answer." *Dudek v. Thomas & Thomas Attys. & Counselors at Law, LLC*, 702 F.Supp.2d 826, 832 (N.D.Ohio 2010) (citing Fed. R. Civ. P. 12(c)).

III. ANALYSIS

A. Plaintiff Sollenberger's federal claims under 42 U.S.C. § 1983

Defendant Plummer and Sheriff Defendants argue that Plaintiff Sollenberger's federal law claims fail as a matter of law and because they are entitled to the protections of the doctrine of qualified immunity. (Doc. 13, at PageID# 336–42, 346–52.) Although dismissals on the basis of qualified immunity are generally made pursuant to summary judgment motions, *Grose v. Caruso*, 284 Fed.Appx. 279, 283 (6th Cir.2008), "this circuit permits a...court to dismiss under Fed. R. Civ. P. 12(b)(6) based on qualified immunity." *Jackson v. Schultz*, 429 F.3d 586, 589 (6th Cir.2005) (citing *Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir.1987)). Therefore, there are two questions presented. First, Defendant Plummer and Sheriff Defendants still bear the burden of establishing that Plaintiff Sollenberger has failed to allege facts that state a viable claim under color of state law. 42 U.S.C. § 1983. Second, Defendant Plummer and Sheriff Defendants' qualified immunity challenge imposes an additional burden on Plaintiff Sollenberger in stating a claim under Section 1983. *See Shoup v. Doyle*, 974 F.Supp.2d 1058, 1072 (S.D.Ohio 2013).

Under the doctrine of qualified immunity, government officials performing discretionary functions are afforded immunity under 42 U.S.C. § 1983, as long "as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Christophel v. Kukulinsky*, 61 F.3d 479, 484 (6th Cir.1995); *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir.1994); *Flatford v. City of Monroe*, 17 F.3d 162, 166 (6th Cir.1994). Even though the reasonableness determination of an official's action is based on objective factors, "the Supreme Court requires a fact-specific inquiry to determine whether officials would reasonably, even if mistakenly, believe their actions are lawful." *Flatford*, 17 F.3d at 166 (citing *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)).

Qualified immunity analysis involves three inquiries: (i) "whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiffs show that a constitutional violation has occurred;" (ii) "whether the violation involved a clearly established constitutional right of which a reasonable person would have known;" and (iii) "whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 302 (6th Cir.2005) (quoting ***620** *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir.2003)). Qualified immunity must be granted if Plaintiff Sollenberger cannot establish all three elements. *See Williams ex rel. Allen v. Cambridge Bd. of Educ.*, 370 F.3d 630, 636 (6th Cir.2004). Therefore, in order for Plaintiff Sollenberger's federal law claims to survive Defendant Plummer and Sheriff Defendants' qualified immunity challenge, Plaintiff Sollenberger must demonstrate that the constitutional rights were clearly established at the time of alleged violation. *See Harlow*, 457 U.S. at 818, 102 S.Ct. 2727.

"Since qualified immunity is a defense, the burden of pleading it rests with the defendant." *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980) (citing Fed. R. Civ. P. 8(c); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1271 (1969)). Once pleaded, the burden shifts to the plaintiff to show that the defendants are not entitled to qualified immunity. *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir.2006); *Wegener v. Covington*, 933 F.2d 390, 392 (6th Cir.1991).

1. Unlawful Search against Sheriff Defendants (Fourth Claim)

Plaintiff Sollenberger claims that because Sheriff Defendants conducted a forensic examination of his old cell phone "[w]ithout any warrant, court order, subpoena, or [Plaintiff Sollenberger's] consent," their actions constituted an unreasonable search, in violation of the Fourth and Fourteenth Amendments, [8] as well as Article I, Section 14 of the Ohio Constitution. [9] (Doc. 2-1, at PageID# 90, 93.) Sheriff Defendants argue that their search was reasonable, as well as provide two alternative arguments: that the search was permissible because it was conducted with the consent of Plaintiff Sollenberger's wife, and that the information at issue was provided to the Sheriff Defendants by third parties. (Doc. 13, at PageID# 335–42.)

Claims for an unlawful search arise under the Fourth Amendment, which provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." *United States v. Mendenhall*, 446 U.S. 544, 550, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). "A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984) (internal quotations omitted). " 'The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government,' without regard to whether the government actor is investigating crime or performing another function." *City of Ontario v. Quon*, 560 U.S. 746, 755–56, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010) (quoting *Skinner v. Railway Labor Execs.' Ass'n.*, 489 U.S. 602, 613–14, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)). However, the Supreme Court in *Quon* declined to establish whether an employee subject to an investigation for ***621** misconduct has a reasonable expectation of privacy. 560 U.S. at 759–60, 130 S.Ct. 2619.

Assuming *arguendo*—Plaintiff Sollenberger has sufficiently plead facts to support a reasonable expectation of privacy in his old cell phone, application of the Fourth Amendment does not stop when the Government acts in its capacity as an employer. *Treasury Emps. v. Von Raab*, 489 U.S. 656, 665, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). The Supreme Court in *O'Connor* analyzed this issue, as it relates to a search of a physician's office at a state hospital, unanimously agreeing, "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *O'Connor v. Ortega*, 480 U.S. 709, 717, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (plurality opinion); *see also id.*, at 731, 107 S.Ct. 1492 (Scalia, J., concurring in judgment); *id.*, at 737, 107 S.Ct. 1492 (Blackmun, J., dissenting).

This application is only the beginning of the inquiry because what is considered reasonable depends on the context of the search. *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). "Because the reasonableness of an expectation of privacy, as well as the appropriate standard for a search, is understood to differ according to context, it is essential first to delineate the boundaries of the workplace." *O'Connor*, 480 U.S. at 715, 107 S.Ct. 1492 (stating "[t]he workplace includes those areas and items that are related to work and are generally within the employer's control.") (plurality opinion). The reasonableness determination requires "[balancing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); *Camara v. Municipal Court*, 387 U.S. 523, 536–37, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). For searches conducted by a public employer, the Court must "balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace." *O'Connor*, 480 U.S. at 719–20, 107 S.Ct. 1492 (plurality opinion).

It is well settled that a warrantless search or seizure is presumptively unreasonable under the Fourth Amendment. U.S. CONST. amend. IV; *see also United States v. Jones*, 562 F.3d 768, 772 (6th Cir.2009). However, because the touchstone of the Fourth

Amendment is "reasonableness," there are certain exceptions to the warrant requirement. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) (citations omitted). "Lists of recognized exceptions are inclusive rather than exclusive." *Johnson v. City of Memphis*, 617 F.3d 864, 868 (6th Cir.2010). "[T]he Supreme Court held in [*O'Connor*], that a workplace search by a government employer to investigate work-related misconduct is not subject to the probable cause and warrant requirements of the Fourth Amendment. Rather, such a search is legal so long as it is reasonable under all of the circumstances." *Jackson v. City of Columbus*, 194 F.3d 737, 754 (6th Cir.1999) (citation omitted), *overruled on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). In order for a workplace search to be reasonable, it must be "justified in its inception" and "reasonably related in scope to the circumstances" that prompted the search. *See O'Connor*, 480 U.S. at 726, 107 S.Ct. 1492 (plurality opinion).

In *Jackson,* the Sixth Circuit "upheld the dismissal of a police chief's claim that his office was unreasonably searched after he was reassigned from his duties upon ***622** the city's initiation of an investigation against him for improper conduct." *James v. Hampton*, 592 Fed.Appx. 449, 457 (6th Cir.2015) (discussing *Jackson*, 194 F.3d at 744); *see also Quon*, 560 U.S. at 762, 130 S.Ct. 2619 (extending reasonableness standard to include text messages sent on an electronic device). In *Quon*, "[t]he search was justified at its inception because there were 'reasonable grounds for suspecting that the search [was] necessary for a noninvestigatory work-related purpose.' " 560 U.S. at 761, 130 S.Ct. 2619 (alterations in original) (citing *O'Connor*, 480 U.S. at 726, 107 S.Ct. 1492).

Here, in December 2014, the Montgomery County Sheriff's Office received and reviewed 105-copied pages of text messages from the NAACP. (Doc. 2-1, at PageID# 89.) The Sheriff's Office review of the information provided by the NAACP was reasonable because law enforcement is permitted to review evidence presented to them by private, third parties. *See Clements–Jeffrey v. City of Springfield*, 810 F.Supp.2d 857, 868 (S.D.Ohio 2011) ("[W]hen a private party presents evidence to the police, it is 'not incumbent on the police to stop her or avert their eyes.' ") (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 489, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Walter v. United States*, 447 U.S. 649, 656, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980)).

Following this review, the Sheriff's Office initiated an investigation against Plaintiff Sollenberger and the other employees involved. (Doc. 2-1, at PageID# 89.) The 105-copied pages provided "reasonable grounds" for suspecting that a search of Plaintiff Sollenberger's old cell phone would yield evidence that Plaintiff Sollenberger was "guilty of work-related misconduct." *See O'Connor*, 480 U.S. at 726, 107 S.Ct. 1492 (plurality opinion). The pages contained statements by the Plaintiff that were derogatory and expressed a desire to harm minority members of the community. (Doc. 13-2, at PageID# 358–406; Doc. 13-3, at PageID# 407–63.)

As a part of this investigation, digital information was accessed and extracted from Plaintiff Sollenberger's old cell phones to authenticate the pages received by the NAACP. (Doc. 2-1, at PageID# 90.) Like the plaintiff in *Hampton*, Plaintiff Sollenberger has not alleged facts that suggest it would be unreasonable, given the context of the Sheriff's Office investigation against him, to suspect the cell phone to contain evidence of his work-related misconduct. *See, e.g.*, *Manasco v. Bd. of Police Comm'rs*, No. 4:11–CV–00557–CDP, 2011 U.S. Dist. LEXIS 157310, at *9–10 (E.D.Mo. Apr. 1, 2011) (finding that the production of plaintiffs' personal cell phone records of text messages was not an unreasonable intrusion).

Additionally, Sheriff Defendants argue that the search was permissible because Plaintiff Sollenberger's wife, Defendant Sollenberger provided consent. (Doc. 13, at PageID# 341-42.) Whether authority exists to consent to a search is a "recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably...." *Ill. v. Rodriguez*, 497 U.S. 177, 186, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990).

> The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises,

> than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape.

Id. In support of their argument, Sheriff Defendants cite to *Cowans v. Bagley*. (Doc. ***623** 13, at PageID# 341–42.) In *Cowans*, the Sixth Circuit found a wife's consent to search the home she shared with her husband valid, stating such determinations "turn[ ] on what the officers knew (or should have known under the circumstances)." 639 F.3d 241, 250 (6th Cir.2011). There, the officers were unaware that the husband and wife were separated and did not share bedrooms. *Id.*

Here, on December 16, 2014, Sheriff Defendants conducted an interview with Defendant Sollenberger where she explained that "they were currently awaiting final results of their divorce trial", and that "[Plaintiff Sollenberger] moved out of the house." [10] (Doc. 11-2, at PageID# 235.) In January, Sheriff Defendants were able to successfully extract digital information from Plaintiff Sollenberger's old cell phones. (Doc. 2-1, at PageID# 90.) There is a reasonable inference that because Sheriff Defendants were aware of the circumstances surrounding Plaintiff Sollenberger and Defendant Sollenberger's marriage at the time of the search, the Sheriff Defendants' could not have reasonably relied on Defendant Sollenberger's authority to give consent to the search. However, this is distinct from the issue of abandonment, which is not "in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *State v. Freeman*, 64 Ohio St.2d 291, 414 N.E.2d 1044, 1048 (1980) (citing *United States v. Edwards*, 441 F.2d 749, 753 (5th Cir.1971)).

Although Plaintiff Sollenberger alleges that Defendant Sollenberger possessed his old phone without his knowledge or consent, the pleadings fail to address whether or not the old phone was essentially abandoned, diminishing any reasonable expectation of privacy. Rather, the facts as alleged support the assertion that Sheriff Defendants' could have reasonably concluded Defendant Sollenberger's consent to the search was valid because the old phone was abandoned, as it was left behind at Defendant Sollenberger's residence when he moved out, the phone remained there for an extended period, and the phone did not contain any sort of password protection. (Doc. 11-2, at PageID# 235; Doc. 8, at 9.) Therefore, Plaintiff Sollenberger has not alleged facts sufficient to establish Defendant Sollenberger's inability to give consent to the search.

Even assuming Defendant Sollenberger was unable to give valid consent and Sheriff Defendants were aware of this fact—construing all facts in Plaintiff Sollenberger's favor—the Court cannot conclude Plaintiff Sollenberger has plead sufficient facts to support an unreasonable search at its inception. Therefore, the search is removed from the bounds of Fourth Amendment protection. Plaintiff Sollenberger's unlawful search claim fails the first prong of the qualified immunity analysis because he fails to state a constitutional claim.

Next, for a search to be reasonable in scope, it must reasonably relate to the objectives of the search and not excessively intrude in light of the nature of the misconduct. *O'Connor*, 480 U.S. at 726, 107 S.Ct. 1492 (plurality opinion). Sheriff Defendants argue that the search was reasonable in scope because they extracted the ***624** same digital information extracted by Defendants Sollenberger and Estridge. (Doc. 13, at PageID# 340.) Furthermore, Sheriff Defendants argue that extracting this information was necessary in their investigation to authenticate the 105-copied pages sent by the NAACP, and ultimately, to determine if a violation of their professional conduct rules had occurred. (*Id.*, at PageID# 340.) In response, Plaintiff Sollenberger argues that the search in *Quon*—relied upon by Sheriff Defendants—is distinguishable because a personal cell phone was not searched, but rather, a work-issued cell phone where the employee had notice of possible searches. (Doc. 19, at 8.)

The Court in *Quon* did state "OPD's audit of messages on Quon's employer-provided pager was not nearly as intrusive as a search of his personal e-mail account or pager, or a wiretap on his home phone line, would have been." 560 U.S. at 762–63, 130 S.Ct. 2619. However, the Court further clarified, the fact "[t]hat the search did reveal intimate details of Quon's life does not make it unreasonable[,]" and thus, was permissible in scope. *Id.* at 763, 130 S.Ct. 2619. Furthermore, although the cell phone has been used as a personal cell phone in the past, Defendant Sollenberger disclosed during her December interview that it was also used for work purposes and claimed as a work expenditure for tax purposes. (Doc. 11-2, at 19.) The search was

reasonable in scope because "the extracted digital information [was] similar to or the same as the digital information [Defendants Sollenberger and Estridge] were able to extract," the cell phone was used for work purposes, and the information was extracted in furtherance of the Sheriff Office's investigation. (Doc. 2-1, at PageID# 90; Doc. 11-2, at 19.) Moreover, the search of Plaintiff Sollenberger's old cell phone is not unreasonable in scope simply because the search may have revealed intimate details of Plaintiff Sollenberger's life.

Nevertheless, had Plaintiff Sollenberger alleged facts establishing a violation of a constitutional right, he must also allege plausible facts that the violation was of a "constitutional right that was clearly established law at the time, such that a reasonable officer would have known that his conduct violated that right." *Johnson v. Moseley*, 790 F.3d 649, 653 (6th Cir.2015). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (citing *Harlow*, 457 U.S. at 818, 102 S.Ct. 2727 (stating, "bare allegations...should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.")). "Moreover, the allegations must demonstrate that each defendant officer, through his or her own individual actions, *personally* violated plaintiff's rights under clearly established law." *Moseley*, 790 F.3d at 653 (citing *Iqbal*, 556 U.S. at 676, 129 S.Ct. 1937; *Robertson v. Lucas*, 753 F.3d 606, 615 (6th Cir.2014)). "A right is clearly established if there is binding precedent from the Supreme Court, the Sixth Circuit, or the district court itself, or case law from other circuits which is directly on point." *Blake v. Wright*, 179 F.3d 1003, 1007 (6th Cir.1999) (internal quotation marks and citations omitted).

Here, Sheriff Defendants argue that the federal courts have not clearly established the parameters of reasonable searches of electronic communications, and specifically, employee text messages. (Doc. 13, at PageID# 347–48.) "The Supreme Court's more-recent precedent shows a marked lack of clarity in what privacy expectations as to content of electronic communications are reasonable." ***625** *Rehberg v. Paulk*, 611 F.3d 828, 844 (11th Cir.2010) (discussing *Quon*, 560 U.S. at 748, 130 S.Ct. 2619). The Supreme Court in *Quon* stated that it "must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer", 560 U.S. at 759, 130 S.Ct. 2619, and that it "touches issues of far reaching significance[.]" *Id.* at 750, 130 S.Ct. 2619. The Court cautioned that "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." *Id.* at 759, 130 S.Ct. 2619 (declining to make a broad holding because of far reaching implications).

Plaintiff Sollenberger argues that his constitutional right was clearly established based on the Supreme Court's decision in *Riley v. California*. (Doc. 19, at 4–5, 16.) The Court stated that officers must generally secure a warrant before conducting a search of data on cell phones. *Riley v. California*, —— U.S. ——, 134 S.Ct. 2473, 2485, 189 L.Ed.2d 430 (2014). However, *Riley* interprets the warrant exception for searches incident to arrest, whereas the case here involves the parameters of the warrant exception for investigations of employee misconduct. *See United States v. Lichtenberger*, 786 F.3d 478, 487 (6th Cir.2015) (stating the *Riley* Court's holding dealt with the search incident to arrest exception). Furthermore, the Court in *Riley* specifically stated, "even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone." 134 S.Ct. at 2495.

Assuming *arguendo*, Plaintiff Sollenberger sufficiently pleaded the first element of qualified immunity; he has nevertheless failed to establish actions that were objectively unreasonable and constituted a violation of a clearly established constitutional right. Therefore, Plaintiff Sollenberger's unlawful search claim fails the second and third elements of the qualified immunity analysis. Thus, the Court DISMISSES Plaintiff Sollenberger's unlawful search claim, without prejudice.

2. Failure to train against Defendant Plummer (Fifth Claim)

Defendant Plummer is being sued in his official capacity as Sheriff of Montgomery County, Ohio. (Doc. 2-1, at PageID# 88.) "[A] suit against a governmental officer 'in his official capacity' is the same as a suit 'against [the] entity of which [the] officer is an agent,' and 'imposes liability on the entity that [the officer] represents." *Wood v. Plummer*, No. 3:11–CV–00032, 2011 WL

2971874, at *6, 2011 U.S. Dist. LEXIS 79712, at *19 (S.D.Ohio June 27, 2011) (alterations in original) (quoting *McMillian v. Monroe County*, 520 U.S. 781, n. 2, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997)), *adopted by* 2011 WL 2971082, 2011 U.S. Dist. LEXIS 79704 (S.D.Ohio July 21, 2011) (Rose, J.). Therefore, Plaintiff Sollenberger's Fifth Claim is a claim against Montgomery County.

However, " 'a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents' on a theory of vicarious liability." *Shoup*, 974 F.Supp.2d at 1084 (quoting *Monell v. Dept. of Soc. Servs. of New York*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). In order to state a claim against a local government under Section 1983, a plaintiff "must show: 1) a deprivation of his constitutional or federal rights, 2) that occurred pursuant to a custom, usage, or official policy of the municipality." *Wood,* 2011 WL 2971874, at *6, 2011 U.S. Dist. LEXIS 79712, at *19 (citing *Monell*, 436 U.S. at 690–91, 98 S.Ct. 2018). Section 1983 will only attach to a county when the execution of its "policy or custom, whether made by ***626** its lawmakers or by those whose edicts or acts may be fairly said to represent official policy," caused the plaintiff's injury. *Monell*, 436 U.S. at 694, 98 S.Ct. 2018; (*see also City of Canton v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) (stating the government entity must itself cause the constitutional violation at issue through execution of its policies or customs)). "Thus, a [county] may be held liable in a Section 1983 action for a violation of constitutional rights directly caused by its failure to train municipal employees, including its police officers, resulting from its official policy or custom." *Shoup*, 974 F.Supp.2d at 1084 (citing *Harris*, 489 U.S. at 380, 109 S.Ct. 1197).

A failure to train claim can only be based on insufficient police training when the failure equates to a "deliberate indifference to the rights of persons with whom the police come into contact." *Harris*, 489 U.S. at 388, 109 S.Ct. 1197. "To succeed on a failure to train or supervise claim, the plaintiff must prove the following: (1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the [county's] deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury." *Ellis v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir.2006). Here, Plaintiff Sollenberger alleges that Defendant Plummer "failed to instruct, supervise, control, or discipline on a continuing basis the [Sheriff Defendants] regarding their duties to refrain from unlawfully gaining access to" Plaintiff Sollenberger's personal cell phone. (Doc. 2-1, at PageID# 94.) Construing all facts in Plaintiff Sollenberger's favor, this generally meets the requirements of the first element because Plaintiff Sollenberger does allege that the training was insufficient for lawful searches, the basis of the alleged constitutional violation. Therefore, Plaintiff Sollenberger states the first element of a failure to train claim.

The second element is met in two possible situations. *Ellis*, 455 F.3d at 700. First, by alleging facts sufficient to demonstrate a pattern of constitutional violations or repeated complaints thereof, with the county's response or lack thereof amounting to a policy of deliberate indifference. *See Brown v. Shaner*, 172 F.3d 927, 931 (6th Cir.1999). Here, Plaintiff Sollenberger states "[t]he Sheriff failed to instruct, supervise, control, or discipline on a continuing basis...", (Doc. 2-1, at PageID# 94.) and "knew, or had he diligently exercised his duties of instruction, supervision, control, and discipline on a continuing basis, would have known that the wrongs committed upon Plaintiff Sollenberger were about to be committed." (*Id.*) Plaintiff Sollenberger fails to make any factual allegations to support this assertion beyond a "formulaic recitation" of what is loosely construed to be an element of a deliberate indifference claim. *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. The recitation does not provide support to the claim he purports to state, and the factual allegations fail to mention any pattern of violations.

The other situation where a plaintiff can sufficiently state a claim for failure to train amounting to deliberate indifference is to allege a "failure to provide adequate training in light of foreseeable consequences that could result from a lack of instruction." *Shaner*, 172 F.3d at 931. "The Supreme Court has described this situation as one in which 'the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the [county] can reasonably be said to have been deliberately indifferent to the need.' " *Shoup*, 974 F.Supp.2d at 1085 (quoting *Harris*, 489 U.S. at 390, 109 S.Ct. 1197). Plaintiff Sollenberger describes Defendant Plummer's "knowledge of [employee's] inadequate training and experience for the job" and failure "to properly ***627** train and educate police officers to carry out their duties[.]" (Doc. 2-1, at PageID# 93–94.) However, Plaintiff Sollenberger provides no factual allegation that might support these claims beyond simply reciting that Defendant Plummer failed to instruct, supervise, control, and discipline employees. Therefore, Plaintiff Sollenberger has failed to sufficiently plead the second element of his failure to train claim.

Although failing to sufficiently plead one element is adequate for dismissal, the Court notes that Plaintiff Sollenberger also fails to allege facts to state the third element of his failure to train claim. Here, he has failed to make any factual allegations explaining how the County failed to train its officers, as well as any other factual allegations that would support his claim, beyond the search of his old cell phone. Therefore, the Court DISMISSES Plaintiff Sollenberger's failure to train claim, without prejudice.

B. Plaintiff Sollenberger's state law claims against Defendant Plummer and Sheriff Defendants

1. Statutory Immunity for Ohio state law claims

Defendant Plummer and Sheriff Defendants argue that they enjoy statutory immunity from Ohio tort law claims as to a political subdivision and its employees because Plaintiff Sollenberger sued them in their individual and official capacities, respectfully. (Doc. 13, at PageID# 343.) In response, Plaintiff Sollenberger argues that Defendant Plummer is precluded from immunity because the search, and the claims related thereto, arose out of Defendant Plummer's employment relationship. (Doc. 19, at 11–12.)

R.C. 2744.02(A)(1) provides "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." There are also exceptions to a political subdivision's immunity, as well as certain defenses to those exceptions. *Sampson v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St.3d 418, 966 N.E.2d 247, 250 (2012) (citing OHIO REV. CODE §§ 2744.02(B), 2744.03, 2744.09). "The Political Subdivision Tort Liability Act...requires a three-tiered analysis to determine whether immunity is applicable[:]"

> The first tier sets out a general rule that political actors are not liable for damages. OHIO REV. CODE § 2744.02(A)(1). In the second tier, the Court must determine whether any of the five exceptions to the general rule of immunity is applicable. OHIO REV. CODE § 2744.02(B). The third tier of the analysis requires consideration of whether a defense to liability applies that restores immunity. OHIO REV. CODE §§ 2744.02(B)(1)(a)–(c), 2744.03.

Allen v. Clark, No. 1:13–CV–00326, 2014 WL 3016075, at *9, 2014 U.S. Dist. LEXIS 90807, at *30 (S.D.Ohio July 3, 2014).

The first determination is whether the employees fall within the definition of a "political subdivision." *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 780 N.E.2d 543, 546 (2002). "[W]hen allegations are made against the elected holder of an office of a political subdivision who is sued in an official capacity, the officeholder is also entitled to the grant of immunity contained in R.C. 2744.02." *Lambert v. Clancy*, 125 Ohio St.3d 231, 927 N.E.2d 585, 591 (2010). "Claims brought against [a county sheriff] in his official capacity are the equivalent of claims brought against the county as a government entity." *Coley v. Lucas Cnty.*, 799 F.3d 530, 542 (6th Cir.2015) (citing *Chesher v. Neyer*, 477 F.3d 784, 796–97 (6th Cir.2007)). "Federal courts have held ***628** that sheriffs and sheriff's deputies are considered employees of the county, which is a political subdivision of the state." *Coley*, 799 F.3d at 542–43 (citing OHIO REV. CODE § 2744.01(F); *Sanford v. Cnty. of Lucas*, No. 3:07–CV–03588, 2009 WL 723227, at *8, 2009 U.S. Dist. LEXIS 20774, at *8 (N.D.Ohio, Mar. 16, 2009) (citing cases)). Thus, Defendant Plummer and Sheriff Defendants meet the first tier.

The next step is determining if any of the five exceptions to immunity enumerated in Section 2744 apply. *Shoup*, 974 F.Supp.2d at 1088 (citing *Hubbard*, 780 N.E.2d at 546). The burden is on the plaintiff to establish an exception to immunity pursuant to Section 2744.04(B). *See Allen*, 2014 WL 3016075, at *9, 2014 U.S. Dist. LEXIS 90807, at *30–31 (dismissing claims where

plaintiffs failed to identify an exception to a city's contended immunity). Defendant Plummer and Sheriff Defendants argue that Plaintiff Sollenberger's Complaint fails to identify an applicable exception to the Act. (Doc. 13, at PageID# 344.)

In response, Plaintiff Sollenberger contends that Section 2744.09(B) is applicable and excepts his claim from immunity under Section 2744.02. (Doc. 19, at 11–12.) Section 2744.09(B) states:

> This chapter does not apply to, and shall not be construed to apply to, the following:...(B) Civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision....

Plaintiff Sollenberger argues that R.C. 2744.09(B) renders R.C. Chapter 2744 precluded because the state law claims alleged arose out of Defendant Plummer's employment relationship. (Doc. 19, at 12.) Plaintiff Sollenberger concedes that this argument is applicable only to Montgomery County, and not the individual Sheriff Defendants. (*Id.*) The Ohio Supreme Court in *Sampson* stated, "[w]hen an employee of a political subdivision brings a civil action against the political subdivision alleging an intentional tort, that civil action may qualify as a 'matter that arises out of the employment relationship' within the meaning of R.C. 2744.09(B)." *Sampson v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St.3d 418, 966 N.E.2d 247, 252 (2012). Furthermore, "an employee's action against his...political—subdivision employer arises out of the employment relationship between the employee and the political subdivision within the meaning of R.C. 2744.09(B) if there is a causal connection or causal relationship between the claims raised by the employee and the employment relationship." *Id.*

In *Sampson*, a political subdivision accused the plaintiff of misconduct when working as a plumber, including responding to service calls and emergencies as well as his use of the employer's gas cards during transportation. Here, Plaintiff Sollenberger argues that his actions arose out of his employment relationship because "the search was motivated by alleged employee misconduct and protecting the public[,]" stating the position of Sheriff Defendants that Plaintiff Sollenberger was unable to fulfill his duties as a Detective. (Doc. 19, at 12.) Consistent with *Sampson*, Plaintiff Sollenberger has alleged facts sufficient to demonstrate his actions arose out of his employment relationship because the Sheriff's Office accused and investigated Plaintiff Sollenberger of misconduct in carrying out his duties as an employee. Therefore, R.C. 2744.09(B) would remove the immunity protection afforded under Section 2744.02 to Defendant Plummer.

It is unclear whether R.C. 2744.03(A)(3) reattaches the immunity protection removed by Section 2744.09(B). *See* ***629** *Fuller v. Cuyahoga Metro. Hous. Auth.*, No. 1:06–CV–2093, 2008 WL 339464, at *8, 2008 U.S. Dist. LEXIS 8730, at *53 (N.D.Ohio Feb. 6, 2008) (noting a lack of clarity in the application of R.C. 2744.03(A)(3)). Nonetheless, Section 2744.09 only precludes the application of Chapter 2744, and Defendant Plummer argues that he is entitled to statutory immunity pursuant to R.C. 311.05, in addition to R.C. 2744.02. (Doc. 21, at 6.) *See Coley v. Lucas Cnty.*, No. 3:09–CV–00008, 2014 U.S. Dist. LEXIS 8260, at *10–17, 2014 WL 273235 (N.D.Ohio Jan. 23, 2014) (analyzing R.C. 311.05 for both official and individual capacity immunity), *aff'd*, 779 F.3d 530 (6th Cir.2015); *Amrhein v. Telb*, No. L–06–1170, 2006 WL 2790370, at *2, 2006 Ohio App. LEXIS 5032, at *5 (Ohio Ct.App. Sept. 29, 2006) (stating R.C. 311.05 establishes qualified immunity for a sheriff). Under this Section, a "sheriff shall only be responsible for the...misconduct in office of any of his deputies if he orders, has prior knowledge of, participates in, acts in reckless disregard of, or ratifies the...misconduct in office of the deputy." OHIO REV. CODE § 311.05.

Here, Plaintiff Sollenberger does not allege that Defendant Plummer ordered, possessed prior knowledge of, participated in, or acted in reckless disregard of Sheriff Defendants' actions in searching the old phone. Rather, Plaintiff Sollenberger argues in his response "[Defendant Plummer] undoubtedly ratified all of the employees' prior conduct when [Plaintiff Sollenberger] was placed on administrative leave and subsequently terminated." (Doc. 19, at 14.) An inference may be made that Defendant Plummer, as Sheriff, was aware of Plaintiff Sollenberger's termination. However, even assuming this conclusory statement as

fact, it does not support Defendant Plummer's reckless disregard of, or involvement in, the alleged misconduct of his deputies, which was the alleged improper search of the old cell phone, not Plaintiff Sollenberger's termination.

Moreover, there are no facts alleged demonstrating any involvement, knowledge of, participation, or reckless disregard of the alleged misconduct by Defendant Plummer that would remove him from the protections of R.C. 311.05. "Negligence or inaction alone are insufficient in themselves to show ratification of an agent's unauthorized act, but ratification must follow knowledge of the facts." *Morr v. Crouch*, 19 Ohio St.2d 24, 249 N.E.2d 780, 784 (1969). "[A]n Ohio Appellate Court interpreted this phrase to mean that 'inaction or silence alone is not enough to prove ratification of an agent's unauthorized action, but that ratification can be shown by inaction or silence where the principal is fully informed of all the material facts to the agent's actions.' " *Coley*, 2014 U.S. Dist. LEXIS 8260, at *16, 2014 WL 273235 (quoting *Amato v. Heinika Ltd.*, No. 84479, 2005 WL 110441, at *2, 2005 Ohio App. LEXIS 206, *5 (Ohio App.Ct.2005)).

While Plaintiff Sollenberger did allege he was placed on administrative leave and subsequently terminated, a fact that must be accepted as true; Plaintiff Sollenberger does not allege any facts beyond what can be inferred as mere inaction or silence, nor does he allege that Defendant Plummer was fully informed of all material facts of the alleged misconduct. Therefore, the Court DISMISSES Plaintiff Sollenberger's invasion of privacy claim, civil claim pursuant to R.C. 2307.60, and civil conspiracy claim against Defendant Plummer, without prejudice.

Additionally, Plaintiff Sollenberger argues certain exceptions that fall within the second tier of the analysis and, if plausibly stated, are applicable against Sheriff Defendants. (Doc. 19, at 14.)

***630 a. Individual Capacity Immunity—Sheriff Defendants**

Plaintiff Sollenberger argues that Section 2744.02(B)(5) applies to Sheriff Defendants because civil liability may be imposed upon a political subdivision by a section of the Ohio Revised Code. (*Id.*, at 14.) Additionally, Plaintiff Sollenberger argues liability is imposed under the exceptions to immunity pursuant to R.C. 2744.03(A)(6)(a)-(c). (*Id.*) In contrast, Sheriff Defendants argue that Section 2744.02(B)(5) is inapplicable to individual employees and that Plaintiff Sollenberger has not alleged facts to support the application of any of the three exceptions in R.C. 2744.03(A)(6); therefore, the statute provides them with statutory immunity for Plaintiff Sollenberger's state law claims. (Doc. 13, at PageID# 345.)

Here, Plaintiff Sollenberger does not explicitly state that Sheriff Defendants were sued in their individual capacities. "[W]hen a plaintiff does not allege capacity specifically; the court must examine the nature of the plaintiff's claims, the relief sought, and the course of proceedings to determine whether a state official is being sued in a personal capacity." *Biggs v. Meadows*, 66 F.3d 56, 61 (4h Cir.1995). In the analysis, the Court must consider factors, such as "the nature of the plaintiff's claims, requests for compensatory or punitive damages, and the nature of any defenses raised in response to the complaint, particularly claims of qualified immunity, to determine whether the defendant had actual knowledge of the potential for individual liability." *Moore v. City of Harriman*, 272 F.3d 769, 773 n. (6th Cir.2001) (citing *Biggs*, 66 F.3d at 61).

In Plaintiff Sollenberger's Complaint, the caption names each Sheriff Defendant, but does not provide a designation describing the capacity in which they are sued. (Doc. 2-1, at PageID# 87–88.) The only party with such a designation is Defendant Plummer, who "is being sued in his official capacity as the Sheriff of Montgomery County." (*Id.*, at PageID# 88.) Plaintiff Sollenberger names each individual Sheriff Defendant, followed by "was an employee of the Montgomery County Sheriff's Office during the relevant time period, and was operating within the scope of employment at all times alleged herein." (*Id.*) Nonetheless, Plaintiff Sollenberger has sued the Sheriff Defendants for three torts under Ohio law. (*Id.*, at PageID# 90–92, 94.) Additionally, Plaintiff Sollenberger invoked an exception to statutory immunity for individual defendants under R.C. § 2744.03(A)(6). (Doc. 19, at 14.) Lastly, the Sheriff Defendants raised the qualified immunity defense against Plaintiff Sollenberger's federal claims, which is only applicable for defendants sued in their individual capacity. (Doc. 13, at PageID# 346–49.) In light of these circumstances, it is appropriate to analyze statutory immunity for Sheriff Defendants as individuals under Section 2744.03.

Pursuant to Section 2744.03(A)(6), an individual employee of a political subdivision is entitled to immunity from tort liability unless "(a) [t]he employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities; [or] (b) [t]he employee's acts or omissions were with malicious purpose, in bad faith, or in wanton or reckless manner; [or] (c) [c]ivil liability is expressly imposed upon the employee by" another provision of the Revised Code. Plaintiff Sollenberger argues that the second and third exceptions apply, because "there are facts and reasonable inferences that the Sheriff Defendants abused the authority with which they are vested[,]" and the United States Constitution and the Ohio Revised Code impose liability on a political subdivision. (Doc. 19, at 14.) Sheriff Defendants argue that Plaintiff Sollenberger has failed to allege any facts that amount to ***631** wanton or reckless behavior, nor that their investigation was undertaken with bad faith or a malicious purpose. (Doc. 21, at 9.) Additionally, Sheriff Defendants argue that neither the United States Constitution nor the Ohio Revised Code impose liability. (*Id.*)

i. Wanton or Reckless Conduct against Sheriff Defendants

"Wanton" and "reckless" conduct are two different degrees of care under the statute. *Anderson v. City of Massillon*, 134 Ohio St.3d 380, 983 N.E.2d 266, 267 (2012). "Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is a great probability that harm will result." *Id.* Wanton misconduct is a "very high standard" that is not met by mere negligence. *Messer v. Rohrer*, No. C–3–95–270, 1997 WL 1764771, at *14, 1997 U.S. Dist. LEXIS 23753, at *43 (S.D.Ohio Mar. 31, 1997). "Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *City of Massillon*, 983 N.E.2d at 267.

In Plaintiff Sollenberger's Complaint, there is not a state law claim that specifically mentions Defendants Parin or Cavender. (Doc. 2-1, at PageID# 90–92, 94.) The facts of his Complaint allege that both officers were employed by the Montgomery County Sheriff's Office, and were operating within the scope of their employment. (*Id.*, at PageID# 88.) The facts mention Defendant Cavender once more, stating that he arrived at Defendant Sollenberger's residence, but was unable to retrieve the cell phone at that time. (*Id.*, at PageID# 90.) Plaintiff Sollenberger's Complaint does not contain any other factual allegations regarding either officer. (*Id.*, at PageID# 88–90.) Therefore, Plaintiff Sollenberger's claim fails as a matter of law. Furthermore, the lack of factual allegations in the Complaint prevents the Court from analyzing the alleged conduct under Section 2744.03(A)(6). Thus, the Court declines to reach the issue of statutory immunity for Plaintiff Sollenberger's state law claims asserted against Defendants Parin and Cavender under R.C. 2744.03(A)(6)(b).

Defendant Hutson is not specifically mentioned in Plaintiff Sollenberger's state law claims, but is mentioned four times in the Complaint's factual allegations. (*Id.*, at PageID# 88–90.) Like Defendants Parin and Cavender, Plaintiff Sollenberger's Complaint alleges that Defendant Hutson was employed by the Montgomery County Sheriff's Office, that he was operating within the scope of his employment, and that he had accompanied Defendant Cavender on his unsuccessful trip to Defendant Sollenberger's residence. (*Id.*) In addition, Defendant Sollenberger is alleged to have met with Defendant Hutson, who imaged two phones—one containing the 105-copied pages of text messages received by the NAACP and another containing no such information. (*Id.*, at PageID# 90.)

Here, Plaintiff Sollenberger does not sufficiently plead facts to demonstrate Defendant Hutson's failure to exercise any care where there was a great probability of harm, nor do the facts as pleaded sufficiently demonstrate a reckless disregard to conduct an unreasonable search that is substantially greater than negligent conduct. There are no additional facts alleged beyond that a search of his old cell phone occurred, and was conducted by Defendant Hutson within the scope of his employment. Therefore, Defendant Hutson's search of Plaintiff Sollenberger's phone, as plead, does not meet the "very high standard" of "wanton" and "reckless" behavior. ***632** Additionally, the search itself was reasonable pursuant to the Office's employee misconduct investigation. *See supra* Part III(A)(1).

Accordingly, the Court grants Defendant Hutson's request for statutory immunity under Section 2744.03(A)(6) against Plaintiff Sollenberger's state law tort claims.

ii. Expressly Imposed Liability

Plaintiff Sollenberger has provided several arguments for where civil liability is expressly imposed as required by R.C. 2744.03(A)(6)(c). (Doc. 19, at 14.) Section 2744.03(A)(6)(c) provides that employees are immune unless:

> Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

First, Plaintiff Sollenberger argues civil liability is expressly imposed through alleged violations of his Constitutional rights. (Doc. 19, at 14.) However, "constitutional guarantees and prohibitions" do not expressly impose liability for their violation. *See W.P. v. City of Dayton*, No. 22549, 2009 WL 50150, at *2, 2009 Ohio App. LEXIS 70, at *4 (Montgomery Cty. Jan. 9, 2009). Second, Plaintiff Sollenberger argues that civil liability is expressly imposed by R.C. 2744.03(A)(6) through its exceptions. (Doc. 19, at 14.) However, Section 2744.03(A)(6) does not itself expressly impose civil liability, but rather, that section creates an immunity defense. *See Elston v. Howland Local Sch.*, 113 Ohio St.3d 314, 865 N.E.2d 845, 848 (2007) (stating defendant school district relied on the immunity defense in R.C. 2744.03(A)).

Finally, Plaintiff Sollenberger argues that R.C. 2307.60 and 2913.04 expressly impose liability as a civil claim for an uncharged criminal act. (Doc. 2-1, at PageID# 91–92.) Section 2307.60 provides "anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action...." Section 2913.04 is a criminal statute and provides "no person, in any manner and by any means, including, but not limited to, computer hacking, shall knowingly gain access to" another's electronic devices. Sheriff Defendants argue that these statutes do not expressly impose liability on a political subdivision, but rather generally impose liability on "persons." In *Cramer v. Auglaize Acres*, the Ohio Supreme Court determined that the use of the term "person" in a state statute "was too general to expressly impose liability on an employee of a political subdivision." 113 Ohio St.3d 266, 865 N.E.2d 9, 17 (2007); *see also O'Toole v. Denihan*, 118 Ohio St.3d 374, 889 N.E.2d 505, 516 (2008) (finding no indication by the General Assembly to abrogate the immunity with the use of the word "person"). Furthermore, the court found additional support for this holding because the statute did not define the term "person." *Cramer*, 865 N.E.2d at 17.

Here, like *Cramer* and *O'Toole*, the statutes use the term "person" and do not specifically identify an intention to abrogate the immunity granted to an employee of a political subdivision. However, Chapter 2307 defines "Person" as having "the same meaning as in division (C) of section 1.59 of the Revised Code and additionally includes a political subdivision and the state." OHIO REV. CODE § 2307(F). Under Chapter 1, " 'Person' includes an individual, corporation, business trust, estate, trust, partnership, and association." ***633** OHIO REV. CODE § 1.59(C). The statute is silent as to the employees of a political subdivision, an aspect necessary to constitute expressly imposed liability. *Compare Satterfield v. Karnes*, 736 F.Supp.2d 1138, 1154 (S.D.Ohio 2010) (finding an Ohio statute expressly imposes liability where the definition of "Person" expressly includes employees), *with Cramer*, 865 N.E.2d at 17 (finding an Ohio statute's use of "Person," when undefined, as too general to expressly impose liability). Although "Person" is defined in Chapter 2307, neither "Employee" nor "Employee of a Political Subdivision" is included in this definition. Therefore, Chapter 2307's use of the word "Person" is too general to expressly impose liability, and the exception is inapplicable.

For the foregoing reasons, the Court finds Defendant Hutson is entitled to statutory immunity for Plaintiff Sollenberger's invasion of privacy claim, civil claim pursuant to R.C. 2307.60, and civil conspiracy claim; therefore, these claims are DISMISSED, without prejudice. Additionally, Plaintiff Sollenberger's invasion of privacy claim, civil claim pursuant to R.C. 2307.60, and civil conspiracy claim, against Defendants Parin and Cavender are DISMISSED as a matter of law, without prejudice.

C. Sufficiency of alleged state law claims

In addition to statutory immunity, Defendant Plummer and Sheriff Defendants move for dismissal as a matter of law on Plaintiff Sollenberger's state law claims because they argue that he has not sufficiently alleged facts to support such claims. (Doc. 13, at PageID# 335–36.) The Court notes that it has granted statutory immunity to Defendants Plummer and Hutson on all of Plaintiff Sollenberger's state law tort claims, and declined to reach the issue of statutory immunity for Defendants Parin and Cavender. However, the Court did find that Plaintiff Sollenberger's state law claims failed as a matter of law against Defendants Parin and Cavender. Therefore, the Court must only test for sufficiency Plaintiff Sollenberger's state law claims against Defendants Sollenberger and Estridge for invasion of privacy, civil claim pursuant to R.C. 2307.60, tortious interference with an employment relationship, and civil conspiracy. Nonetheless, the Court will also analyze the state law claims against Defendant Plummer and Sheriff Defendants for sufficiency.

Defendant Sollenberger has failed to present an argument as to why the Court should dismiss all state law claims against her. (Doc. 2-1, at PageID# 126–27.) The Local Rules of this District provide that "[a]ll Motions...shall be accompanied by a memorandum in support thereof that shall be a brief statement of the grounds, with citation of authorities relied upon." S.D. Ohio Civ. R. 7.2(a)(1). In failing to provide any discussion beyond "Jennifer A. Sollenberger, hereby requests this Court to dismiss the action of the Plaintiff[,]" Defendant Sollenberger has failed to comply with the Court's requirement of providing the grounds upon which the motion relies. Despite this failure, Defendant Sollenberger's filings are liberally construed because she is proceeding pro se. *Spotts v. United States*, 429 F.3d 248, 250 (6th Cir.2005) (citing *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (stating court's hold pleadings of pro se litigants to less stringent standards than pleadings drafted by lawyers)); *Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir.1999) (stating pro se plaintiffs are entitled to a liberal construction of their filings and pleadings). Therefore, the sufficiency of Plaintiff Sollenberger's claims against Defendant Sollenberger will also be analyzed.

***634 a. Invasion of Privacy (First Claim)**

"In Ohio, the tort of invasion of privacy includes four distinct causes of action: (1) intrusion into plaintiff's seclusion, solitude, or private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity that places plaintiff in a false light; and (4) appropriation of plaintiff's name or likeness for defendant's advantage." *Yoder v. Ingersoll–Rand Co.*, No. 97–3710, 1998 WL 939885, at *2, 1998 U.S. App. LEXIS 31993, at *5 (6th Cir.1998). "Ohio recognizes the tort of invasion of the right to privacy for 'the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.' " *Charvat v. NMP, LLC*, 656 F.3d 440, 452 (6th Cir.2011) (quoting *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 syllabus para. 2 (Ohio 1956)). " 'One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.' " *Charvat*, 656 N.E.2d at 452–53 (citing *Sustin v. Fee*, 69 Ohio St.2d 143, 431 N.E.2d 992, 993–94 (Ohio 1982)).

Collectively, defendants argue that Plaintiff Sollenberger has failed to sufficiently plead facts to establish that he had a reasonable expectation of privacy in the phone or the electronic information contained therein. (Doc. 13, at PageID# 348; Doc. 17, at 3.) In order to have a legitimate expectation of privacy, society must be prepared to recognize the expectation as reasonable. *Rakas v. Illinois*, 439 U.S. 128, 143–44, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). In Ohio, a totality of circumstances analysis is the appropriate test. *See Lazette v. Kulmatycki*, 949 F.Supp.2d 748, 761 (N.D.Ohio 2013); *see also Savoy v. United States*, 604 F.3d

929, 935 (6th Cir.2010) (applying state totality of circumstances law to tort claims of intrusion). Although property ownership is a factor in determining whether someone has a "legitimate expectation of privacy in the invaded place[,]" ownership is neither the beginning nor the end of the Court's inquiry. *United States v. Salvucci*, 448 U.S. 83, 91, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980) (quoting *Rakas*, 439 U.S. at 140, 99 S.Ct. 421).

Plaintiff Sollenberger alleges that Defendant Sollenberger took the phone without his knowledge or consent, extracted digital information, such as text messages and pictures, and then, reviewed the information before turning over copies of the text messages to the NAACP and the Montgomery County Sheriff's Office. (Doc. 2-1, at PageID# 89–90.) However, construing the alleged facts in a light most favorable to the nonmoving party, the phone was Plaintiff Sollenberger's old cell phone, but Defendant Sollenberger had possession of the cell phone. (*Id.*, at PageID# 89.) Furthermore, Defendant Sollenberger was in possession of the cell phone "for an extended and continuous period of time." (Doc. 8, at 31.) The phone was one of Plaintiff Sollenberger's old cell phones that he left when he moved out of the house, it was located in Defendant Sollenberger's bedroom dresser drawers, and it was not password protected. (Doc. 11-2, at PageID# 235; Doc. 8, at 9.) Defendant Estridge argues that these facts and circumstances support the assertion that Plaintiff Sollenberger essentially abandoned the cell phone at Defendant Sollenberger's residence. (Doc. 22, at PageID# 565–66.)

The issue of abandonment is not "in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property ***635** in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *State v. Freeman*, 64 Ohio St.2d 291, 414 N.E.2d 1044, 1048 (1980) (citing *United States v. Edwards*, 441 F.2d 749, 753 (5th Cir.1971)). Although Plaintiff Sollenberger alleges that Defendant Sollenberger possessed his old cell phone without his knowledge or consent, the pleadings are devoid of any indication that Plaintiff Sollenberger maintained a reasonable expectation of privacy in the cell phone. Here, Plaintiff Sollenberger left behind the phone at Defendant Sollenberger's residence when he moved out, the phone remained there for an extended period; and the phone did not contain any sort of password protection. Therefore, Plaintiff Sollenberger has not alleged facts sufficient to establish he maintained a reasonable expectation of privacy in the cell phone.

Assuming *arguendo*—Plaintiff Sollenberger has sufficiently plead facts to support a reasonable expectation of privacy in his cell phone—his Complaint is still insufficient to state a claim for invasion of privacy. "The intrusion 'must be of such a character as would shock the ordinary person to the point of emotional distress.' " *Stonum v. U.S. Airways, Inc.*, 83 F.Supp.2d 894, 905 (S.D.Ohio 1999) (quoting *Haller v. Phillips*, 69 Ohio App.3d 574, 591 N.E.2d 305, 307 (1990) (stating it is the same standard as applied to intentional infliction of emotional distress claims)). Although cell phones generally contain personal information, such as e-mails, text messages, and pictures, a reasonable person would not be "shocked" by another's access to their old cell phone that had been essentially "abandoned" at their soon to be ex-wife's home for an extended period. *See Farinacci v. City of Garfield Heights*, No. 08–CV–1355, 2010 WL 1268068, at *16, 2010 U.S. Dist. LEXIS 30406, at *52 (N.D.Ohio Mar. 30, 2010) (finding a house "essentially abandoned" for purposes of an invasion of privacy claim where the plaintiff no longer lived there, the home was no longer maintained, and was in foreclosure proceedings); *State v. Dailey*, No. 8–10–01, 2010 WL 3836204, at *3, 2010 Ohio App. LEXIS 4068, at *9 (Ohio Ct.App. Oct. 4, 2010) (finding abandonment where defendant's jacket containing his cell phone slipped off in a struggle to get away, and the defendant never made a request to have the items returned).

Accordingly, Plaintiff Sollenberger has failed to plausibly state a claim for invasion of privacy under Ohio law; therefore, the Court DISMISSES Plaintiff Sollenberger's invasion of privacy claim against all Defendants, without prejudice.

b. Civil Claim pursuant to R.C. 2307.60 (Second Claim)

Plaintiff Sollenberger asserts his second claim pursuant to R.C. 2307.60, "which permits a person injured by another's criminal conduct to recover against the perpetrator of the crime." *Lazette v. Kulmatycki*, 949 F.Supp.2d 748, 761 (N.D.Ohio 2013). Here, R.C. 2913.04(B) is the crime asserted, which states:

> No person, in any manner and by any means, including, but not limited to, computer hacking, shall knowingly gain access to, attempt to gain access to, or cause access to be gained to any computer, computer system, computer network, cable service, telecommunications device, telecommunications service, or information service without the consent of, or beyond the scope of express or implied consent of, the owner of the computer, computer system, computer network, cable service, telecommunications device, telecommunications service, or information service or other person authorized to give consent.

Defendant Estridge argues that R.C. 2307.60 does not provide Plaintiff Sollenberger ***636** a separate cause of action, and thus, has failed to state a claim for relief. (Doc. 17, at 5.) Essentially, Plaintiff Sollenberger is seeking civil recovery for an uncharged criminal act. However, Section 2307.60 does not create a separate cause of action for a criminal statute. *See Cobra Pipeline Co. v. Gas Nat., Inc.*, No. 1:15–CV–00481, 132 F.Supp.3d 945, 953-54, 2015 WL 5522004, at *6, 2015 U.S. Dist. LEXIS 124236, at *19 (N.D.Ohio Sept. 17, 2015). "Instead, R.C. 2307.60...is merely a codification of the common law that a civil action is not merged in a criminal prosecution." *Replogle v. Montgomery Cnty.*, No. 3:09–CV–00102, 2009 U.S. Dist. LEXIS 130719, at *15 (S.D.Ohio May 1, 2009) (quoting *Edwards v. Madison Twp.*, No. 97APE06–819, 1997 WL 746415, at *7, 1997 Ohio App. LEXIS 5397, at *17–18 (Ohio Ct.App. Nov. 25, 1997)), *report and recommendations adopted by* 2009 U.S. Dist. LEXIS 42843, 2009 WL 1406686 (S.D.Ohio May 19, 2009). Therefore, a separate civil action must be available before invocation of Section 2307.60.

Here, Plaintiff Sollenberger has only alleged a violation of R.C. 2913.04—a statute that could give rise to criminal liability—without identifying a corresponding civil cause of action. As a matter of law, this is insufficient to state a claim under Section 2307.60; therefore, the Court DISMISSES Plaintiff Sollenberger's civil claim pursuant to R.C. 2307.60 against all defendants, without prejudice.

c. Tortious Interference with an Employment Relationship (Third Claim)

Here, Plaintiff Sollenberger labels his third cause of action as "[t]ortious [i]nterference[.]" (Doc. 2-1.) "[T]ortious interference with a business relationship requires proof of the following four elements: '(1) a business relationship; (2) the wrongdoer's knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages resulting therefrom.' " *Peters v. Monroe Twp. Bd. of Trs.*, No. 2:11–CV–00083, 2011 WL 3652719, at *5, 2011 U.S. Dist. LEXIS 92300, at *13–14 (S.D.Ohio Aug. 18, 2011) (quoting *DiPasquale v. Costas*, 186 Ohio App.3d 121, 926 N.E.2d 682, 704 (2010)). Ohio recognizes a second cause of action for interference with an employment relationship, which Plaintiff Sollenberger asserts. *Peters*, 2011 WL 3652719, at *5, 2011 U.S. Dist. LEXIS 92300, at *14 (citing *Dryden v. Cincinnati Bell Tel. Co.*, 135 Ohio App.3d 394, 734 N.E.2d 409, 414 (1999)).

Tortious interference with an employment relationship occurs "when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another." *Hadi v. State Farm Ins. Cos.*, No. 2:07–CV–0060, 2008 WL 4877766, at *4, 2008 U.S. Dist. LEXIS 91558, at *11 (S.D.Ohio Nov. 12, 2008) (quoting *A&B–Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 651 N.E.2d 1283, 1294 (1995)). In order to sufficiently plead a claim for interference with an employment relationship, Plaintiff Sollenberger must plausibly plead facts that demonstrate: "1) the existence of an employment relationship between plaintiff and the employer; 2) the defendant was aware of this relationship; 3) the defendant intentionally interfered with this relationship; and 4) the plaintiff was injured as a proximate result of the defendant's acts." *Hadi*, 2008 WL 4877766, at *4, 2008 U.S. Dist. LEXIS 91558, at *11 (quoting *Lennon v. Cuyahoga Cnty. Juvenile Court*, No. 86651, 2006 WL 1428920, at *5, 2006 Ohio App. LEXIS 2443, at *14–15 (Ohio Ct.App. May 25, 2006)).

***637** "[T]o succeed on a claim for interference with an employment relationship, a plaintiff must establish 'either wanton or malicious behavior.' " *Peters*, 2011 WL 3652719, at *5, 2011 U.S. Dist. LEXIS 92300, at *14 (quoting *Dryden v. Cincinnati Bell Tel. Co.*, 135 Ohio App.3d 394, 734 N.E.2d 409, 414 (1999)). Malice is defined as "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Peters*, 2011 WL 3652719, at *5, 2011 U.S. Dist. LEXIS 92300, at *14–15 (citing *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174, 1176 (1987)). "Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is a great probability that harm will result." *Anderson*, 983 N.E.2d at 267. Wanton misconduct is a "very high standard" that is not met by mere negligence. *Messer*, 1997 WL 1764771, at *14, 1997 U.S. Dist. LEXIS 23753, at *43.

Additionally, the right of noninterference is limited because there are those whose position entitles them to intrude upon the employment relationship, such as the employee-employer relationship. *Peters*, 2011 WL 3652719, at *5, 2011 U.S. Dist. LEXIS 92300, at *15 (stating such an action for interference only extends to "outsiders") (citing *Contadino v. Tilow*, 68 Ohio App.3d 463, 589 N.E.2d 48, 50 (1990). Ohio Courts have held that persons in supervisory roles as well as those who are acting within the scope of their employment duties do not fall within the "outsiders" subject to liability for interference. *Peters*, 2011 WL 3652719, at *5, 2011 U.S. Dist. LEXIS 92300, at *15–16 (citing *Smiddy v. Kinko's, Inc.*, No. C–020222, 2003 WL 203576, at *3 (Ohio Ct.App. Jan. 31, 2003); *Anderson*, 983 N.E.2d at 267)). In Plaintiff Sollenberger's Complaint, he states that Defendant Plummer and Sheriff Defendants were operating within the scope of their employment. (Doc. 2-1, at PageID# 88.) Therefore, their actions fall outside Plaintiff Sollenberger's right of noninterference.

Moreover, Defendant Estridge plead qualified privilege as an affirmative defense. (Doc. 8, at 6.) "The Ohio Supreme Court has held that a privilege exists to publications when it is "fairly made by a person in the discharge of some public or private duty, whether legal or moral. ..." *Hahn v. Kotten*, 43 Ohio St.2d 237, 331 N.E.2d 713, 718 (1975).

> Thus, "where circumstances exist, or are reasonably believed by the defendant to exist, which casts on him the duty of making a communication to assert another person to whom he makes such communication in the performance of such duty, or whether the person is so situated that it becomes right in the interests of society that he should tell third persons certain facts, which he in good faith proceeds to do,..." the communication is qualifiedly privileged.

Brothers v. Cnty. of Summit, No. 5:03–CV–1002, 2007 WL 1567662, at *27, 2007 U.S. U.S. Dist. LEXIS 38468, at *89 (N.D.Ohio May 25, 2007) (quoting *Hahn*, 331 N.E.2d at 719). The elements one must meet for qualified communication "are good faith, an interest to be upheld, a statement limited in scope to this purpose, a proper occasion and publication in a proper manner and the proper parties only." *Hahn*, 331 N.E.2d at 718. To overcome the qualified privilege, the defendant must show actual malice. *Varanese v. Gall*, 35 Ohio St.3d 78, 518 N.E.2d 1177, 1179 (1988).

Plaintiff Sollenberger alleges that he is undergoing a divorce with Defendant Sollenberger, who took one of his old phones without his knowledge or consent, ***638** then, alongside Defendant Estridge, extracted information that Defendant Sollenberger ultimately sent to the NAACP. (Doc 2-1, at PageID# 89.) Additionally, Defendant Estridge transferred files from her computer to an iPhone 4 provided to her by an employee of the Sheriff's Office, and then, Defendant Sollenberger provided the cell phone left at her residence to the Sheriff's Office for imaging. (*Id.*, at PageID# 90.) Finally, Plaintiff Sollenberger alleges his termination was because of the investigation initiated by the Sheriff's Office. (*Id.*)

In Count III, the Complaint states, Defendants Sollenberger and Estridge "acted with the intent to interfere with [Plaintiff Sollenberger's] employment[,]" and that Defendant Sollenberger's "motivation was to gain an advantage in the divorce proceeding and [Defendant Estridge] was assisting [Defendant Sollenberger] in this unlawful endeavor." (Doc. 2-1, at PageID# 92.) Excluding these conclusory statements regarding Defendants Sollenberger and Estridge's purported state of mind, the underlying acts Plaintiff Sollenberger alleges, i.e., extracting information from one of Plaintiff Sollenberger's old cell phones and sending it to the NAACP, and then, providing that information to the Montgomery County Sheriff's Office at a later date, do in and of themselves create a possible inference of malicious or wanton behavior.

However, Defendants Sollenberger and Estridge's actions were in good faith, for the benefit of the public, in light of the content of the text messages and Plaintiff Sollenberger's role as a Detective with the Sheriff's Office. *See Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (holding police misconduct is a matter of concern to the community); *Kuhn v. Washtenaw Cnty.*, No. 10–11191, 2012 WL 1229890, at *11, 2012 U.S. Dist. LEXIS 51443, at *32 (E.D.Mich. Apr. 12, 2012), *aff'd*, 709 F.3d 612 (6th Cir.2013) (holding a defendant was not a third party to an employment relationship because he was acting for the benefit of the Sheriff's Office on an issue of public concern); *Ernst v. Anderson*, No. 02 C 4884, 2005 WL 946876, at *5, 2005 U.S. Dist. LEXIS 7469, at *14 (N.D.Ill. Mar. 3, 2005) (encouraging reporting of police misconduct because the public has an interest in police officers acting in a proper and lawful manner).

Rather than malicious or wanton behavior, the reporting of the text messages to the NAACP and later cooperation with the Sheriff's Office were the result of efforts to convey information of police misconduct for the betterment of the community, which is a matter of public concern. *Cf. Williams v. Commonwealth of Kentucky*, 24 F.3d 1526, 1535–36 (6th Cir.1994) (characterizing reporting of alleged political corruption as a matter of public concern, and discussions of office policy a matter of private concern). The question ultimately becomes whether one should be subject to liability merely for reporting police misconduct. Furthermore, if reporting wrongdoing were sufficient to state malicious or wanton behavior, a third party who merely witnesses employee theft and reports it to a manager would be subject to liability if the employee were later discharged because of the theft. Without further factual allegations specifically supporting malicious or wanton behavior, as opposed to simply reporting police misconduct, Plaintiff Sollenberger has failed to state a plausible claim for tortious interference with an employment relationship, as well as failed to meet the requirements to overcome a qualified privilege for the reporting of matters of public concern.

Accordingly, the Court DISMISSES Plaintiff Sollenberger's tortious interference with an employment relationship ***639** claim against Defendants Sollenberger and Estridge, without prejudice.

d. Civil Conspiracy (Sixth Claim)

In Ohio, to state a claim for civil conspiracy, there must be "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *Milner v. Biggs*, 522 Fed.Appx. 287, 295 (6th Cir.2013) (quoting *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 700 N.E.2d 859, 868 (1998)). "Moreover, '[a]n underlying act is required before a civil conspiracy can succeed.' " *Chesher v. Neyer*, 477 F.3d 784, 805 (6th Cir.2007) (quoting *Williams*, 700 N.E.2d at 868). Here, Plaintiff Sollenberger alleges invasion of privacy is the basis of his civil conspiracy claim. (Doc 2-1, at PageID# 94.) Insofar as the Court has dismissed this claim against all Defendants, there is no basis to support a claim of civil conspiracy.

Accordingly, the Court DISMISSES Plaintiff Sollenberger's civil conspiracy claim against all Defendants, without prejudice.

D. CONCLUSION

For the reasons set forth above, the Court GRANTS Defendant Plummer and Sheriff Defendants' Motion to Dismiss (Doc. 13), the Court GRANTS Defendant Sollenberger's Motion to Dismiss (Doc. 2-1, at PageID# 126-27), and the Court GRANTS Defendant Estridge's Motion to Dismiss (Doc. 17). The captioned case is hereby TERMINATED upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

All Citations

173 F.Supp.3d 608

Footnotes

1 Dannelle is listed in Plaintiff's Complaint as "Danielle" and "Dannielle" Estridge.

2 Defendants Parin, Cavender, and Hutson are referred to, collectively, as "Sheriff Defendants."

3 The Court may consider the information contained in Defendant Sollenberger's interview, as it was referred to in paragraph 21 of the Plaintiff's Complaint, central to his claims, and a matter of public record. *See infra* Part II.

4 The Court may consider the information contained in Defendant Estridge's Answer in ruling on a Motion for Judgment on the Pleadings. *See infra* Part II.

5 The quoted content of the text messages is not contained within Michael's Complaint; nevertheless, the Court may consider the text messages, as they were referred to in paragraphs 19–20 of the Complaint and are central to his claim. *See infra* Part II.

6 Defendant Plummer and Sheriff Defendants' Motion to Dismiss addresses claims one, two, four, five, and six.

7 Defendant Estridge's Motion to Dismiss addresses claims one, two, three, and six.

8 The Fourth Amendment's prohibition against unreasonable searches and seizures is enforceable against the States through the Fourteenth Amendment. *Ker v. California*, 374 U.S. 23, 30, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); *Mapp v. Ohio*, 367 U.S. 643, 660, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

9 The Court must only analyze this claim under the Fourth and Fourteenth Amendments because the Ohio Constitution does not afford plaintiff any greater protections. *Logsdon v. Hains*, 492 F.3d 334, 347 (6th Cir.2007) (citing *State v. Andrews*, 57 Ohio St.3d 86, 565 N.E.2d 1271, 1273 n. 1 (1991)); *State v. Brown*, 143 Ohio St.3d 444, 39 N.E.3d 496, 504 (2015) (holding the Ohio Constitution provides no greater protection than the Fourth Amendment).

10 The Court may consider the document because the interview is a part of public record, was referred to in Plaintiff Sollenberger's Complaint (Doc. 2-1, at PageID# 90), and is central to his claims. *See Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir.2008) (citing *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir.2001)).

End of Document

State of New Hampshire
Public Employee Labor Relations Board
Case No. G-0103-12

IN THE MATTER OF ARBITRATION BETWEEN

MANCHESTER POLICE PATROLMAN'S ASSOCIATION

&

CITY OF MANCHESTER

Grievant: Aaron Brown

AWARD OF THE ARBITRATOR

The Undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered by the above named parties and having been duly sworn and having duly heard the proofs and allegations of the parties AWARDS as follows:

For the reasons set forth in the attached Decision, the discharge of the grievant shall be reduced to a thirty day disciplinary suspension. In addition the grievant shall not be awarded back pay for the period of this thirty day suspension. Under this award the grievant is to be made whole for lost compensation until he returns to work pursuant to this Award, minus thirty days' pay for the period of the suspension. In addition, his back pay shall be offset by any compensation that the grievant received during this time period. The grievant will have no entitlement to his former position in the Special Enforcement Unit, and his reinstatement can be to a position determined to be appropriate by the Chief of the Department.

December 18, 2019
Boston, Massachusetts

Gary D. Altman

State of New Hampshire
Public Employee Labor Relations Board
Case No. G-0103-12

IN THE MATTER OF ARBITRATION BETWEEN

MANCHESTER POLICE PATROLMAN'S ASSOCIATION

&

CITY OF MANCHESTER

Grievant: Aaron Brown

ARBITRATION DECISION AND AWARD

Introduction

The City of Manchester ("City" or "Employer") and the Manchester Police Patrolman Association ("Union") are parties to a Collective Bargaining Agreement ("Agreement"). Under the Agreement, grievances not resolved during the grievance procedure may be submitted to arbitration. The parties presented their case in Arbitration before Gary D. Altman, Esq., on August 21, 2019. The Union was represented by John S. Krupski, Esq., and the City was represented by Mark T. Broth, Esq. The parties had the opportunity to examine and cross-examine witnesses and to submit documentary evidence. The parties submitted written briefs after completion of the testimony.

Issue

The parties agreed that the issue to be decided is:

> Whether the City of Manchester had just cause to terminate the employment of the grievant, Aaron Brown? If not, what shall the remedy be?

Facts

The grievant, Aaron Brown, was hired as a full-time police officer with the City of Manchester Police Department on July 6, 2007. Officer Brown was assigned to the Special Enforcement Division ("SED") in 2013, which is investigates drug activity. When Officer Brown entered the SED he was issued a Department cell-phone.[1] During his tenure with the Department, up to the time of his discharge, Officer Brown had no discipline. Introduced into the record were a number of commendations received by Officer Brown during his employment with the Department.

[redacted]

Lieutenant Patterson stated that during this investigation on the charges by the confidential informant, the Department discovered disturbing text messages made on

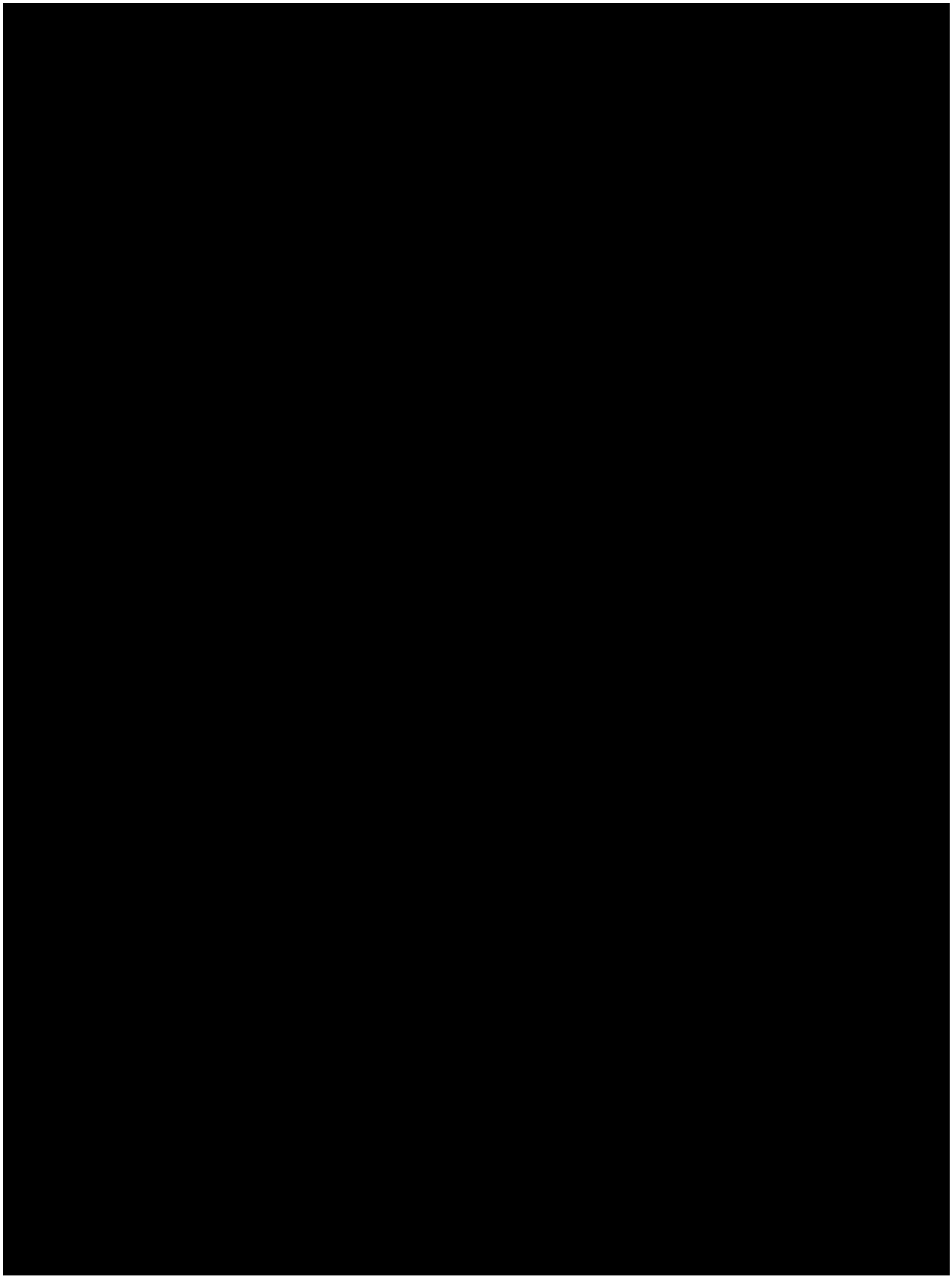
[1] Officer Brown testified that he was told that he could use the Department's cell phone to make personal calls.

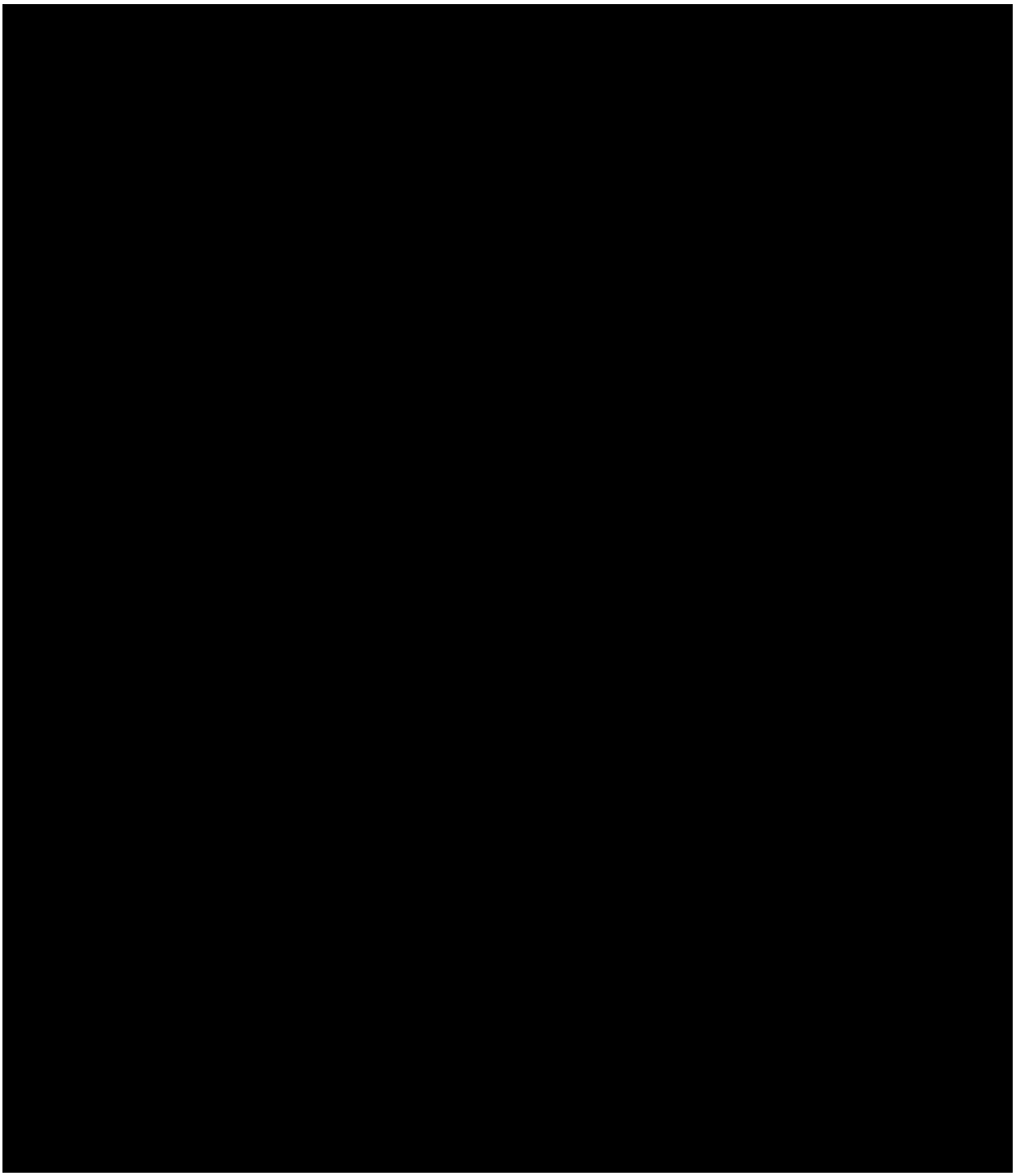
Officer Brown's Department cell phone, and it is these text messages that led to the Department issuing charges, and requesting a County Attorney from a neighboring County to further investigate whether criminal charges should be brought against Officer Brown. The events surrounding these text messages resulted in the Department discharging Officer Brown.

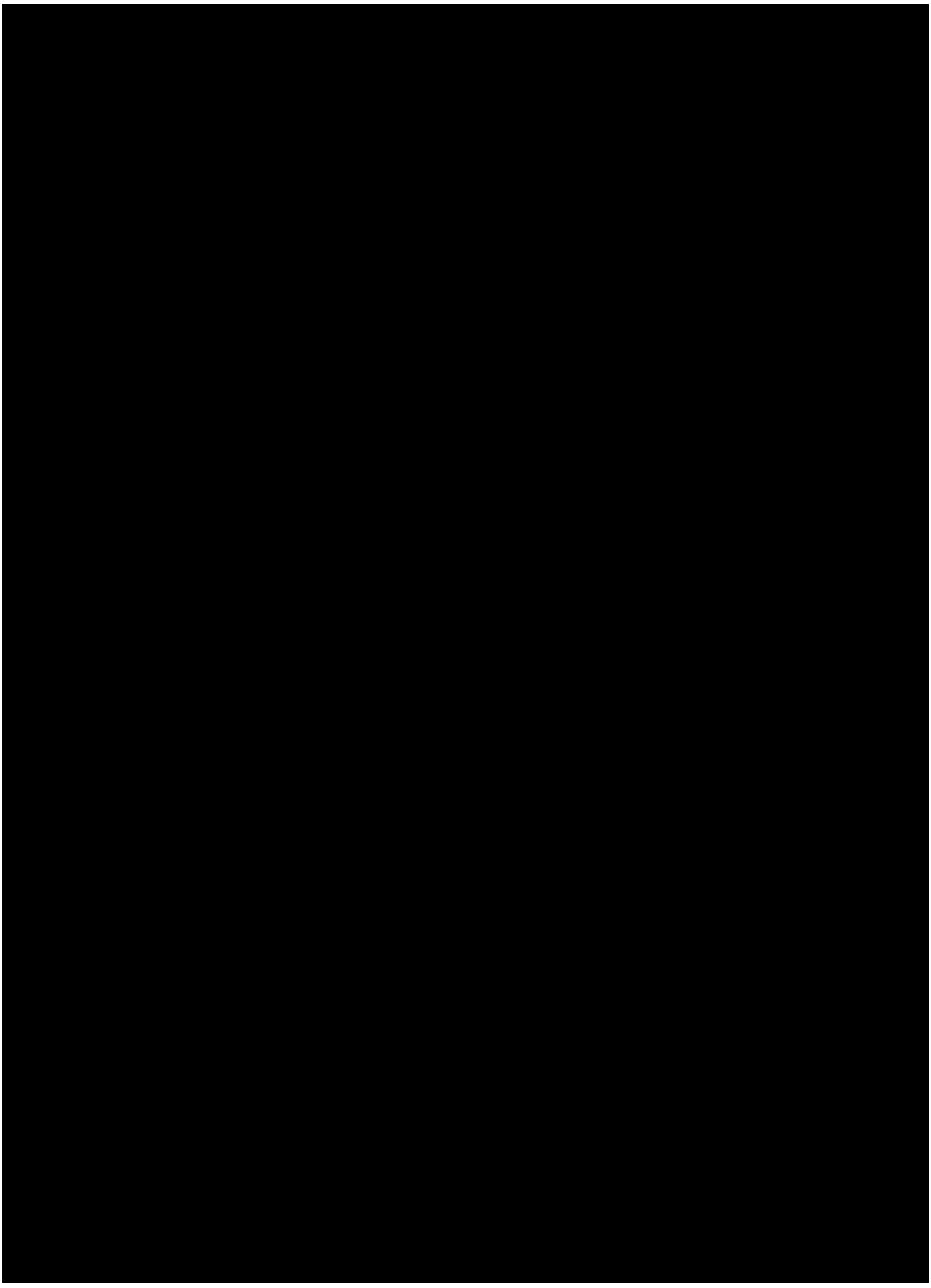
[redacted]

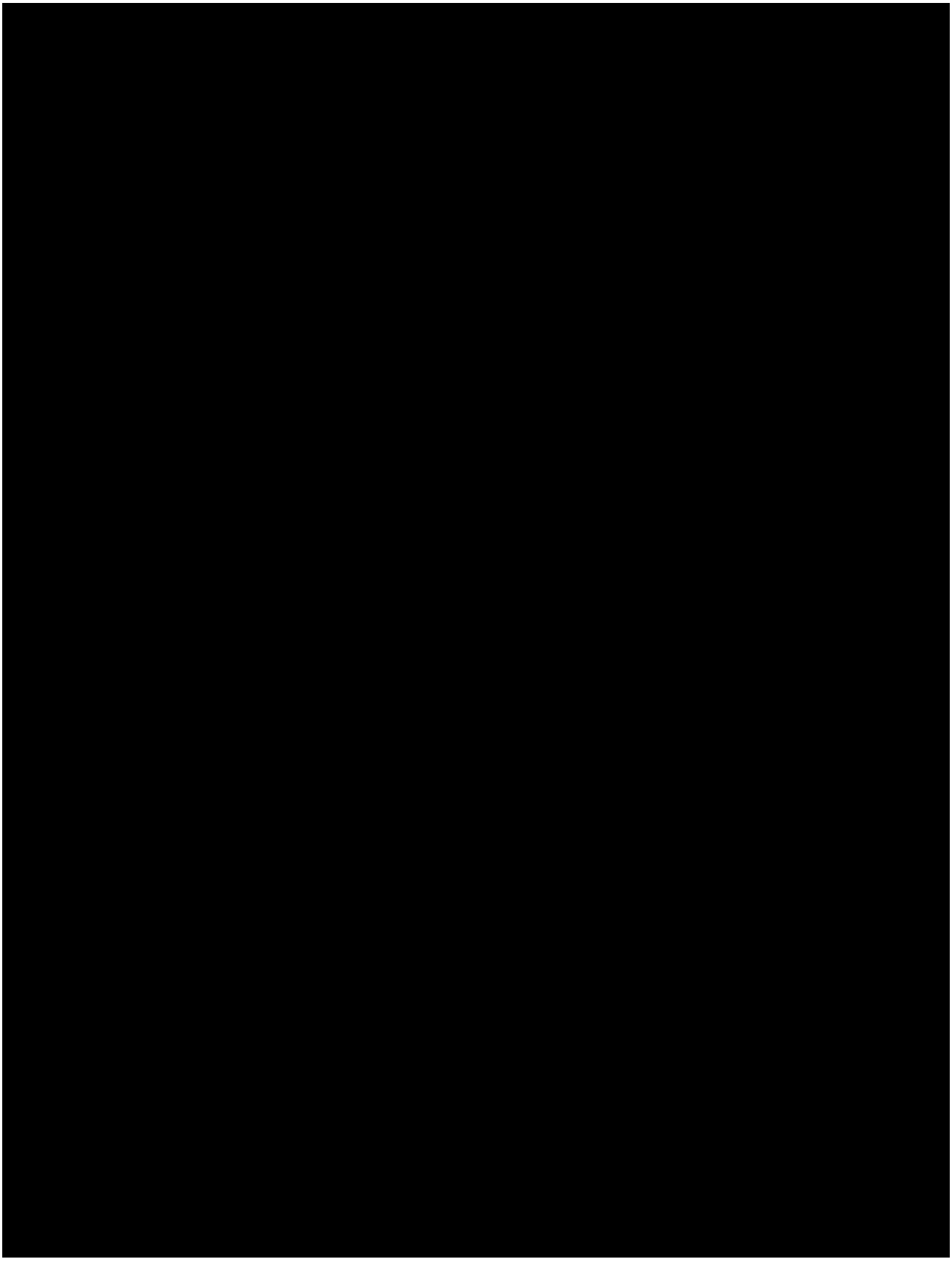
[redacted]

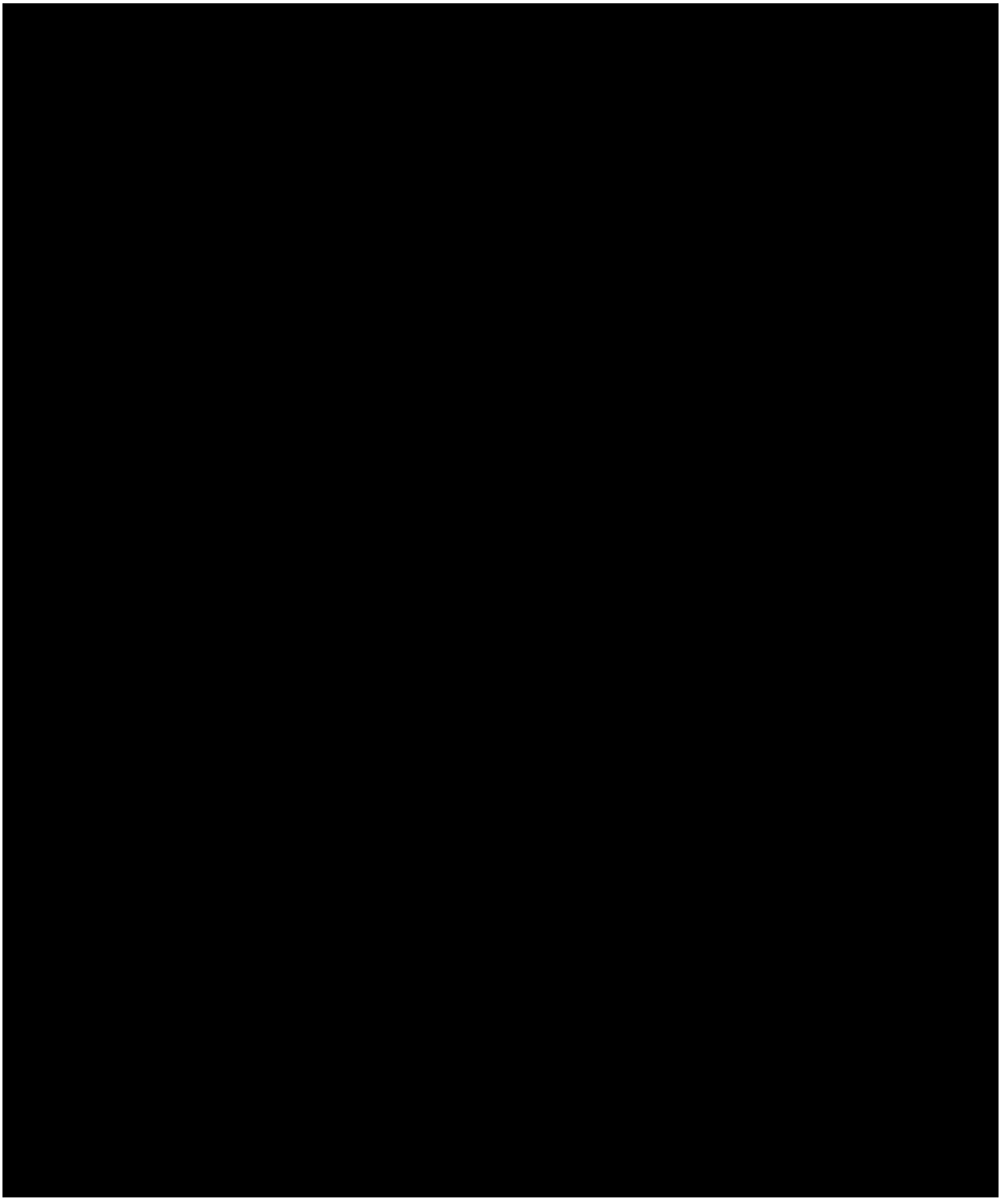
[redacted]











Text Message May 10, 2017

In the afternoon of May 10, 2017 Officer Brown texted to his wife that he may have to go to Dorchester, Massachusetts that evening to work on a joint case with the

FBI. The messages between Mrs. Brown and Officer Brown read as follows:

Mrs. Brown:

Gotcha. Let me know when you know. You know this stuff makes me all nervous nelly.

Mr. Brown:

Yes I know. Its all good, beside I got this new fancy gun. Takes out parking tickets no problem.

Mr. Brown:

FYI "parking tickets" equal black fella.

[redacted]

August 1, 2017 Messages between Mr. and Mrs. Brown:

Mrs. Brown:

What are you doing tonight?

Mr. Brown:

The usual. Currently putting the stall on a parking ticket … like the big jungle cat that I am.

Mrs. Brown:

I wish I followed that but I have no idea what you mean?

Mr. Brown: Parking ticket = black feller

Mr. Brown. And I'm stalking him like a jungle cat.

Lieutenant Patterson testified at the arbitration hearing that Officer Brown stated that he had heard the words "parking ticket" in law enforcement circles as referring to black persons, and stated that he had his own biases, but did not consider himself to be a racist. Officer Brown stated that he did not profile persons of color, and that his arrest records would show that he did not target minorities in his arrests. Lieutenant Patterson stated that the Department reviewed over 18,000 text messages and that the two messages about the "parking ticket" were the only two that had any racial overtones.

Lieutenant Patterson and Sergeant McCabe completed their investigation and recommended that formal discipline be initiated against Officer Brown. Eight charges were filed against Officer Brown, six of the them dealt with Officer Brown's conduct at the two searches, and two addressed the text messages to his wife in which he made racially insensitive statements. The charges were for Unlawful Conduct, Conduct Unbecoming an Officer, and Truthfulness. The charges were then reviewed by a Review Board consisting of Assistant Chief Capano, and Captains Sanclemente and Grant. The Review Board concurred with the findings and conclusions by the Department's Investigators

and concluded that each charge warranted Officer Brown's discharge. Chief Willard accepted the Review Board's conclusions and Officer Brown was discharged from his position.

Positions of the Parties

Summary of the City's Arguments

The City asserts that there was just cause to discharge the grievant, Aaron Brown, from his position as a Police Officer with the Manchester Police Department. [redacted] The Department states that during this investigation it uncovered a series of text messages from Officer Brown's Department issued cell phone that demonstrated serious misconduct. The Department states that there is absolutely no merit to the Union's contention that these text messages were privileged, or should not have been reviewed by the Department. Specifically, The Department states that it was a Department issued cell phone, and that the Department only reviewed messages and emails that were transmitted during Officer Brown's working hours. The City points to a number of court decisions that have held that police officers have no expectation of privacy for emails or text messages transmitted on a department issued cell phone.

[redacted]

[redacted]

The Department further argues that Officer Brown's text messages to his wife demonstrate his hostility to African Americans. Specifically, the Department states that Officer Brown's reference to African Americans as "parking tickets", and that he had a brand new gun, is an

inappropriate racial comment, that demonstrates his bias, and his inability to be fair and perform the duties of a police officer in the largest city in New Hampshire. His comment that he is stalking an African American citizen like a jungle cat demonstrates racial hostility. The Department contends that such statements are inappropriate and could be used against Officer Brown if he was ever accused of using unlawful force against African American citizens.

The Department asserts that a police department must operate on principles of trust between the Department and the public, and among the members of the Department itself. [redacted]

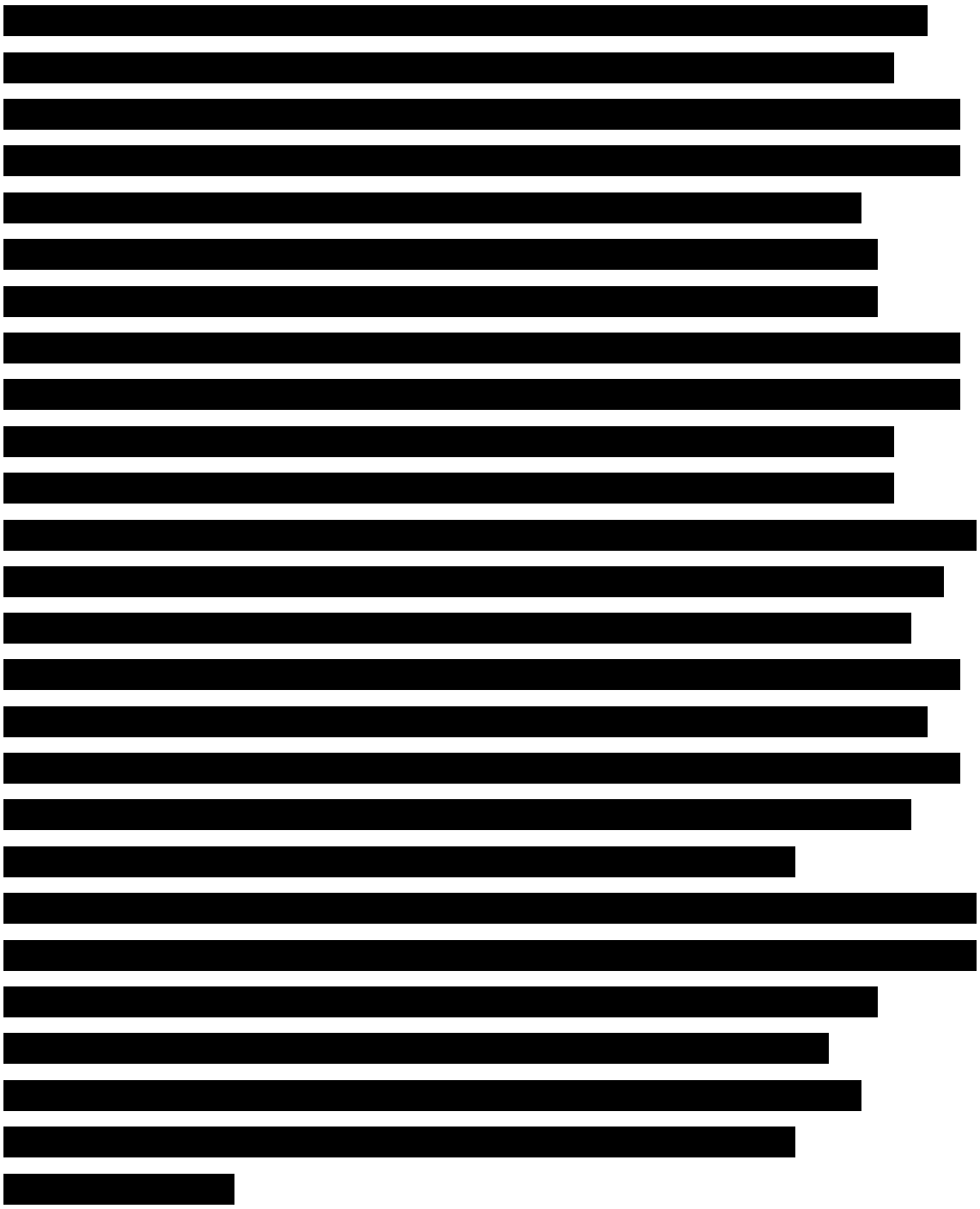
The Department argues that discharge is the only conceivable course of action for the Department. [redacted] The Department states that discharge is certainly appropriate for such blatant misconduct. The Department further maintains that even if Officer Brown's claim that the text messages were made up to impress his wife, then such conduct still disqualifies him from serving as a police officer. The Department argues that it cannot continue to employ a police officer who fantasizes about committing crimes, and that his conduct will always be

measured against his tendency to make up stories to attempt to embellish his toughness. The Department concludes that the grievance must be sustained.

Summary of the Union's Arguments

The Union maintains that there was not just cause to discharge the grievant, Aaron Brown, from his position with the Manchester Police Department. The Union states that the Department brought eight charges against Officer Brown for violating the Department's Operating Procedures. The Union argues that the Department prejudged Officer Brown's guilt before conducting a fair investigation. The Union states that the eight charges brought against Officer Brown all revolved around text messages that Officer Brown sent to his wife. The Union maintains that a review of the text messages and the totality of evidence demonstrates that Officer Brown's text messages to his wife did not amount to a dischargeable offense.

[redacted]



The Union states that charges 7 and 8 relate to the other two text messages that Officer Brown sent to his wife. These messages, the Union states, were again nothing more than Officer Brown's bravado and fictitious banter between a husband and wife. The Union states that Officer

Brown's texts referred to "parking tickets", which is a derogatory term for black americans, and that in another text message he was supposedly stalking a black American as part of his duties.

The Union states that the total context of these two text messages must be considered. The Union maintains that these were text messages sent from a husband to his wife, thus, it is not was if Officer Brown ever sought to make these text message public, and that it was more like a conversation between a husband and wife for which there should be a form of marital privilege, or an expectation of privacy. Moreover, the Union states that these text messages were like his other text messages, boastful and bravado about the exploits of his dangerous work.

The Union further states that in his more than ten years of service there were never any complaints by other officers, or complaints made by the public, that Officer Brown engaged in racial profiling or any other inappropriate conduct. The Union states that Officer Brown invited the Department to consider his arrest records, but the Department failed to do so, which the Union maintains demonstrates that the Department had no interest in pursuing a fair investigation into Officer Brown's conduct. The Union states that it cannot be proven that the these two private conversations amounted to conduct unbecoming, or was conduct that in any way impaired the efficiency or operations of the Department or Officer Brown's ability to perform his police duties. Moreover, the Union also states that it must be remembered that these two texts were the only two texts that could be considered as racially

insensitive, and the Department considered over 1,285 pages that included over 18,000 total text messages.

The Union contends that when considering the fact that Officer Brown has been recognized for his performance as a Manchester Police Officer during his ten years of service, and the fact that he had no prior discipline, discharge is disproportionate to the events that occurred in the present case. The Union concludes that there was not just cause for the discharge of the grievant, Aaron Brown, and that the grievance should be sustained.

Discussion

It is well-established arbitral precedent that the employer has the burden to prove that an employee's discipline is for just cause. This includes proof that the employee is guilty of the alleged wrong doing, and that the penalty imposed by the employer is in keeping with the severity of the offense. An employee's past work record is an important factor to be considered when determining whether the punishment is appropriate and fair. The Manchester Police Department found Officer Brown guilty of eight violations of the Department's Rules and Regulations. [redacted] Charges 7 and 8 related to text messages that Officer Brown sent his wife, on April 22, and May 10, 2017.

I. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

II. Charges 7 – 8

Charges 7 and 8 concern a series of two 2017 text messages that Officer Brown sent to his wife in which he referred to African Americans as "parking tickets"; in one he told his wife not to worry about him because he had a "fancy new gun", and in the other he stated that he was "putting a stall on a parking ticket", and "I am stalking him like a big jungle cat". The Department concluded that these two series of text messages amounted to conduct

unbecoming and each, in and of itself, was grounds for Officer Brown's discharge.

Officer Brown in his text message indicated that the term "parking ticket" referred to "black feller". Clearly any such terminology that refers to a group or race of persons in negative or pejorative terms is unacceptable. There can be no question that police officers must not express themselves in a manner that could indicate their inability to perform their duties in a fair and objective manner. The Union's claim that the texts between Officer Brown and his wife should be afforded some type of marital privilege can not be accepted. It must be remembered that Officer Brown was sending text messages during his working hours. In addition, Officer Brown was using a Department cell phone in sending these texts messages. Unquestionably, the Department has the managerial right to ensure that its cellphones are not used to transmit racially offensive language. Nor must the Department have a specific rule that prohibits an officer from using the Department's cell phones to transmit racially insensitive messages; such conduct is per-se unacceptable.

There is no dispute that Officer Brown's text messages were inappropriate and offensive. The question that remains is whether these texts should serve as grounds for Officer Brown's summary discharge. As a general matter, an arbitrator should not "second guess" the penalty imposed by management. Nevertheless, this does not mean that an arbitrator's sole purpose is only to determine whether the employee has engaged in the wrongful acts.

The Collective Bargaining Agreement requires, and the parties agreed in the stipulated issue, that just cause is

the standard that is to applied in the present case. Just cause has long been held to embrace not only a finding of whether the alleged actions have occurred but also whether the discipline imposed by the employer was appropriate for the offense.

> In many cases, the reasonableness of the penalty imposed on an employee rather than the existence of proper cause for disciplining him is the question an arbitrator must decide. ... In disciplinary cases generally, therefore, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe, under all the circumstances of the situation. The right is deemed to be inherent in the arbitrator's power... Elkouri and Elkouri, How Arbitration Works, Vol 4. p. 668.

Zero tolerance for racially insensitive comments is clearly an appropriate response by the Manchester Police Department. Nonetheless, such conduct can not be considered to always require summary discharge. A review of arbitrable precedent shows that using a racial epithet is, in today's workplace, considered as a serious transgression, and the entirety of the events must be considered. In addition, a review of arbitrable precedent shows that when considering discipline for employees using racial epithets the employee's employment record must be considered to see whether such conduct is an isolated incident or demonstrates a pattern of inappropriate behavior. See MT Detroit, 118 LA (Allen, 2003); Albertson's, 117 LA 39 (Kaufman, 2002).

In the present case, although I have concluded that Officer Brown's texts messages were inappropriate, I do not believe that Officer Brown's actions were maliciously

motivated. These were two text messages from over 18,000 texts sent by Officer Brown that were reviewed by the Department. The text messages at issue were sent only to his wife, they were not made in public, they were not uttered to any other person, and these comments were not posted on social media. They were two text messages sent from Officer Brown to his wife. Officer Brown has never been accused, during his career, of making racially insensitive comments to members of the public or other officers of the Department. Moreover, Officer Brown during his career with the Department has had no prior discipline for any reason.

For these reasons, permanent removal of the grievant from the workforce at this point is not warranted for Officer Brown's offensive text messages. I have no hesitation in concluding that discharge is totally disproportionate to the offense. Accordingly, under the principles of just cause the grievant's discharge must be reversed. This does not mean that the grievant is blameless. The Employer is justified in taking action that will prevent a Manchester Police Officer from using their Department issued cell phone to make racially offensive comments, no matter who is the recipient of such text messages.

Conclusion

Based on all the factors, the discharge of the grievant shall be reduced to a thirty day disciplinary suspension. In addition the grievant shall not be awarded back pay for the period of this thirty day suspension. Under this award the grievant is to be made whole for lost compensation until he returns to work pursuant to this

Award, minus thirty days' pay for the period of the suspension. In addition, his back pay shall be offset by any compensation that the grievant received during this time period. The grievant will have no entitlement to his former position in the Special Enforcement Unit, and his reinstatement can be to a position determined to be appropriate by the Chief of the Department.

December 18, 2019
Boston, Massachusetts

Gary D. Altman

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Manchester Police Patrolman's Association

v.

City of Manchester

Arbitration before: Gary Altman

Case No. G-0103-12

July 27, 2020

MPPA'S BRIEF FOR DAMAGES

I. INTRODUCTION

This Brief is the result of the failure of the City of Manchester to resolve the backpay issue in the above referenced matter. On or about, December 18, 2019, Arbitrator Altman issued a decision, in the above referenced matter, holding that the Grievant Aaron Brown (Hereinafter "Aaron") had been unlawfully terminated from employment on April 11, 2018. Arbitrator Altman ordered that the discharge be reduced to a thirty-day suspension and that Aaron "be made whole for lost compensation until he returns to work pursuant to this award, minus thirty days…." See, Award dated December 18, 2019 and Stipulation of Facts for Damages at 5 (hereinafter "Stipulation").

The parties were not able to resolve the backpay issue and pursuant to the parties Stipulation at the arbitration hearing on August 21, 2019 the MPPA invoked the jurisdiction of the Arbitrator to issue an order on the Backpay. The parties agreed to submit Stipulated Facts for the Arbitrator on June 29, 2020 and closing briefs on July 13, 2020. The parties subsequently agreed to submit the Stipulated Facts to the Arbitrator with the closing Briefs on July 13, 2020.

Thereafter, the City requested a two-week extension to file briefs and stipulations until July 27, 2020. This request was granted and this brief follows.

The proper methodology, as set forth below, is to first determine the backpay based on contractual rights owed to Aaron by the City, (Section II); then require the City to ascertain and submit the proper respective contributions to the New Hampshire Retirement System (Section III) and finally determine that the City is not entitled to any mitigation based upon the circumstances in this particular matter (Section IV).

II. BACKPAY CALCULATION

The calculation of Backpay is a relatively straightforward mathematical calculation. We begin with the Hourly straight time backpay:

A) Straight time pay (Joint Exhibit 1, Article 13; Stipulation at 13-21)

(i) 5/12/18-6/30/18 (Hourly rate $35.95/hour Stipulation at 13)
7 weeks*40 hours*$35.95=$10,066
(ii) 7/1/18-6/30/19 (Hourly Rate $37.03/hour Stipulation at 16)
52 weeks *40 hours*$37.03=$77,022
(iii) 7/19-6/30/20 (Hourly Rate $37.77/hour Stipulation at 17)
52 weeks *40 hours*$37.77=$78,562
(iv) 7/1/20-8/30/20 (Hourly Rate $38.53/hour Stipulation at 18)
8 weeks *40 hours*$38.53=$12,330
(v) 9/1 and thereafter until 6/30/21
1 week*40 hours*$38.53=$1,541

Summary $10,066 +$77,022 +$78,562+$12,330=$177,980

B) Holiday pay (Joint Exhibit 1 Article 10; Stipulation at 20)

(i) May-June 2018-1 Holiday—Hourly rate $35.95 *8 hours=$288
(ii) 7/18-12/18-------7 Holidays-Hourly rate $37.03*56 hours=$2,074
(iii) 1/19-6/19---------5 Holidays-Hourly rate $37.03*40 hours=$1481
(iv) 7/19-12/19-------7 Holidays—Hourly rate $37.77*56 hours=2,115
(v) 1/20-6/20---------5 Holidays—Hourly Rate$38.53*40 hours=$1541

Summary $288+$2074=$1481+$2115+$1541=$7,499

C) Hazardous duty Pay (Joint Exhibit 1 Article 28; Stipulation at 21)

Each officer receives a $50 per week non-discretionary payment for being a police officer.

(i) 5/12/18-8/30/20=119 weeks * $50=$5,950

D) Insurance buyout (Joint Exhibit 1 Article 20.1 (a); Stipulation at 19)

Employees who forego the Health Insurance are paid $4000 a year. The payments are done on a biannual basis.

(i) 7/1/18-12/1/18--$2000
(ii) 1/19-12/19-------$4,000
(iii) 1/20-7/1/20-------$2,000

Summary-$2000+$4000+$2000=$8,000

E) By Executive order of the Governor of NH the Honorable Christopher Sununu First Responders (Police included) received a stipend of $2485 in 2020 Stipulation at 21.

F) Sick Time Accrual (Joint Exhibit 1 Article 15.A)

(i) Time of Separation-732 hours were taken at time of and accrue at 12 hours per month. 12 hours per month * 26 months=312 hours
(ii) 732 hours plus 312 Hours=1044 hours
(iii) 1044 hours/ 8 hours=130.5 days
(iv) 120 days is maximum (Joint Exhibit 1 Art 15.A.1)

Summary: Aaron be credited with 120 days of sick leave

G) Vacation Time Accrual (Joint Exhibit 1 Article 11)

(i) Paid all sick time at separation
(ii) Would have earned at 13.3 hours per month for 26 months or 345.8 hours

Summary: Aaron be credited 345.8 hours of vacation time

Backpay Conclusion

A) Hourly Back Pay-$177, 980
B) Holiday Pay-------$ 7,499
C) Hazard pay------- $ 5,950
D) Insurance -------- $ 8,000
E) Covid pay $ 2,485

$201,914

F) Sick time credit—120 days or 960 hours
G) Vacation credit 43.225 days or 345.8 hours

III. NEW HAMPSHIRE RETIREMENT CALCULATION

This Arbitrator has ruled that, "Under this award the grievant is to be made whole for lost compensation until he returns to work pursuant to this award, minus thirty days pay for the period of suspension." See Decision at 1. The calculation of the backpay, less thirty-days, is provided above. Participation in the New Hampshire Retirement System ("NHRS") is mandatory for all Full Time New Hampshire Police officers. RSA 100-A:3. This retirement system is part of an officer's compensation and is calculated based upon a percentage of the "earnable compensation" received by the officer.

The collective bargaining agreement provides the base wages and compensation package and the officer is also entitled to his mandatory statutory compensation that is derived from the NHRS, but paid for by the City and the officer. The State of New Hampshire has adopted a comprehensive statutory and regulatory mandatory retirement system for all public employees, including police officers. As a full-time officer Aaron is required to belong to the New Hampshire Retirement System. RSA 100-A:3 (I) (a). Aaron is not entitled to social security as police officer when he retires and the NHRS is the only required retirement funds available to him as a Group II participant.

The calculation of his retirement is based upon several factors but primarily requires that he have a certain amount of "creditable service" which is calculated based upon his earnable compensation. See, 100-A:4 (II) and RSA 100-A (I) (XIV). In order to receive a service retirement Aaron must be 47 years of age and have 22 years of creditable service. RSA 100-A:5

(II)(d). Simply put, if the City does not contribute to his retirement he does not have creditable service.

The methodology of contribution is based on two parts: one is contribution from Aaron and the other is a contribution from the City. The amount of contribution is provided by statute and Aaron is required to contribute, through payroll deductions, an amount of 11.55% of his income. RSA 100-A:16 (I)(a). The City is required to pay a fluctuating amount, primarily, based on the returns of the investments of the NHRS. This amount is set annually by the Board of Trustees of the NHRS. The amount contributed by the City is a percentage of the earnable compensation that Aaron receives form the City. See, RSA 100-A:16 (III)(c). Currently the amounts of contribution are FY 2018 and 2019 (29.43%) and the amount for FY 2020 and 2020 is (28.43%). See, https://www.nhrs.org/employers/employer-contribution-rates

In order to satisfy the Arbitrator's order, the City must make the relevant contributions to the NHRS before any offset is taken into consideration. If the contributions are not made than Aaron would not get his creditable service. This would amount to the City by inaction imposing upon Aaron a suspension of greater than thirty days. Regardless of any offset or mitigation that the City may be entitled to the contributions to the NHRS MUST be made for the complete lost back pay calculation set forth is section II above prior to any calculation of any offset. The payment to the NHRS must be paid by the City before any offset, if applicable, is applied by this Arbitrator. However, based on the information provided below in Section IV, the City should not be entitled to any offset.

IV. THE CITY IS NOT ENTITLED TO ANY OFFSET OR MITIGATION

This Arbitrator, ordered that, "...his backpay shall be offset by any compensation that the grievant received during this period of time." See Order at p. 1. The objective or public policy to

be satisfied by providing an offset to an employer is so that an employee is not overcompensated by being paid twice. See, Elkouri, How Arbitration Works, 8th Ed., Chapter 18.31.1 page 18-38. Further, some arbitrators have held, "…no authority exists to penalize an employee financially for failing to have earnings." Id. at p. 18-39. This would amount to a windfall to the City who was found to have unjustly terminated the grievant.

The fact is that Aaron was not able to earn any income while he was awaiting the decision of this Arbitrator on damages. However, assuming arguendo, that there is some duty to mitigate this duty is not absolute. It is the duty of the employer to bring forward affirmative evidence to show that the failure to obtain similar employment was inexcusable. Id.; American Bakeries Co., 77 LA 530, 535 (Modjeska, 1981); Orlando Transit Co., 71 LA 897, 900 (Serot, 1978); Quirk Serv. Laundry & Cleaners, 52, LA 121, 127-28 (Merrill, 1968); Armour & Co., 11 LA 600, 605 (Gilden, 1984).

In this matter, the inability of Aaron to obtain other police related employment (or any similar employment) was precluded by the City itself. The City initiated and then advertised that Aaron was subject to a criminal investigation and placed him on the so called "Laurie List" now known as the Exculpatory Evidence Schedule, precluding him from employment with a law enforcement agency. Even after this arbitrator issued his decision which invalidated the factual reasons that Aaron was criminally investigated and accused of being dishonest the City refused to reinstate Aaron and continues to fail to reinstate. Not only does the City fail to reinstate Aaron, it has attempted to remove his certification through the NH Police Standards and training, unsuccessfully. See, Letter dated February 11, 2020 (Attached without underlying attachments) (Counsel For the City objected to inclusion based upon relevancy). Please note the PSTC has

taken no action on Aaron's certification. Aaron remains able to perform his duties as the Manchester Police Department.

The City of Manchester formally terminated Aaron Brown by letter dated April 16, 2018 with an effective date of April 12, 2018. See, Joint Exhibit 6. Nonetheless, on April 11, 2018 (five days before) the City issued a **press release** which states, in relevant part, "...a criminal investigation will be initiated into Brown's actions. The department has consulted with both the Attorney General and County Attorney in this matter and will continue to do so." See, Union Exhibit 1. [redacted]

[redacted] Under the rules of the Police Standards and Training, an individual may not be hired by a new agency as a police officer when charges of a criminal nature are pending. See, Pol 301.05(g)(3)(4). Although the rule technically speaks of a conviction, the hiring authority is not allowed to hire an individual while a matter is pending for a criminal investigation. This criminal investigation took a substantial amount of time and, in fact, as late as April 1, 2019, the Stafford County Attorney Velardi was still informing the press at large that the allegations against Aaron were unfounded. See, Union Exhibit 8.

[redacted] It is undisputed that

Aaron was never charged, or convicted, of any criminal activity concerning his employment with the City of Manchester.

[redacted] The administration of City police department testified at length of the importance of not employing an officer that was placed on the EES. In fact, it is judicially recognized that the EES is a sort of "death list..." and has a stigma which precludes employment in many circumstances. See, Duchesne v. Hillsborough County Attorney, 167 N.H. 774, 783 (2015). Despite the Arbitrator's finding that these allegations were factually inaccurate, the City has done nothing to remove Aaron from the EES. In fact, it has used his placement on the EES as a defense and reasoning for not reinstating him. See, Manchester Police Patrolman's Association v. City of Manchester, PELRB Case No. G-0103-11, Joint Prehearing Statement. Further, the City has no excuse for failing to return Aaron to work as of the date of the Award on December 18, 2019. The Department has shifted gears and has attempted to label Aaron as a racist, which is incorrect and factually unfounded. This Arbitrator found that,

> In the present case, although I have concluded that Officer Brown's text messages were inappropriate, I do not believe that Officer Brown actions were maliciously motivated. These were two text messages from over 18,000 texts sent by Officer Brown that were reviewed by the Department. The text messages at issue were sent only to his wife, they were not made in public, they were not uttered to any other person, and these comments were not posted on social media. They were two texts sent from Officer Brown to his wife. Officer Brown has never been accused, during his career, of making racially insensitive comments to members of the public or other officers of the Department. Moreover, Officer Brown, during his career with the Department has had no prior discipline for any reason.
>
> See, Decision at pg. 24-25

The City does not determine whether Aaron returns to work. That decision has been made by this Arbitrator, and they must follow the "final and binding" ruling of this Arbitrator and should not receive a reward for refusing to implement said award.

The only agency with the authority to determine whether or not an individual is certified as a police officer is the New Hampshire Police Standards and Training. It is only the New Hampshire Police Standards and Training who can determine whether an officer may serve as a police officer and be certified as a full-time police officer. See, RSA 106-L:5(V) and Pol 402.02.

In addition, at the time of his termination, Aaron had two minor children (ages 6 and 9) which required care. Previously, his wife was the primary caretaker. Aaron and his wife switched roles, and he became the primary caretaker for their sons and his wife adjusted her work hours and began working seven days a week and also performing functions as an adjunct professor in nursing school. In addition, due to the high cost of childcare it made attempting to obtain a menial level job prohibitive and a poor economic decision. Childcare expenses, at the lowest level, with the Boys and Girls Club afterschool care and summer camps are approximately $13,000.00 per year. All other options would have been more expensive. Clearly, the ability to obtain even a menial job would be difficult, if not impossible based upon the advertisement by the City of Aaron's unjust termination.

In fact, Aaron could not even apply for unemployment, which would have only been for a twenty-six week period. Unemployment disallows claims for individuals who were terminated for misconduct connected with their work. See, RSA 282-A:35. Unemployment only pays $427.00 per week and the City would be required to pay back the State if Aaron had received this benefit. See, RSA 282-A:25.

If the Arbitrator is inclined to provide the City with an offset it should only be for the time that Aaron was not under criminal scrutiny and before the issuance of the December 18, 2019 decision. This should be based on a realistic assessment of wages that could possibly been earned by Aaron. For example, in Hillsborough County, the average weekly wage for governmental employees is $1,113.00. See, https://www.nhes.nh.gov/elmi/products/op/profiles_htm/hillsborough.htm This would have to be reduced by the $250 that would be expended for Childcare. ($13,000/52) The Arbitrator should also take into consideration the imposition placed upon families during the COVID-19 pandemic dilemma since March of 2020. Aaron could not obtain substantially similar employment due primarily to the activities of the City. Should the Arbitrator award any offset, the offset should cease as of the date of the order, December 18, 2019. Otherwise, the City would have an economic incentive to never reinstate an employee when there is an order because they have the economic leverage. The longer they wait the greater the leverage. The City is currently employing such a tactic in this matter.

V. CONCLUSION

For the reasons stated above, the damage awarded should be full backpay, as articulated in Section II, with a continuing weekly assessment against the City in the amount of $1,591.00 (weekly wage $1,541.00 + $50.00) and Aaron be reinstated immediately or damages continue until there is reinstatement or an agreed upon resolution.

Respectfully submitted,

Manchester Police Patrolman's Association
By and Through their attorneys,
MILNER & KRUPSKI, PLLC

Dated: July 27, 2020

By: */s/ John S. Krupski*

John S. Krupski, Esquire
109 North State Street, Suite 9
Concord, NH 03301
(603) 410-6011
jake@milnerkrupski.com

Chief of Police
Carlo T. Capano

Assistant Chief
Ryan A. Grant

CITY OF MANCHESTER
Police Department

To Whom It May Concern: February 11, 2020

On April 11, 2018, the Manchester Police Department (MPD), following a thorough and timely internal investigation, terminated the employment of Officer Aaron Brown. [redacted] On April 11, 2018 the MPD filed a Form B (Attachment A), attached to which was a copy of the Notice of Intent to Discipline (Attachment B) that was provided to Officer Brown prior to his termination.

Following his termination, Officer Brown, through his collective bargaining representative, filed a grievance alleging that the MPD lacked "just cause" to terminate his employment. The grievance was submitted to binding arbitration. [redacted] However, Arbitrator Altman did find sufficient evidence to sustain the finding that Officer Brown had, while on duty, sent racist text messages. Despite that finding, Arbitrator Altman determined that the disciplinary consequence of termination was too severe and ordered the MPD to reduce the termination to a thirty (30) day unpaid disciplinary suspension. The MPD has been ordered to give Officer Brown back wages from the end of the thirty (30) day suspension through current. Further, the Arbitrator ordered the MPD reinstate Officer Brown to active duty.

Based on the Arbitrator's arbitration award and remedy , I am submitting the attached amended Form B (attachment D), which notifies the Council that Officer Brown's termination has been changed to a thirty (30) day suspension. The MPD understands that pursuant to POL 401.01(a) (Lapse in Service), Officer Brown's certification lapsed thirty (30) days after the date of his termination. See POL 101.41 ("Termination" means ceasing employment as a police or corrections officer, through either resignation, as defined in POL 101.39, or discharge, as defined in POL 101.17").

Pursuant to POL 401(b), the MPD *may* request that Officer Brown be re-certified upon his reinstatement. Please be advised that the MPD *is not* requesting Officer Brown's recertification. The MPD has notified Officer Brown that by ordering his reinstatement, Arbitrator Altman has taken an action that is contrary to public policy and injurious to the public good. The MPD believes that in light of the founded misconduct of sending racist text messages, Officer Brown's reinstatement would be contrary to dominant and well established public policies; specifically, the standards established by this Council to obtain and retain certification as a law enforcement officer, including the prohibition against certification of applicants "whose general character and reputation in the community are such that a reasonable person would doubt that the applicant would conduct him/herself with honesty and integrity and uphold the rule of law." See POL 301.05(g)(15).

The MPD intends to vigorously object to any effort by Officer Brown or his labor representative to seek enforcement of the reinstatement order. The reinstatement order, if implemented, would knowingly place a racist in the law enforcement organization responsible for New Hampshire's most diverse population. No state or federal agency should use its power to force MPD to employ an officer in a community whose diverse members now have founded cause to doubt that officer's honesty, integrity, and ability to uphold the rule of law.

The MPD respectfully requests that it be notified should Officer Brown seek re-certification and that it be afforded the opportunity to be heard as to why re-certification would not be appropriate in light of his founded misconduct.

Please let me know if you have any questions regarding this matter.

Sincerely,

Carlo T. Capano

Carlo T. Capano
Chief of Police
Manchester Police Department
405 Valley St. Manchester, NH 03103
Phone: (603) 792-5400

State of New Hampshire
Public Employee Labor Relations Board
Case No. G-0103-12

IN THE MATTER OF ARBITRATION BETWEEN

Manchester Police Patrolman's Association

&

City of Manchester

Grievant: Aaron Brown

CITY OF MANCHESTER'S SUPPLEMENTAL BRIEF IN OPPOSITION TO AN AWARD OF BACK PAY

The City of Manchester (hereinafter "City") respectfully submits this Supplemental Brief in Opposition to an Award of Back Pay to the Grievant, Aaron Brown ("Grievant"). In support thereof, the City states as follows:

I. Background

For purposes of this supplemental proceeding, the facts as found in the Arbitration Award and as set forth in the parties' Stipulated Facts are not in dispute. On April 12, 2018, Grievant was terminated from his position as a Manchester Police Department ("MPD") patrol officer following an investigation [redacted] The investigation further determined that Grievant had used inappropriate and unacceptable racial epithets regarding African Americans in text messages sent to his wife, while on duty, and while using a Department issued cell phone (Charges 7-8). The Union grieved Grievant's termination. An arbitration hearing was held On August 21, 2019. On December 18, 2019, the Arbitrator

issued an Award [redacted] The Arbitrator sustained the finding that Grievant had improperly sent racist text messages while on duty and using Department equipment. However, and despite finding that Grievant's use of terminology:

> that refers to a group or race of persons in negative or pejorative terms is unacceptable. There can be no question that police officers must not express themselves in a manner that could indicate their inability to perform their duties in a fair and objective manner….

and further finding that Grievant's sending of racially insensitive messages was "per-se unacceptable;" and that "zero tolerance for racially insensitive comments is clearly an appropriate response by the Manchester Police Department," the Arbitrator found that termination was disproportionate to the offense and imposed a thirty (30) day suspension.[1] Award, pp. 23-25. Further, the Arbitrator ruled that:

> [u]nder this award the grievant is to be made whole for lost compensation until he returns to work pursuant to this Award, minus thirty days' pay for the period of the suspension. In addition, his back pay shall be offset by any compensation that the grievant received during this time period.

Award, p.1. The Department did not reinstate Grievant. On December 27, 2019, the City's undersigned counsel informed the Union that the City would not implement the Arbitrator's

[1] The Arbitrator's decision was largely based on his belief that Grievant's actions were not "maliciously motivated." Award, pp.24-25. Unfortunately, public scrutiny of police officer conduct does not lend itself to such a nuanced analysis. The fact, as found by the Arbitrator, is that Grievant sent racist text messages. The City's position was, and remains, that persons who espouse racist views have no role in law enforcement. The City respectfully submits that Grievant's malice is imbedded in the racist statements themselves, regardless of the context in which they were made. It is simply no longer acceptable, if it ever was, for police officers to espouse racist views as long as they do so only in forums where they are unlikely to get caught, and regardless of whether their racist statements were maliciously intended. It is well-settled in the context of unlawful Title VII harassment that the intent of the harasser is irrelevant; instead, it is the impact on the victim that is the basis for liability. Should Grievant ever be involved in an incident where he is alleged to have violated the civil rights of a citizen who is a member of a minority group, the text messages would likely be conclusive proof of Grievant's racist mindset, with both the citizen and the City (from a financial liability standpoint) being the victim of the Grievant's conduct. It is for these reasons that the City has taken the position that Grievant's reinstatement would be contrary to public policy.

award to the extent that it required reinstatement on the grounds that the reinstatement remedy violated public policy.

The parties have, by agreement, returned to the Arbitrator to determine the amount, if any, of back pay that Grievant is entitled to receive from the date of his termination through the present. Importantly, the Arbitrator is not being asked to fashion an alternate remedy to reinstatement. The parties have reached an accommodation with regard to the reinstatement issue. Accordingly, the Arbitrator is only asked to determine the amount, if any, of back pay to which Grievant is entitled from his termination through the present, less the thirty (30) day period of unpaid suspension imposed by the Arbitrator in place of termination.

On March 20, 2020, the City, by counsel, requested information from the grievant regarding his efforts, if any, to mitigate his loss of income following his termination. The City's information request, together with the Union's responses on Grievant's behalf, are appended to the parties' Stipulated Facts. Stipulation, Attachments C and D, respectively. Grievant did not request an evidentiary hearing with regard to this supplemental proceeding. Therefore, the information provided by the Union in response to the City's information request constitute the totality of the facts on which the Arbitrator may rely upon in assessing Grievant's efforts to mitigate his lost income.

The Grievant had sought "no interim employment" whatsoever.[2]Stipulation, Attachment D. To be clear, Grievant did not even apply for a single position in any field of endeavor.[3] *Id.* The Grievant did not seek the assistance of an employment agency in an effort to secure new

[2] According to the New Hampshire Department of Employment Security (NHDES), New Hampshire's unemployment rate between May 2018 and March 2020 was approximately 2.6%, well below the national average. See NHDES Chart https://www.nhes.nh.gov/elmi/products/chartroom/documents/chart01.pdf

[3] Grievant's certification as a sworn police officer was never suspended by the certifying organization, the New Hampshire Police Standards and Training Council.

employment. *Id.* He did not seek or collect any unemployment, disability, workers' compensation, or other wage replacement insurance benefits for any portion of the period of unemployment that followed his termination. *Id.* Grievant did not enroll in any new school or training programs while unemployed[4] or start his own business. *Id.* Grievant does not claim that he was unable to work due to physical or emotional illness. While claiming that he had been forced to seek professional help for "emotional/mental trauma" that allegedly resulted from his termination, he does not assert that the emotional trauma prevented him from apply for jobs, seeking employment counseling, or applying for unemployment or other insurance benefits.[5] *Id*. In essence, rather than seek interim employment pending the outcome of his grievance, the grievant decided to remove himself from the workforce and make no effort whatsoever to find new employment or any source of replacement income. Instead, Grievant claims that he assumed the role as primary caregiver for his two young sons. He asserted that his wife, a nurse practitioner and adjunct professor of nursing, had increased her workload while he stayed at home. *Id.*

II. Argument

Under New Hampshire law, "it is well established that a party seeking damages occasioned by the fault of another must take all reasonable steps to less his or her resultant loss." *Grenier v. Barclay Square Commercial Condo. Owners' Ass'n*, 150 N.H. 111, 119 (2003). This same concept is incorporated into federal and state employment laws, which require that an individual who suffers a loss of income as a result of an employer's wrongful conduct is required

[4] Grievant claims that shortly after his termination, he obtained the six (6) credit hours necessary to complete his Criminal Justice degree. He has not asserted that this course work interfered with his ability to seek employment, or that it was a necessary prerequisite to obtaining new employment (it was not necessary for him to have a Criminal Justice degree before being hired by the Manchester Police Department).

[5] Presumably, had he been disabled as a result of his alleged trauma, Grievant would have been eligible to apply for workers' compensation or disability insurance benefits.

to make reasonable efforts to mitigate their loss. See 42 USC Section 2000(e)-5(g) (duty to mitigate under Title VII); *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 199-200 (1941) (duty to mitigate under NLRA). In *NLRB v. Community Health Services, Inc.*, 812 F.3d 768, 773 (10th Cir. 2016), the Court of Appeals explained:

> Where unlawfully terminated employees are under an obligation to seek work, the policy holds that backpay calculations logically should include a deduction for interim earnings. Without such a deduction, employees who are willing to bet on the outcome of the claims against the former employer or whose short-term financial needs are minimal would have little incentive to comply with their mitigation obligation. Instead, they could wait for a favorable decision from the Board to make them whole. The duty to seek interim employment gives these employees an incentive to remain productive during the period the claims against the former employer are unresolved.

Community Health Services, Inc.; 812 F.3d at 771.

In the context of labor arbitration, it is well settled that "an employee who has been wronged by an employer has an affirmative duty to mitigate, so far as reasonable, the amount of the loss." Elkouri & Elkouri, *How Arbitration Works*, Ch. 18.3.I, (8th Ed. 2016). The majority view among labor arbitrators is that:

> A discharged employee should be required to make a reasonable effort to mitigate damages by seeking substantially equivalent employment. The reasonableness of his effort should be evaluated in light of the individual's qualifications and the relevant job market. His burden is not onerous, and does not require that he be successful in mitigating his damages. Further, the burden of proving lack of diligence or an honest, good faith effort on the employee's part is on management.

Id. (internal quotations omitted). *See also* Brand & Biren, *Discipline and Discharge in Arbitration*, Ch. 13.II.D.4 (3rd Ed. 2015) ("The duty to mitigate damages does not require a grievant to seek employment in *any* available position. Rather, the duty requires a grievant to seek a position similar in duties, wages, hours and location to that which was lost. In searching for similar alternative employment, an employee is held to a due diligence standard. Due

diligence does not require the employee to succeed in the pursuit of alternative employment. Rather, due diligence requires the employee to demonstrate a bona fide attempt to mitigate losses, taking into account the employment opportunities available to a person in the employee's particular situation with that person's particular attributes and/or shortcomings.").

In the instant case, the Arbitrator has accepted this majority view. In his Award, he expressly provided that the calculation of back pay should be "offset by any compensation that the grievant received during the time period" of income loss resulting from his termination. The Arbitrator apparently presumed that the Grievant, acting in good faith and acknowledging his obligation to mitigate his loss, would make reasonable efforts to offset his lost income. This was not the case. As set forth above, Grievant made no effort whatsoever to find alternate employment or otherwise mitigate his loss. Grievant offers no explanation or excuse for his failure to do so. Grievant resides in a state which, until March 2020, enjoyed one of the lowest unemployment rates in the nation. He does not, nor could he, assert that there was a lack of employment opportunities in any particular occupation or field of endeavor, as he made no effort to identify a single work opportunity. He was not medically disabled from working. He did not put a job search on hold while engaging in activities, like pursuing further education or starting a business, that arguably could have enhanced his ability to offset his lost income. Instead, he chose to become a primary caregiver to his children.

While this may have been an appropriate decision for Grievant and his family, it does not excuse him from his obligation to mitigate his damages.[6] An award of back pay is conditioned upon the principle that the Grievant, and not others acting on his behalf, will make reasonable

[6] Grievant may argue that by staying home, he was able to reduce family expenses by avoiding child care costs. No evidence has been offered in support of this argument. Grievant may further argue that by staying home, his wife was able to work additional hours. Again, no evidence has been offered that Grievant's choice resulted in an overall increase in family income. Even if it did, the duty to mitigate is specific to Grievant and not to his wife.

efforts to engage in the workforce. He cannot shift the burden of engaging in the work force to another member of his household and expect that he can collect back pay without personally making any mitigation efforts. *Delima v. Home Depot USA, Inc.*, Civ. No. 06-328-JE (D. Or. Feb. 19, 2008) (in Title VII action for unlawful termination, court granted defendant's motion for summary judgment on issue of back pay where plaintiff testified that she removed herself from the work force a year after her termination in order to be a stay at home mom. Court held that plaintiff's actions did not demonstrate reasonable diligence in searching for a comparable position.)

It is well settled that "[i]f, as a result of employee's action or inaction, he has failed to mitigate the loss, then to the degree of such failure he is himself partially responsible. For this reason back pay may be wholly or partially denied where the employee has failed to take advantage of reasonable employment opportunities." Elkouri & Elkouri, *How Arbitration Works*, Ch. 18.3.I, (8th Ed. 2016) (internal citations omitted). In this case, Grievant's failure to pursue *any* employment opportunities in a state with an extraordinarily low unemployment rate must be considered a failure to take advantage of reasonable opportunities. In the Title VII context, courts have held that the failure to make any effort to mitigate is *per se* unreasonable. *See Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 379 (1st Cir. 2004) (holding that "[f]ailure to mitigate damages can take a variety of forms, including not looking for new employment…"). *See also Hansard v. Pepsi-Cola Metropolitan Bottling Co., Inc.*, 865 F.2d 1461, 1468 (5th Cir. 1989) (cited with approval by *Johnson*, 364 F.3d at 379 (1st Cir. 2004) ("[Plaintiff] is clearly not entitled to back pay after December 1985 because, by his own admission, he stopped looking for work. A plaintiff may not simply abandon his job search and continue to recover back pay.").

It is anticipated that the Union will argue that Grievant was relieved of his obligation to mitigate after issuance of the Award and the City's refusal to reinstate his employment. The City respectfully submits that the Grievant was timely informed that he would not be reinstated. Had he made reasonable efforts to mitigate and secured interim employment before the Award was issued, it would have been foolhardy and bad faith for him to abandon that employment knowing that his reinstatement was being contested and remained in dispute. Arbitrators have consistently recognized that an employee's obligation to mitigate damages extends beyond simply securing a job: the employee must put in a good faith effort to maintain employment. *See* Elkouri & Elkouri, *How Arbitration Works*, Ch. 18.3.I, (8th Ed. 2016). *See also Johnson*, 364 F.3d at 379 (stating that in the Title VII context, employees have failed to fulfill their duty to mitigate when they fail to look for work, find new employment but voluntarily quit, and/or get discharged from new employment for misconduct). Employees who resign from new employment for personal reasons have failed to mitigate and are not entitled to back pay. Elkouri & Elkouri, Ch. 18.3.I. Having never made a good faith, reasonable effort to mitigate after his termination, Grievant had no interim employment to abandon after the Award was issued.

Where, as here, the Grievant has failed to fulfill his duty to mitigate his losses by wholly removing himself from the workforce, the City should not be held responsible for back pay. *See Builders Plumbing Supply*, 89K/23639 (supplemental opinion), 95 BNA LA 351 ("If an improperly discharged employee remains idle during the period prior to reinstatement, the former employer should not be liable for back pay totaling what the employee would have earned had the discharge not taken place. Such persons do indeed have a duty to avoid willfully incurred losses."). Grievant's failure to make any effort to mitigate makes it impossible to determine what he might have earned through a good faith, reasonable job search. However,

given that Grievant's ability to work and the state's low unemployment rate, there is simply no reason to assume that a reasonable job search would have allowed the grievance replace most, if not all, of his lost income.

III. Conclusion

Because the Grievant has failed to make any effort to mitigate his losses, the City is not obligated to reward the Grievant's idleness by issuing back pay. The Grievant made the decision to forfeit his right to back pay when he chose to disengage from the workforce.

Respectfully submitted,

CITY OF MANCHESTER

By Its Attorneys,

DRUMMOND WOODSUM & MACMAHON

Dated: July 27, 2020

By: /s/ Mark T. Broth

Mark T. Broth, Esquire (NH Bar #279)
670 N. Commercial Street, Suite 207
Manchester, NH 03101
603-716-2895
mbroth@dwmlaw.com

150 N.H. 111
Supreme Court of New Hampshire.

Mark GRENIER d/b/a Royalty Automotive Services,
v.
BARCLAY SQUARE COMMERCIAL CONDOMINIUM OWNERS' ASSOCIATION and another.

No. 2002–457.
|
Argued: June 11, 2003.
|
Opinion Issued: Oct. 10, 2003.

Synopsis
Condominium owner brought action challenging parking rule implemented by condominium association and condominium management company. The Superior Court, Strafford County, Houran, J., found for condominium owner, and condominium association and condominium management company appealed. The Supreme Court, Broderick, J. held that: (1) condominium association and condominium management company lacked authority to have condominium owner's cars towed for violating parking rule; (2) condominium association and condominium management company were not entitled to award of attorney fees; (3) condominium owner was not entitled to award of attorney fees; and (4) mitigation of damages doctrine did not apply.

Affirmed in part, reversed in part, vacated in part, and remanded.

Dalianis and Duggan, JJ., concurred in part and dissented in part with opinion.

Attorneys and Law Firms

****240 *112** Robert E. Ducharme, of Stratham, by brief and orally, for the plaintiff.

***113** Sanford Roberts, PA, of Portsmouth (Sanford Roberts on the brief and orally), for the defendants.

Opinion

BRODERICK, J.

The defendants, Barclay Square Condominium Owners' Association and New Hampshire Real Estate Management and Brokerage, Incorporated, appeal an order of the Superior Court (*Houran*, J.) finding that they were not authorized to: (1) promulgate a rule to regulate the use of parking spaces; and (2) tow vehicles that are in violation of that rule. The defendants also argue that the court erred by failing to award them attorney's fees. The plaintiff, Mark Grenier d/b/a Royalty Automotive Services, cross-appeals, arguing that the trial court erred by failing to award him attorney's fees and costs, and by ordering him to pay storage costs associated with the towing of his vehicles. We affirm in part, reverse in part, vacate in part and remand.

The trial court found the following relevant facts. The plaintiff owns two units in the Barclay Square condominium complex (Barclay Square) located in Somersworth. Barclay Square is a twenty-four-unit business and commercial complex established in 1987 and is a registered condominium association. It is governed by a board of directors (board) and managed by defendant New Hampshire Real Estate Management and Brokerage, Inc. (New Hampshire Real Estate).

From his two units, the plaintiff operates Royalty Automotive Services, an automobile repair and sales business. In connection with his business, the plaintiff needs parking spaces for a number of vehicles, both during the day and overnight. The plaintiff regularly uses a portion of the common area to the rear of the units for parking.

**241 At the annual meeting of the Barclay Square Condominium Association (association) in September 1998, the association adopted a temporary amendment requiring all business owners in Barclay Square wishing to use parking spaces in the rear of the units to request permission from the board. This amendment was effective until the next annual meeting in September 1999. At the September 1999 meeting, twenty-two unit owners voted sixteen to six to discontinue the temporary amendment. The association, however, voted twenty to two to direct the board to promulgate, within sixty days, "a new parking/general usage policy for the rear land" and to bring the proposal to a vote.

In 1999, the board developed a proposed ordinance (parking rule) regarding overnight parking in the rear common area. The owners of twenty-one of twenty-four units voted to approve the ordinance, which provides as follows:

> *114 Effective November 1, 1999 all unit owners and lessees wanting to use the rear common land to park *registered and inspected* (excluding dealer plates) motor vehicles or trailers overnight must first request permission in writing from the BSCCA Board of Directors. Under no circumstances shall the Board grant an individual business owner permission to park more than four (4) vehicles overnight at one time. Permission granted will be on a "space available" basis and will be for a specified area of land in the rear.... Non-compliance with the terms and conditions of said parking permission will be grounds for immediate revocation of this permission.

By letter dated December 14, 1999, the plaintiff requested permission to park "the maximum amount of vehicles allowed overnight" in the rear common area. On March 26, 2001, G. Brandt Atkins, president of New Hampshire Real Estate, wrote to the plaintiff, informing him that he had been and continued to be in violation of the parking rule and asking that he conform by 5:00 p.m. on April 3, 2001. Atkins included a copy of the parking rule with the letter and stated that "non-compliance will be grounds for the Board of Directors to immediately revoke the permission you requested in your December 14, 1999 letter to the Board."

Atkins notified all unit owners and tenants on April 5, 2001, that he intended to tow any vehicle in violation of the overnight parking rule that same evening. Atkins had received approval from the board to tow offending vehicles prior to issuing notices to unit owners and tenants. On the evening of April 5, 2001, Atkins discovered seven vehicles belonging to the plaintiff's business parked in the rear common area. He had three vehicles that were unregistered and/or uninspected towed.

The plaintiff did not pay the $300 necessary to recover his vehicles from the towing company and the vehicles were subsequently moved into storage at Superior Towing Company, Inc. By court order incorporating the parties' stipulation, two parties originally named in this case, Superior Towing Company, Inc. and Automation Towing/Recovery, were dismissed, the plaintiff paid $4,350 to Superior Towing Company, and Superior Towing was ordered to hold the vehicles without additional charge pending the court's decision on the merits. The court stated that "[t]he ultimate responsibility for the towing and storage charges of $4,350 will be determined by the court in its final decision."

Following a non-jury trial, the trial court found that the board did not have the authority to amend its rules to limit overnight parking in the rear common area to four vehicles per business owner. Further, it found that the board was not authorized **242 to tow vehicles in violation of the parking *115 rule because the rule itself limits the sanction available, at least as to the first violation, to revocation of parking permission. Moreover, the court found that the plaintiff did not receive sufficient notice of the association's intent to tow vehicles parked in violation of the parking rule.

The court stated, however, that the plaintiff was responsible for any storage costs in excess of $300 because he failed to reclaim his vehicles on April 6, 2001, and, therefore, did not mitigate his damages. The court also denied the plaintiff's request for attorney's fees and costs. The plaintiff filed a motion to reconsider, which was also denied. This appeal followed.

In their brief, the defendants concede that they did not have the authority to limit the available parking per business owner as found by the trial court. They argue alternatively, however, that they had the authority to tow offending vehicles from the property because the parking rule also prohibits keeping uninspected and/or unregistered vehicles overnight in the rear common land. We need not decide this issue because even if we assume that the defendants could penalize the plaintiff for parking unregistered and/or uninspected vehicles in the rear common area, they were not authorized to tow his vehicles. The parking rule, in pertinent part, provides that "[n]on-compliance with the terms and conditions of said parking permission will be grounds for immediate revocation of this permission." In finding that the defendants did not have the authority to implement the towing rule, the trial court stated that the penalty provision could reasonably be interpreted as limiting the sanction to be imposed in the event of a parking violation. We agree. While a condominium association may be permitted to promulgate reasonable rules to address day-to-day concerns, the rule cannot contravene or otherwise conflict with the express language of the condominium documents. Here, the parking rule provides expressly that the unit owner will lose permission to use parking spaces if he or she fails to comply with the parking rule. Moreover, at the time of the events in question, the condominium by-laws provided that the board shall have the power to levy fines, which were not to exceed $10 for one violation, against a unit owner for violations of the provisions of the declaration, by-laws or condominium rules. We conclude, therefore, that the defendants' implementation of the towing penalty was not authorized in light of these other penalty provisions.

The defendants next argue that the trial court erred by failing to award it attorney's fees pursuant to RSA 356–B:15, II (Supp.2002). "We will not overturn the trial court's decision concerning attorney's fees absent an [unsustainable exercise] of discretion." *Business Publications v. Stephen,* 140 N.H. 145, 147, 666 A.2d 932 (1995) (quotation omitted); *see also State v. Lambert,* 147 N.H. 295, 296, 787 A.2d 175 (2001) (explaining unsustainable exercise of discretion ***116** standard). In evaluating the trial court's ruling on this issue, we must first keep in mind the tremendous deference given to a trial court's decision on attorney's fees. *Daigle v. City of Portsmouth,* 137 N.H. 572, 574, 630 A.2d 776 (1993).

Our analysis begins with the statutory language itself; when that language is plain and unambiguous, we need not look beyond the statute for further indications of legislative intent. *Johnson v. City of Laconia,* 141 N.H. 379, 380, 684 A.2d 500 (1996). We ascribe to statutory words and phrases their usual and common meaning, unless the statute itself suggests otherwise. *Id.* Nevertheless, we do not assume ****243** that the legislature would enact statutory language that would lead to an absurd result. *Atwood v. Owens,* 142 N.H. 396, 398, 702 A.2d 333 (1997).

RSA 356–B:15 provides:

> I. The declarant, every unit owner, and all those entitled to occupy a unit shall comply with all lawful provisions of this chapter and all provisions of the condominium instruments. Any lack of such compliance shall be grounds for an action or suit to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the unit owners' association, or by its board of directors or any managing agent on behalf of such association, or, in any proper case, by one or more aggrieved unit owners on their own behalf or as a class action.
>
> II. The unit owners' association shall be entitled to all costs and attorneys' fees incurred in any proceeding under RSA 356–B:15, I.

The defendants argue that they are entitled to attorney's fees under the plain language of RSA 356–B:15, II. Contrary to the defendants' argument, it is not the question of who initiates the underlying action that controls the award of attorney's fees, but rather whether the party claiming those fees was successful. To construe RSA 356–B:15, II as allowing the defendants to recover attorney's fees in this case would discourage condominium unit owners such as the plaintiff from bringing claims to protect their rights since they would be responsible for the association's attorney's fees regardless of whether they win or lose.

Such an absurd result could not have been intended by the legislature. Rather, we interpret RSA 356–B:15, II as providing for an award of attorney's fees to a condominium unit association for litigation in which it prevails.

The legislative history of RSA 356–B:15, II supports this interpretation. RSA 356–B:15, II was proposed along with RSA 356–B:46–a (Supp.2002) in ***117** Senate Bill 105, entitled, "An act relative to rent collection upon delinquency in payment of common expenses by condominium unit owners." The description of this bill provides that it:

> I. Allows a condominium unit owners' association to collect rents from the tenant of a unit to offset common expenses assessed to the unit in the event that the unit owner fails to pay the common expenses assessed to the unit.
>
> II. Holds harmless any tenant who pays rent or a portion of rent to the unit owners' association, rather than to the unit owner, in compliance with the provisions of the bill.
>
> III. Provides for the association's recovery of attorneys' fees and costs incurred *in enforcing RSA 356–B:15, I.*

N.H.H.R. Jour. 766 (1997) (emphasis added). As is evident from this history, the purpose of RSA 356–B:15, II is to allow the recovery of attorney's fees and costs associated with actions in which the association successfully enforces the lawful provisions of RSA chapter 356–B and all provisions of the condominium instruments. Thus, we hold that the defendants are not entitled to attorney's fees and costs in this case under RSA 356–B:15, II.

On cross-appeal, the plaintiff argues that the trial court erred by failing to grant him costs and attorney's fees. "A prevailing party may be awarded attorney's fees when that recovery is authorized by statute, an agreement between the parties, or an established judicial exception to the general rule that precludes recovery of such fees." *Town of Nottingham v. Newman,* 147 N.H. 131, 137, 785 A.2d 891 (2001) (quotation omitted). Although parties generally are responsible for their own attorney's fees,

> ****244** we have recognized exceptions where an individual is forced to seek judicial assistance to secure a clearly defined and established right if bad faith can be established; where litigation is instituted or unnecessarily prolonged through a party's oppressive, vexatious, arbitrary, capricious or bad faith conduct; as compensation for those who are forced to litigate in order to enjoy what a court has already decreed; and for those who are forced to litigate against an opponent whose position is patently unreasonable.

Business Publications, 140 N.H. at 147, 666 A.2d 932 (quotations omitted). The plaintiff argues that he is deserving of attorney's fees because the association, in enacting the parking rule and towing sanction, acted in bad faith and ***118** maintained a position that was patently unreasonable. As explained above, the trial court has authority to award fees as compensation for those who "are forced to litigate against an opponent whose position is patently unreasonable." *Daigle,* 137 N.H. at 574, 630 A.2d 776. The focus in such cases is on a litigant's unjustifiable belligerence or obstinacy where an action is commenced, prolonged, required or defended without any reasonable basis in the facts provable by evidence. *Id.*

After reviewing the record, we find that the trial court's discretion in denying the plaintiff attorney's fees is sustainable. We find no support in the record that the defendants either acted in bad faith by implementing the new parking rule and towing sanction or that its position in this case was patently unreasonable. While the defendants' actions may have been wrong, the record reflects that the actions were taken to remedy a legitimate parking concern. The issue was the subject at two annual meetings, with the owners of twenty-one of twenty-four units eventually voting to approve the final rule in 1999. Moreover, all unit owners, including the plaintiff, were notified on April 5, 2001, that vehicles in violation of the overnight parking rule would be towed that evening. Atkins also received approval from the board to tow offending vehicles prior to issuing notices to unit owners and tenants. While the trial court found that the plaintiff did not receive sufficient notice of the impending towing,

this does not mean that the defendants' overall position is patently unreasonable. The fact that its position was unsuccessful does not alone warrant an award of fees. *Id.* at 575, 630 A.2d 776.

The plaintiff next argues that even if the defendants did not act in bad faith, he is entitled to attorney's fees based upon equitable principles. Essentially, he contends that it is fundamentally unfair to allow an association to recover attorney's fees under RSA 356–B:15, II if it prevails, but deny the same benefit to the unit owner who successfully litigates his or her claim. We find this argument unpersuasive. First, while RSA 356–B:15, II may not be evenhanded in its award of attorney's fees, it is for the legislature, not this court, to determine whether such legislation should be amended, since we will not add words to a statute that the legislature did not see fit to include. *See Appeal of Pritchard,* 137 N.H. 291, 293, 627 A.2d 102 (1993). Second, because we conclude that the defendants did not act with bad faith or maintain a position that was patently unreasonable, the plaintiff is not entitled to attorney's fees.

The plaintiff may, however, be entitled to costs. As a general rule, costs are "allowable only when authorized by statute or court rule." ***119** *Claremont School Dist. v. Governor (Costs and Attorney's Fees),* 144 N.H. 590, 593, 761 A.2d 389 (1999) (quotation omitted). Superior Court Rule 87, entitled "Taxation of Costs ****245** in Civil Proceedings," provides that "[c]osts shall be allowed as of course to the prevailing party as provided by these rules, unless the Court otherwise directs." *Super. Ct. R.* 87(a). Superior Court Rule 87(b) delineates the procedures for claiming costs and objecting to claimed costs. Superior Court Rule 87(c) details which costs shall be allowed to the prevailing party and which costs may be allowed within the discretion of the trial court. From the record before us, it is unclear if the parties or the trial court followed the procedures of Rule 87, or if the trial court made its finding regarding plaintiff's request for costs pursuant to Rule 87. Consequently, we vacate the trial court's denial of the plaintiff's request for costs. On remand, the plaintiff's request for costs shall be considered within the framework of Superior Court Rule 87. *See Gammans v. FHP Constructors,* 146 N.H. 702, 704–05, 778 A.2d 419 (2001).

Finally, the plaintiff asserts that the trial court erred by ordering him to pay $4,350 in storage costs associated with the wrongful towing of his vehicles. The trial court reasoned that the plaintiff was responsible for these storage costs because, by failing to recover his vehicles the day after they were towed, he failed to mitigate his damages. This reasoning is flawed.

It is well established that a party seeking damages occasioned by the fault of another must take all reasonable steps to lessen his or her resultant loss. *See Flanagan v. Prudhomme,* 138 N.H. 561, 575, 644 A.2d 51 (1994). The defendants bear the burden of proving that the plaintiff failed to mitigate damages. *Id.* at 575–76, 644 A.2d 51. For the mitigation doctrine to apply, however, the party against whom the doctrine is asserted must be seeking damages. In this case, the plaintiff did not claim storage costs as damages. In addition to seeking recovery of towing fees, the plaintiff's lawsuit asked for the costs associated with the litigation, his attorney's fees, and the release of his cars "without the payment of any costs or fees." In other words, he merely sought the return of his wrongfully towed and stored vehicles. At no time did the plaintiff request, or present any evidence of, consequential damages associated with the wrongful towing and storage of his vehicles. Had he done so, we would find the trial court's mitigation analysis persuasive.

Because the vehicles were illegally towed and stored, the plaintiff had no express or implied contractual obligation to pay Superior Towing to store his wrongfully towed vehicles—that obligation belonged to the defendants. To rule, as the trial court implicitly did, that the plaintiff should have mitigated the *defendants'* obligation to pay Superior Towing ***120** turns the mitigation doctrine on its head. The defendants cannot use mitigation as a sword to protect themselves from obligations they incurred to Superior Towing through their unlawful conduct. The plaintiff did not seek the storage costs as damages when he initially filed his petition for declaratory judgment. Accordingly, the defendants cannot assert a failure to mitigate against damages the plaintiff did not originally claim and for which he is not legally liable.

That the parties stipulated, at the urging of the court, that the plaintiff would pay the storage costs pending the court's ultimate resolution of liability does not mandate a different result. Having found that the defendants acted illegally in taking the plaintiff's vehicles, the trial court should have ruled that they, not the plaintiff, were responsible for the $4,350 in storage costs. The plaintiff could not be held responsible to mitigate damages he was not legally obligated to pay.

****246** *Affirmed in part; reversed in part; vacated in part; remanded.*

BROCK, C.J., and NADEAU, J., concurred; DALIANIS and DUGGAN, JJ., concurred in part and dissented in part.

DALIANIS and DUGGAN, JJ., concurring in part and dissenting in part.

While we agree with the majority opinion in most respects, we respectfully dissent from the majority's conclusion that the plaintiff had no duty to mitigate damages in this case. "As a general rule, plaintiffs may not recover damages for harm that could have been avoided through reasonable efforts or expenditures." *Flanagan v. Prudhomme,* 138 N.H. 561, 575, 644 A.2d 51 (1994). "An exception may be allowed when the party causing harm acted intentionally or with reckless disregard for the plaintiff's interests." *Id.* "Even in that circumstance, however, the plaintiff cannot intentionally or heedlessly fail to protect his or her own interests." *Id.*

The majority reasons that the doctrine does not apply to the plaintiff because: (1) he did not seek storage fees as damages; and (2) the defendants, not he, were contractually liable for the fees. We believe that both of these premises are mistaken.

As a factual matter, we believe that the plaintiff sought the storage fees as damages. While he did not claim them in his initial petition for declaratory judgment, temporary and permanent injunction and damages, the record shows that he sought reimbursement of these fees later in the litigation. Although the majority may conclude that the plaintiff sought reimbursement of the fees later in the litigation because the trial court ordered him to pay them, this is pure speculation. Indeed, the plaintiff himself, at trial and on appeal, implicitly conceded that the storage fees were his to mitigate. In both forums, he argued only that requiring him to ***121** mitigate damages by removing his vehicles the day after they were towed was unreasonable.

No matter how it is framed, the issue before us is which party owes money to the towing company, an innocent third party, for storing the plaintiff's vehicles. From the towing company's perspective, it is logical that the plaintiff should pay the charges because the vehicles are his and, presumably, he is the only one who can reclaim them from storage. Thus, the towing and storage costs are technically the plaintiff's damages resulting from the defendants' illegal act, thereby obligating him to mitigate those damages, if possible. While it may seem unfair that the plaintiff should have to do anything as he was the one who suffered the wrong, this is no different from other tort or contract claims to which the mitigation doctrine applies. *See Restatement (Second) of Torts* § 918 (1979); *Lane v. Camire,* 126 N.H. 344, 344–45, 493 A.2d 1125 (1985) (affirming directed verdict for defendant on plaintiff's claim of damages totaling $80,000 from loss of or damage to stored property where plaintiff made no attempt to mitigate damages by retrieving property from storage, four days after its removal).

We believe that the trial court correctly found that the plaintiff failed to mitigate his damages by paying the $300 towing fee to retrieve his vehicles the day after they were towed. We agree with the trial court that requiring the plaintiff to pay the $300 towing fee to secure his vehicles was reasonable. *See Flanagan,* 138 N.H. at 575, 644 A.2d 51.

We disagree with the trial court that the plaintiff's failure to pay the $300 towing fee precluded him from recovering any portion of the storage fees, however. The record shows that had the plaintiff paid ****247** the $300 towing fee, he would have had to either park his retrieved vehicles in the common area of the complex or find an alternative place to store them. Either option would have required him to incur additional damages. As the evidence demonstrates, had he parked his retrieved vehicles in the common area of the complex, they would likely have been towed again. The notice the plaintiff received on April 5, 2001, from the board indicated that it intended to enforce the overnight parking ordinance "strictly" and would have any vehicle that did not comply with the ordinance towed.

The evidence further shows that had the plaintiff found an alternative place to store his vehicles, he would have had to pay storage costs. For instance, from May to December 2001, the plaintiff paid Rescue Leasing $200 per month to store vehicles to

avoid having more than four vehicles in the common area overnight. Therefore, we would hold that the trial court erroneously ruled that the plaintiff was not entitled to recover any portion of the costs for storing his wrongfully towed vehicles, and we would ***122** remand to the trial court to determine the portion of these costs he was entitled to recover.

All Citations

150 N.H. 111, 834 A.2d 238

61 S.Ct. 845
Supreme Court of the United States.

PHELPS DODGE CORPORATION
v.
NATIONAL LABOR RELATIONS BOARD.
NATIONAL LABOR RELATIONS BOARD
v.
PHELPS DODGE CORPORATION.

Nos. 387, 641.
|
Argued March 11, 1941.
|
Decided April 28, 1941.

Synopsis

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Petition by the Phelps Dodge Corporation to review an order of the National Labor Relations Board and request by the National Labor Relations Board for modification and enforcement of the order. To review a decision of the Circuit Court of Appeals, 113 F.2d 202, which modified the order of the Board, and, as modified, granted the request for an enforcement order, the Phelps Dodge Corporation and the National Labor Relations Board bring certiorari.

Case remanded to the National Labor Relations Board.

Mr. Justice MURPHY, Mr. Justice BLACK, Mr. Justice DOUGLAS, Mr. Justice STONE, and Mr. Chief Justice HUGHES dissenting in part.

Attorneys and Law Firms

***179** Mr. Denison Kitchel, of Phoenix, Ariz., for Phelps Dodge Corporation.

***181** Messrs. Thomas E. Harris, of Washington, D.C., and Robert H. Jackson, Atty. Gen., for National Labor Relations Board.

Opinion

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The dominating question which this litigation brings here for the first time is whether an employer subject to the National Labor Relations Act may refuse to hire employees solely because of their affiliations with a labor union. Subsidiary questions grow out of this central issue relating to the means open to the Board to 'effectuate the policies of this Act (chapter)', if it finds such discrimination in hiring an 'unfair labor practice'. Other questions touching the remedial powers of the Board are also involved. We granted a petition by the Phelps Dodge Corporation and a cross-petition by the Board, 312 U.S. 669, 61 S.Ct. 447, 85 L.Ed. 1112; 312 U.S. 669, 61 S.Ct. 450, 85 L.Ed. 1112, to review a decision by the Circuit Court of Appeals for the Second Circuit, 113 F.2d 202, which enforced the order of the Board, 19 N.L.R.B., p. 547, with modifications. The main issue is intrinsically important and has stirred a conflict of decisions. National Labor Relations Board v. Waumbec Mills, 1 Cir., 114 F.2d 226.

The source of the controversy was a strike, begun on June 10, 1935, by the International Union of Mine, Mill and Smelter Workers at Phelps Dodge's Copper Queen Mine, Bisbee, Arizona. Picketing of the mine continued until August 24, 1935, when the strike terminated. During the strike, the National Labor Relations Act came into force. Act of July 5, 1935, 49 Stat. 449, 29 U.S.C. s 151 et seq., 29 U.S.C.A. s 151 et seq. The basis of the Board's conclusion that the Corporation had committed unfair labor practices in violation of s 8(3) of the Act was a finding, not challenged here, that a number of men had been refused employment ***182** because of their affiliations with the Union. Of these men, two, Curtis and Daugherty, had ceased to be in the Corporation's employ before the strike but sought employment after its close. The others, thirty-eight in number, were strikers. To 'effectuate the policies' of the Act, s 10(c), the ****847** Board order the Corporation to offer Curtis and Daugherty jobs and to make them whole for the loss of pay resulting from the refusal to hire them, and it ordered thirty-seven of the strikers reinstated with back pay, and the other striker made whole for loss in wages up to the time he became unemployable. Save for a modification presently to be discussed, the Circuit Court of Appeals enforced the order affecting the strikers but struck down the provisions relating to Curtis and Daugherty.

First. The denial of jobs to men because of union affiliations is an old and familiar aspect of American industrial relations. Therefore, in determining whether such discrimination legally survives the National Labor Relations Act, the history which led to the Act and the aims which infuse it give direction to our inquiry. Congress explicitly disclosed its purposes in declaring the policy which underlies the Act. Its ultimate concern, as well as the source of its power, was 'to eliminate the causes of certain substantial obstructions to the free flow of commerce'. This vital national purpose was to be accomplished 'by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association'. s 1. Only thus could workers ensure themselves economic standards consonant with national well-being. Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise. 'The act', this Court has said, 'does not interfere with the normal exercise of the right of the employer to select ***183** its employees or to discharge them'. But 'under cover of that right', the employer may not 'intimidate or coerce its employees with respect to their self-organization and representation.' When 'employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge'. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45, 46, 57 S.Ct. 615, 628, 81 L.Ed. 893, 108 A.L.R. 1352. This is so because of the nature of modern industrialism. Labor unions were organized 'out of the necessities of the situation. * * * Union was essential to give laborers opportunity to deal on equality with their employer'. Such was the view, on behalf of the Court, of Chief Justice Taft, American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209, 42 S.Ct. 72, 78, 66 L.Ed. 189, 27 A.L.R. 360, after his unique practical experience with the causes of industrial unrest as co-chairman of the National War Labor Board. And so the present Act, codifying this long history, leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free.

It is no longer disputed that workers cannot be dismissed from employment because of their union affiliations. Is the national interest in industrial peace less affected by discrimination against union activity when men are hired? The contrary is overwhelmingly attested by the long history of industrial conflicts, the diagnosis of their causes by official investigations, the conviction of public men, industrialists and scholars. [1] Because of ****848** ***184** the Pullman strike, Congress in the Erdman Act of 1898 prohibited inroads upon the workingman's right of association by discriminatory practices at the point of hiring. [2] Kindred legislation has been put on the statute books of more than half the states. [3] And during the late war the National War Labor Board concluded that discrimination against union men at the time of hiring violated its declared policy that 'The right of workers to organize in trade-unions and to bargain collectively * * * ***185** shall not be denied, abridged, or interfered with by the employers in any manner whatsoever'. [4] Such a policy is an inevitable corollary of the principle of freedom of organization. Discrimination against union labor in the hiring of men is a dam to self organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace.

These are commonplaces in the history of American industrial relations. But precisely for that reason they must be kept in the forefront in ascertaining the meaning of a major enactment dealing with these relations. To be sure, in outlawing unfair labor practices, Congress did not leave the matter at large. The practices condemned 'are strictly limited to those enumerated in section 8', S.Rep. No. 573, 74th Cong., 1st Sess., p. 8. Section 8(3) is the foundation of the Board's determination that in refusing employment to the two men because of their union affiliations Phelps Dodge violated the Act. And so we turn to its provisions that 'It shall be an unfair labor practice for an employer * * * By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization'.

Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to determine meaning. Of compelling ***186** consideration is the fact that words acquire scope and function from the history of events which they summarize. We have seen the close link between a bar to employment because of union affiliation and the opportunities of labor organizations to exist and to prosper. Such an embargo against employment of union labor was notoriously one of the chief obstructions to collective bargaining through self-organization. Indisputably the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act. The prohibition against 'discrimination in regard to hire' must be ****849** applied as a means towards the accomplishment of the main object of the legislation. We are asked to read 'hire' as meaning the wages paid to an employee so as to make the statute merely forbid discrimination in one of the terms of men who have secured employment. So to read the statute would do violence to a spontaneous textual reading of s 8(3) in that 'hire' would serve no function because, in the sense which is urged upon us, it is included in the prohibition against 'discrimination in regard to * * * any term or condition of employment'. Contemporaneous legislative history, [5] and, above all, the background of industrial experience forbid such textual mutilation.

The natural construction which the text, the legislative setting and the function of the statute command, does not impose an obligation on the employer to favor union members in hiring employees. He is as free to hire as he is to ***187** discharge employees. The statute does not touch 'the normal exercise of the right of the employer to select its employees or to discharge them'. It is directed solely against the abuse of that right by interfering with the countervailing right of self-organization.

We have already recognized the power of Congress to deny an employer the freedom to discriminate in discharging. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352. So far as questions of constitutionality are concerned we need not enlarge on the statement of Judge Learned Hand in his opinion below (113 F.2d 207), that there is 'no greater limitation in denying him (the employer) the power to discriminate in hiring, than in discharging'. The course of decisions in this Court since Adair v. United States, 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436, 13 Ann.Cas. 764, and Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441, L.R.A.1915C, 960, have completely sapped those cases of their authority. Pennsylvania R. Co. v. United States Railroad Labor Board, 261 U.S. 72, 43 S.Ct. 278, 67 L.Ed. 536; Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 50 S.Ct 427, 74 L.Ed. 1034; Virginian R. Co. v. System Federation, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789; National Labor Relations Board v. Jones & Laughlin Steel Corp., supra.

Second. Since the refusal to hire Curtis and Daugherty solely because of their affiliation with the Union was an unfair labor practice under s 8(3), the remedial authority of the Board under s 10(c) became operative. Of course it could issue, as it did, an order 'to cease and desist from such unfair labor practice' in the future. Did Congress also empower the Board to order the employer to undo the wrong by offering the men discriminated against the opportunity for employment which should not have been denied them?

Reinstatement is the conventional correction for discriminatory discharges. Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other. The powers of the Board as well as the restrictions upon ***188** it must be drawn from s 10(c), which directs the Board 'to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act (chapter)'. It could not be seriously denied that to require discrimination in hiring or firing to be 'neutralized', National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U.S. 333, 348, 58 S.Ct. 904, 911, 82 L.Ed. 1381, by requiring the discrimination to cease not abstractly but in the concrete victimizing instances, is an 'affirmative

action' which 'will effectuate the policies of this **850 Act (chapter)'. Therefore, if s 10(c), had empowered the Board to 'take such affirmative action * * * as will effectuate the policies of this Act (chapter)', the right to restore to a man employment which was wrongfully denied him could hardly be doubted. Even without such a mandate from Congress this Court compelled reinstatement to enforce the legislative policy against discrimination represented by the Railway Labor Act, 45 U.S.C.A. s 151 et seq. Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034. [6] Attainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies. Compare Virginian R. Co. v. System Federation, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789. To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed.

But, we are told, this is precisely the differentiation Congress has made. It has done so, the argument runs, *189 by not directing the Board 'to take such affirmative action as will effectuate the policies of this Act', simpliciter, but, instead, by empowering the Board 'to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act'. To attribute such a function to the participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application. We find no justification whatever for attributing to Congress such a casuistic withdrawal of the authority which, but for the illustration, it clearly has given the Board. The word 'including' does not lend itself to such destructive significance. Helvering v. Morgan's, Inc., 293 U.S. 121, 125, 55 S.Ct. 60, 61, 79 L.Ed. 232, note.

Third. We agree with the court below that the record warrants the Board's finding that the strikers were denied reemployment because of their union activities. Having held that the Board can neutralize such discrimination in the case of men seeking new employment, the Board certainly had this power in regard to the strikers. And so we need not consider whether the order concerning the strikers should stand, as the court below held it should, even though that against Curtis and Daugherty would fall.

Fourth. There remain for consideration the limitations upon the Board's power to undo the effects of discrimination. Specifically, we have the question of the Board's power to order employment in cases where the men discriminated against had obtained 'substantially equivalent employment'. The Board as a matter of fact found that no such employment had been obtained, but alternatively concluded that, in any event, the men should be offered employment. The court below, on the other hand, in harmony with three other circuits, Mooresville Cotton Mills v. National Labor Relations Board, 4 Cir., 94 F.2d 61; *190 National Labor Relations Board v. Botany Worsted Mills, 3 Cir., 106 F.2d 263; National Labor Relations Board v. Carlisle Lumber Co., 9 Cir., 99 F.2d 533, ruled that employment need not be offered any worker who had obtained such employment, and since the record as to some of the strikers who had gone to work at the Shattuck Denn Company was indecisive on this issue, remanded the case to the Board for further findings. This aspect of the Board's authority depends on the relation of the general remedial powers conferred by s 10(c) to the provisions of s 2(3).

The specific provisions of the Act out of which the proper conclusion is to be drawn should be before us. Section 10(c), as we already know, authorizes the Board 'to take such affirmative action, including reinstatement **851 of employees with or without back pay, as will effectuate the policies of this Act (chapter)'. The relevant portions of Section 2(3) follows: 'The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment'.

Merely as a matter of textual reading these provisions in combination permit three possible constructions: (1) a curtailment of the powers of the Board of take affirmative action by reading into s 10(c) the restrictive phrase of s 2(3) regarding a worker 'who has not obtained any other regular and substantially equivalent employment'; (2) a completely distributive reading of s 10(c) and s 2(3), whereby the factor of 'regular and substantially equivalent employment' in no way limits the Board's usual power to require employment to be offered a worker who has lost employment because of discrimination; (3) an avoidance of this either-or reading *191 of the statute by pursuing the central clue to the Board's powers-effectuation of the policies of the Act-and in that light appraising the relevance of a worker's having obtained 'substantially equivalent employment'.

Denial of the Board's power to order opportunities of employment in this situation derives wholly from an infiltration of a portion of s 2(3) into s 10(c). The argument runs thus: s 10(c) specifically refers to 'reinstatement of employees'; the latter portion of s 2(3) refers to an 'employee' as a person 'who has not obtained any other regular and substantially equivalent employment'; therefore, there can be no reinstatement of an employee who has obtained such employment. The syllogism is perfect. But this is a bit of verbal logic from which the meaning of things has evaporated. In the first place, we have seen that the Board's power to order an opportunity for employment does not derive from the phrase 'including reinstatement of employees with or without back pay', and is not limited by it. Secondly, insofar as any argument is to be drawn from the reference to 'employees' in s 10(c), it must be noted that the reference is to 'employees', unqualified and undifferentiated. To circumscribe the general class, 'employees', we must find authority either in the policy of the Act or in some specific delimiting provision of it.

Not only is the Act devoid of a comprehensive definition of 'employee' restrictive of s 10(c) but the contrary is the fact. The problem of what workers were to be covered by legal remedies for assuring the right of self-organization was a familiar one when Congress formulated the Act. The policy which it expressed in defining 'employee' both affirmatively and negatively, as it did in s 2(3), had behind it important practical and judicial experience. 'The term 'employee',' the section reads, 'shall include any employee, and shall not ***192** be limited to the employees of a particular employer, unless the Act (chapter) explicitly states otherwise * * *.' This was not fortuitous phrasing. It had reference to the controversies engendered by constructions placed upon the Clayton Act and kindred state legislation in relation to the functions of workers' organizations and the desire not to repeat those controversies. Cf. New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 58 S.Ct. 703, 82 L.Ed. 1012. The broad definition of 'employee', 'unless the Act (chapter) explicitly states otherwise', as well as the definition of 'labor dispute' in s 2(9), expressed the conviction of Congress 'that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer'. H.R. Rep. No. 1147, 74th Cong., 1st Sess., p. 9; see, also, S.Rep. No. 573, 74th Cong., 1st Sess., pp. 6, 7.

The reference in s 2(3) to workers who have 'obtained regular and substantially equivalent employment' has a ro le consonant with some purposes of the Act but not one destructive of the broad definition of 'employee' with which s 2(3) begins. In determining whether an employer has refused to bargain collectively with the representatives of 'his employees' in violation of s 8(5) and s 9(a) it is of course essential to determine who constitute 'his employees'. One aspect of this is covered ****852** by s 9(b) which provides for determination of the appropriate bargaining unit. And once the unit is selected, the reference in s 2(3) to workers who have obtained equivalent employment comes into operation in determining who shall be treated as employees within the unit.

To deny the Board power to neutralize discrimination merely because workers have obtained compensatory employment would confine the 'policies of this Act' to the ***193** correction of private injuries. The Board was not devised for such a limited function. It is the agency of Congress for translating into concreteness the purpose of safeguarding and encouraging the right of self-organization. The Board, we have held very recently, does not exist for the 'adjudication of private rights'; it 'acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining'. National Licorice Co. v. National Labor Relations Board, 309 U.S. 350, 362, 60 S.Ct. 569, 576, 84 L.Ed. 799; and see Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 60 S.Ct. 561, 84 L.Ed. 738. To be sure, reinstatement is not needed to repair the economic loss of a worker who, after discrimination, has obtained an equally profitable job. But to limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization. That there are factors other than loss of wages to a particular worker to be considered is suggested even by a meager knowledge of industrial affairs. Thus, to give only one illustration, if men were discharged who were leading efforts at organization in a plant having a low wage scale, they would not unnaturally be compelled by their economic circumstances to seek and obtain employment elsewhere at equivalent wages. In such a situation, to deny the Board power to wipe out the prior discrimination by ordering the employment of such workers would sanction a most effective way of defeating the right of self-organization.

Therefore, the mere fact that the victim of discrimination has obtained equivalent employment does not itself preclude the Board from undoing the discrimination and requiring employment. But neither does this remedy automatically flow from the Act itself when discrimination ***194** has been found. A statute expressive of such large public policy as that on which the National Labor

Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. On the other hand, the power with which Congress invested the Board implies responsibility-the responsibility of exercising its judgment in employing the statutory powers.

The Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies. It entrusts to an expert agency the maintenance and promotion of industrial peace. According to the experience revealed by the Board's decisions, the effectuation of this important policy generally requires not only compensation for the loss of wages but also offers of employment to the victims of discrimination. Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination. But even where a worker has not secured equivalent employment, the Board, under particular circumstances, may refuse to order his employment ***195** because it would not effectuate the policies of the Act. It has, for example, declined to do so in the case of a worker who had been discharged for ****853** union activities and had sought re-employment after having offered his services as a labor spy. Matter of Thompson Cabinet Company, 11 N.L.R.B. 1106, 1116, 1117.

From the beginning the Board has recognized that a worker who has obtained equivalent employment is in a different position from one who has lost his job as well as his wages through an employer's unfair labor practice. In early decisions, the Board did not order reinstatement of workers who had secured such equivalent employment. See Matter of Rabhor Company, Inc., 1 N.L.R.B. 470, 481; Matter of Jeffery-De Witt Insulator Company, 1 N.L.R.B. 618, 628. It apparently focussed on the absence of loss of wages in determining the applicable remedy. But other factors may well enter into the appropriateness of ordering the offending employer to offer employment to one illegally denied it. Reinstatement may be the effective assurance of the right of self-organization. Again, without such a remedy industrial peace might be endangered because workers would be resentful of their inability to return to jobs to which they may have been attached and from which they were wrongfully discharged. On the other hand, it may be, as was urged on behalf of the Board in Mooresville Cotton Mills v. National Labor Relations Board, 4 Cir., 97 F.2d 959, 963, that, in making such an order for reinstatement the necessity for making room for the old employees by discharging new ones, as well as questions affecting the dislocation of the business, ought to be considered. All these and other factors outside our domain of experience may come into play. Their relevance is for the Board, not for us. In the exercise of its informed discretion the Board may find that effectuation of the Act's policies may or may not require reinstatement. We have no warrant for speculating on matters of fact the determination of ***196** which Congress has entrusted to the Board. All we are entitled to ask is that the statute speak through the Board where the statute does not speak for itself.

The only light we have on the Board's decision in this case is its statement that, if any of the workers discriminated against had obtained substantially equivalent employment, they should be offered employment 'for the reasons set forth in' Matter of Eagle-Picher Mining & Smelting Co., 16 N.L.R.B. 727, 833. But in that case the Board merely concluded that s 2(3) did not deny it the power to order reinstatement; it did not consider the appropriateness of its exercise. Thus the Board determined only the dry legal question of its power, which we sustain; it did not consider whether in employing that power the policies of the Act would be enforced. The court below found, and the Board has not challenged the finding, that the Board left the issue of equivalence of jobs at the Shattuck Denn Company in doubt, and remanded the order to the Board for further findings. Of course, if the Board finds that equivalent employment has not been obtained, it is within its province to require offers of re-employment in accordance with its general conclusion that a worker's loss in wages and in general working conditions must be made whole. Even if it should find that equivalent jobs were secured by the men who suffered from discrimination, it may order employment at Phelps Dodge if it finds that to do so would effectuate the policies of the Act. We believe that the procedure we have indicated will likewise effectuate the policies of the Act by making workable the system of restricted judicial review in relation to the wide discretionary authority which Congress has given the Board.

From the record of the present case we cannot really tell why the Board has ordered reinstatement of the strikers who obtained subsequent employment. The Board first found that the men had not obtained substantially ***197** equivalent employment within the meaning of s 2(3); later it concluded that even if they had obtained such employment it would order their reinstatement. It did so, however, as we have noted, merely because it asserted its legal power so to do. When the court below held that proof did not support the Board's finding concerning equivalence of employment at Shattuck Denn and remanded the case to the Board for additional evidence on that issue, the Board took this issue out of the case by expressly declining to ask for its review here.

The administrative process will best be vindicated by clarity in its exercise. Since ****854** Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders (s 10(e) and (f), it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board.

Fifth. As part of its remedial action against the unfair labor practices, the Board ordered that workers who had been denied employment be made whole for their loss of pay. In specific terms, the Board ordered payment to the men of a sum equal to what they normally would have earned from the date of the discrimination to the time of employment less their earnings during this period. The court below added a further deduction of amounts which the workers 'failed without excuse to earn', and the Board here challenges this modification.

Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. ***198** Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred. To this the Board counters that to apply this abstractly just doctrine of mitigation of damages to the situations before it, often involving substantial numbers of workmen, would put on the Board details too burdensome for effective administration. Simplicity of administration is thus the justification for deducting only actual earnings and for avoiding the domain of controversy as to wages that might have been earned.

But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness. Here again we must avoid the rigidities of an either-or-rule. The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations.[7] See (1939) ***199** 48 Yale L.J. 1265. ****855** The Board has a wide discretion to keep the present matter within reasonable bounds through flexible procedural devices. The Board will thus have it within its power to avoid delays and difficulties incident to passing on remote and speculative claims by employers, while at the same time it may give appropriate weight to a clearly ***200** unjustifiable refusal to take desirable new employment. By leaving such an adjustment to the administrative process we have in mind not so much the minimization of damages as the healthy policy of promoting production and employment. This consideration in no way weakens the enforcement of the policies of the Act by exerting coercion against men who have been unfairly denied employment to take employment elsewhere and later, because of their new employment, declaring them barred from returning to the jobs of their choice. This is so because we hold that the power of ordering offers of employment rests with the Board even as to workers who have obtained equivalent employment.

But though the employer should be allowed to go to proof on this issue, the Board's order should not have been modified by the court below. The matter should have been left to the Board for determination by it prior to formulating its order and should not be left for possible final settlement in contempt proceedings.

Sixth. Other minor objections to the Board's order were found without substance below. After careful consideration we agree with this disposition of these questions, and do not feel that further discussion is required.

The decree below should be modified in accordance with this opinion, remanding to the Board the two matters discussed under Fourth and Fifth herein, for the Board's determination of these issues. So ordered.

Remanded.

Mr. Justice ROBERTS took no part in the consideration or disposition of the case.

Mr. Justice MURPHY (dissenting in part).

While I fully approve the disposition of the first three issues in the opinion just announced, I cannot assent to the modification of that part of the Board's order ***201** which required reinstatement of certain employees, or to the limitation imposed on the Board's power to make back pay awards.

First. The Board is now directed to reconsider its order of reinstatement merely because, in the course of its recital, it stated that even if the employees in question had secured other substantially equivalent employment it would nevertheless order their reinstatement for the reasons set forth in Matter of Eagle-Picher Mining & Smelting Co., 16 N.L.R.B. 727.[1] There is neither ****856** claim nor evidence that reinstatement will not effectuate the policies of the Act. There is no suggestion that the order the Board issued was wrong or beyond its power. That order is challenged only because the statement and reference to the Eagle-Picher case are said to ***202** demonstrate that the Board ordered reinstatement mechanically due to a misconception of its functions under the statute, and that it did not consider whether reinstatement would effectuate the policies of the Act.

Even if it be assumed that this recital imports an inaccurate appraisal of the Board's power, an assumption which I believe is without justification, modification of its order is not a necessary consequence. The question before us is whether the order the Board issued was within its power. There is no occasion now to determine what disposition should be made of an order which was not an exercise of the Board's administrative discretion, or to infer that the Board must investigate the substantial equivalency of other employment before it may order reinstatement. Suffice to say, the Board found that certain employees had been the objects of unfair labor practices and that it would effectuate the policies of the Act to order their reinstatement. It expressly rested its order upon those findings.

The circumstances occasioning the latter finding are convincing evidence that the Board not only was required to but did exercise discretion in the formulation of its order of reinstatement. Throughout the hearing the employer's counsel sought to show by cross examining them that the complaining employees were not entitled to reinstatement. Shortly after that examination commenced, the trial examiner requested the Board's attorney to state the theory upon which he contended that those employees should be reinstated. Considerable testimony was offered to show the working conditions, hours, rates of pay, continuity of operation, etc., of mines in which the witnesses had secured other employment.

All this was in the record certified to the Board. Accompanying it was the contention of the employer that reinstatement should be denied for various reasons. The ***203** Board explicitly considered the contention, among others, that reinstatement would provoke further disputes and discord among the employees rather than promote labor peace. It also considered the contention that many of the employees had obtained other substantially equivalent employment, making both general and specific findings concerning it.[2] Finally, it concluded that the policies of the Act would be effectuated by ordering the employer to tender reinstatement to designated employees.

That its order of reinstatement was more than a perfunctory exercise of power is ****857** pointedly manifest from the Board's own statements. Answering the employer's contention that reinstatement might foster discord among the employees, the Board declared: 'We cannot but consider the difficulties of adjustment envisaged in the foregoing testimony (upon which the employer relied) as conjectural and insubstantial, especially in view of the lapse of time since the strike. However, even assuming that the asserted resentment of non-strikers towards strikers and picketers persists, the effectuation of the policies of the Act patently requires[3] the restoration of the strikers and picketers to their status quo before the discrimination against them.'

In discussing its proposed order, the Board said: 'Having found that the respondent has engaged in unfair labor practices, we will order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act[4] and to restore as nearly ***204** as possible the condition which existed prior to the commission of the unfair labor practices.'

And in its formal order, the Board stated: 'Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Phelps Dodge Corporation * * * shall: * * * 2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:[5] (a) Offer to the following persons immediate and full reinstatement to their former or substantially equivalent positions * * *; (b) Make whole (the following employees) for any loss of pay they may have suffered by reason of the respondent's discriminatory refusal to reinstate them * * * less the net earnings of each * * *.'

The italicized phrases in these quotations were not chance or formal recitals. They expressed in summary a considered exercise of administrative discretion. The Board carefully followed the precise procedure which this Court says it should have adopted. It found that the employees in question had been the victims of unfair labor practices. It also found that the policies of the Act would be effectuated by ordering their reinstatement. Since there was evidence to support these findings, it is difficult to understand what more the Board should or could have done.

But if we are now to consider in the abstract whether the Board properly opined that it might have the power to order reinstatement without regard to the substantial equivalency of other employment, I am nevertheless unable to approve the modification of its order, or to accept the inference that the Board must consider the substantial equivalency of other employment before it may order reinstatement. There is nothing in s 10(c) or in the Act ***205** as a whole which expressly or impliedly obligates the Board to consider the substantial equivalency of other employment or to make findings concerning it before it may order reinstatement. Indeed, such a rule narrows rather than broadens the administrative discretion which the Act confers on the Board.

Practical administrative experience may convince the Board that the self-interest of the employee is a far better gauge of the substantial equivalency of his other employment than any extended factual inquiry of its own. Conversely, the Board may conclude that the policies of the Act are best effectuated by an investigation in every case into the nature of his other employment. That choice of rules is an exercise of discretion which Congress has entrusted to the Board. Whichever rule the Board adopts, it does not follow that reinstatement becomes a remedy which is granted automatically upon a finding of unfair labor practices. If for other reasons the Board finds that the policies of the Act will not be effectuated, of course it not only could but should decline to order an offer of reinstatement. Compare Matter of Thompson Cabinet Co., 11 N.L.R.B. 1106.

Second. As already indicated, I am unable to accept the limitation now imposed on the Board's power to make back pay ****858** awards. Again the question is simply this: Was the back pay order within the power of the Board and supported by evidence? What order the Board should have made or what rule of law it should have followed if some of the employees had 'willfully incurred' losses are questions of importance which we should answer only when they are presented. They are not here now.

The Board expressly found that the policies of the Act would be effectuated by ordering the employer to make whole those employees who had been the victims of discriminatory practices. We are pointed to nothing which requires a different conclusion. We are not referred to ***206** any employee who 'willfully incurred' losses, or to any evidence in the record compelling us to hold that any of them did. At most the record shows only that some of the employees obtained other employment-which was not substantially equivalent-and then voluntarily relinquished it. For all we know, the Board could have determined that this evidence did not establish 'willfully incurred' losses. Plainly that was a permissible inference from the evidence, and this being so, there is no occasion now to decide what the Board should have done had it drawn some other inference.

But again, if we are now to rule on the abstract issue, I cannot agree that the power to make back pay awards must be fettered in the manner described in the opinion just announced. For if the Board has no choice but to accept the limitation now imposed, its administrative discretion is curbed by the very decision which purports to leave it untouched.

It must be conceded that nothing in the Act requires such a limitation in so many words. To be sure nothing in the Act requires a back pay award to be diminished by the amounts actually earned (compare Republic Steel Corp. v. N.L.R.B., 311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6), but that should admonish us to hesitate before we introduce yet another modification which Congress has not seen fit to enact, especially when the two situations differ in many respects. It is not our function to read the Act as we think it should have been written, or to supplant a rule adopted by the Board with one which we believe is better. Our only office is to determine whether the rule chosen, tested in the light of statutory standards, was within the permissible range of the Board's discretion.

The Board might properly conclude that the policies of the Act would best be effectuated by refusing to embark on the inquiry whether the employees had willfully incurred losses. Administrative difficulties engendered ***207** by a contrary rule would be infinite, particularly as the number of individuals involved in the dispute increased. Underlying the contrary rule is the supposition that the employee would purposely remain idle awaiting his back pay award. But that attributes to the employee an omniscience frequently not given to members of the legal profession. He must be able to determine that the employer actually has committed unfair labor practices; that the unfair labor practices affect commerce within the meaning of ss 2(6) and 2(7); that the Board will take favorable action and make a back pay award; that the Circuit Court of Appeals will enforce that order in full; and that this Court finally will affirm if the case comes here.

This is not all. He must have capital sufficient to provide for himself and for any dependents while he awaits the back pay award, even though that may not come until several years later. [6] He must risk union disfavor by dividing his efforts between a labor dispute and a search for a new job. He must realize, although his natural suppositions are otherwise, that he will probably not endanger seniority rights or chance of reinstatement by accepting other employment. He must be able to decide when he has made sufficient efforts to secure other employment notwithstanding that he is not told whether he can or must accept any job no matter where it is or what type of employment, wages, hours, or working conditions.

At his peril he must determine all these things because conventional common law concepts and doctrines of damages, applicable ****859** in suits to enforce purely private rights, are to be imported into the National Labor Relations Act.

***208** Having these considerations in mind, supplemented perhaps by others not available or suggested to us, the Board might well decide that the rule disapproved here would best effectuate the policies of the Act. I do not think we should substitute our judgment on this issue for that of the Board.

Accordingly, I would affirm the order of the Board in full.

Mr. Justice BLACK and Mr. Justice DOUGLAS concur in this opinion.
Mr. Justice STONE (dissenting in part).

With two rulings of the Court's opinion the CHIEF JUSTICE and I are unable to agree.

Congress has, we think, by the terms of the Act, excluded from the Board's power to reinstate wrongfully discharged employees, any authority to reinstate those who have ‘obtained any other regular and substantially equivalent employment’. And we are not persuaded that Congress, by granting to the Board, by s 10(c) of the Act, authority ‘to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act (chapter)’, has also authorized it to order the employer to hire applicants for work who have never been in his employ or to compel him to give them ‘back pay’ for any period whatever.

The authority of the Board to take affirmative action by way of reinstatement of employees is not to be read as conferring upon it power to take any measures, however drastic, which it conceives will effectuate the policies of the Act. We have held that the provision is remedial not punitive, Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 235, 236, 59 S.Ct. 206, 219, 83 L.Ed. 126; see, also, National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U.S. 261, 267, 268, 58 S.Ct. 571, 574, 575, 82 L.Ed. 831, 115 A.L.R. 307, ***209** and that its purpose is to effectuate the policies of the

Act by achieving the 'remedial objectives which the Act sets forth' and 'to restore and make whole employees who have been discharged in violation of the Act.' Republic Steel Corporation v. National Labor Relations Board, 311 U.S. 7, 12, 61 S.Ct. 77, 79, 80, 85 L.Ed. 6. The Act itself has emphasized this purpose when, in including in the category of 'employees' those who might not otherwise have been so included, ti provided, s 2(3), that the term 'employee' 'shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment'.

While the stated policy of a statute is an important factor in interpreting its command, we cannot ignore the words of the command in ascertaining its policy. In enlarging the category of 'employees' to include wrongfully discharged employees and at the same time excluding from it those who have obtained 'other regular and substantially equivalent employment', the Congress adopted a policy which it may well have thought would further the cause of industrial peace quite as much as the enforced employment of discharged employees where there was no occasion to compensate them for the loss of their employment. It is the policy of the Act and not the Board's policy which is to be effectuated, and in the face of so explicit a restriction of the definition of discharged employees to those who have not procured equivalent employment, we can only conclude that Congress has adopted the policy of restricting the authorized 'reinstatement of employees' to that class.

Even if we read the language of s 2(3) distributively, it seems difficult to say that the specially granted power to reinstate employees, extends to those who, by definition, are not employees, and this is the more so when the effect of the definition is consonant with what appears ***210** to be the declared purpose of the reinstatement provision. Nor can it fairly be said that the definition of employees is of significance only for the purpose of determining the appropriate bargaining agency of the employees. ****860** There is no evidence in the statute itself or to be derived from its legislative history that the definition was not to be applied in the one case quite as much as in the other. Certainly the fact of substantially equivalent employment has as much bearing upon making the discharged employee whole as upon his right to participate in the choice of a bargaining representative, and no ground has been advanced for saying that it applies to one and not the other.

As a majority of the Court is of opinion that the Board does possess the power to order reinstatement even though the discharged employees had obtained other equivalent employment, we agree that the case should now be remanded to the Board for a determination of the question whether reinstatement here would further the policies of the Act.

We agree that petitioner's refusal to hire two applicants for jobs, because of their union membership, was an unfair labor practice within the meaning of s 8(3) of the Act, even though they had never been employees of the petitioner, and that under s 9(c) the Board was authorized to order petitioner to cease and desist from the practice and to take appropriate proceedings under s 10 to enforce its order. But it is quite another matter to say that Congress has also authorized the Board to order the employer to hire applicants for work who have never been in his employ and to compel him to give them 'back pay.'

The Congressional debates and committee reports give no hint that in enacting the National Labor Relations Act Congress or any member of it thought it was giving the Board a remedial power which few courts had ever ***211** assumed to exercise or had been thought to possess and we are unable to say that the words of the statute go so far. The authority given to the Board by s 10(c) is, as we have said, not an unrestricted power, and the grant is not to be read as though the words 'including reinstatement of employees with or without back pay' were no part of the statute. None of the words of a statute are to be disregarded and it cannot be assumed that the introduction of the phrase in this one was without a purpose.

Undoubtedly the word 'including' may preface an illustrative example of a general power already granted, Helvering v. Morgan's, Inc., 293 U.S. 121, 125, 55 S.Ct. 60, 61, 79 L.Ed. 232, or it may serve to define that power or even enlarge it. Cf. Montello Salt Co. v. Utah, 221 U.S. 452, 462, 31 S.Ct. 706, 707, 55 L.Ed. 810, Ann.Cas.1912D, 633, et seq. Whether it is the one or another must be determined by the purpose of the Act, to be ascertained in the light of the context, the legislative history, and the subject matter to which the statute is to be applied.

In view of the traditional reluctance of courts to compel the performance of personal service contracts it seems at least doubtful whether an authority to the Board to take affirmative action could, without more, fairly be construed as permitting it to take a kind of affirmative action which had very generally been thought to be beyond the power of courts. This is the more so because

the Board's orders were by s 10(c) made subject to review and modification of the courts without any specified restriction upon the exercise of that authority.

It is true that in Texas & N.O.R. Co. v. Brotherhood of Railway & S. S. Clerks, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034, this Court had held that upon contempt proceedings for violation of a decree enjoining coercive measures by the employer against his union employees, a court could properly direct that the contempt be purged on condition that the employer restore the status quo. But Congress in enacting the National ***212** Labor Relations Act took a step further by providing that the Board could order reinstatement of employees even though there had been no violation of any previous order of the Board or of a court. It thus removed the doubt which would otherwise have arisen by defining and, as we think, enlarging the Board's authority to take affirmative action so as to include the power to order 'reinstatement' of employees. But an authority to order reinstatement is not an authority to compel the employer to instate as his employees those whom he has never employed, and an authority to award 'back pay' to reinstated employees, is not an authority to compel payment of wages to applicants for ****861** employment whom the employer was never bound to hire.

Authority for so unprecedented an exercise of power is not lightly to be inferred. In view of the use of the phrase 'including reinstatement of employees', as a definition and enlargement, as we think it is, of the authority of the Board to take affirmative action, we cannot infer from it a Congressional purpose to authorize the Board to order compulsory employment and wage payments not embraced in its terms.

All Citations

313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271, 8 L.R.R.M. (BNA) 439, 133 A.L.R. 1217, 4 Lab.Cas. P 51,120

Footnotes

1 United States Industrial Commission, Final Report (1902) p. 892; Anthracite Coal Strike Commission, Report to the President on the Coal Strike of May-October, 1902, S. Doc. No. 6, 58th Cong., Spec. Sess., p. 78; Laidler, Boycotts and the Labor Struggle (1913) p. 39 et seq.; United States Commission on Industrial Relations, Final Report (1916) S.Doc. No. 415, 64th Cong., 1st Sess., p. 118; Interchurch World Movement, Commission of Inquiry, Report on the Steel Strike of 1919 (1920) pp. 27, 209, 219; Bonnet, Employers' Associations in the United States (1922) pp. 80, 296, 550; Gulick, Labor Policy of the United States Steel Corporation (1924) pp. 125-127; Cummins, The Labor Problem in the United States (2d ed. 1935) p. 351; Bureau of Labor Investigation of Western Union and Postal Telegraph-Cable Companies (1909) S. Doc. No. 725, 60th Cong., 2d Sess., pp. 39-41; S.Rep. No. 46, Part 1, 75th Cong., 1st Sess., p. 8.

2 30 Stat. 424; see United States Strike Commission, Report on the Chicago Strike of June-July, 1894, S.Doc. No. 7, 53d Cong., 3d Sess.; Olney, Discrimination Against Union Labor-Legal? (1908) 42 Amer.L.Rev. 161.

3 Ala.Code Ann. (1928) § 3451; Ark., Acts of 1905, Act 214, p. 545; Cal.Labor Code (1937) ss 1050-1054, St.1937, pp. 211, 212; Colo.Stat.Ann. (1935) c. 97, ss 88, 89, 93; Conn.Gen.Stat. (1930) ss 6210, 6211; Fla.Comp.Gen.Laws Ann. (1927) s 6606; Ill.Rev.Stat. (1939), c. 38, s 139; Ind.Stat.Ann. (1933) ss 40-301, 40-302; Iowa Code (1939) ss 13253, 13254; Kan.Gen.Stat. (1935) ss 44-117, 44-118, 44-119; Me.Laws (1933) c. 108; Minn.Stat. (1927) s 10378; Miss.Code Ann. (1927) ss 9271-9274; Mo.Rev.Stat. (1939) s 4643, Mo.St.Ann. s 4255, p. 2969; Mont.Rev.Code Ann. (1935) ss 3093, 3094; Nev.Comp.Laws (1929) ss 10461-10463; N.M.Stat.Ann. (1929) ss 35-4613, 35-4614, 35-4615; New York Labor Law, Consol.Laws, c. 31, s 704(2), (9); N.C.Code Ann. (1939) ss 4477, 4478; N.D.Comp.Laws Ann. (1913) s 9446; Okl.St.Ann. tit. 40, ss 172, 173; Ore.Comp.Laws Ann. (1940) ss 102-806, 102-807; Vernon's P.C.Tex. (1936) arts. 1616-1618; Utah Rev.Stat.Ann. (1933) ss 49-5-1, 49-5-2; Va.Code (1936) s 1817; Wash.Rev.Stat.Ann. (1932) s 7599; Wis.Stat. (1939) s 343.682. See (1937) 37 Col.L.Rev. 816, 819; Witte, The Government in Labor Disputes (1932) pp. 213-218.

4 Awards of the National War Labor Board: Sloss-Sheffield Steel & Iron Co., Docket No. 12. See, also, Omaha & Council Bluffs Street Ry., Docket No. 154; Smith & Wesson Co., Docket No. 273. Cf. Gregg, The National War Labor Board (1919) 33 Harv.L.Rev. 39.

5 Rather clearly the House Committee which reported the bill viewed the word 'hire' as covering the situation before us. H.R.Rep. No. 1147, 74th Cong., 1st Sess., p. 19. The Chairman of the Senate Committee expressly stated during the debate that 'no employer may discriminate in hiring a man whether he belongs to a union or not, and without regard to what union he belongs (except where there is a valid closed shop agreement)'. 79 Cong.Rec. 7674. For further materials bearing on the legislative history see the able opinion of Judge Magruder in National Labor Relations Board v. Waumbec Mills, 1 Cir., 114 F.2d 226.

6 An injunction had been granted against interference with the workers' self-organization and reinstatement was ordered in contempt proceedings after employees had been discharged for union activities. Surely, a court of equity has no greater inherent authority in this regard than was conveyed to the Board by the broad grant of all such remedial powers as will, from case to case, translate into actuality the policies of the Act.

7 In accordance with the Board's general practice, deductions were made in the present case for amounts earned during the period of the back pay award. But the deductions have been limited to earnings during the hours when the worker would have been employed by the employer in question. Matter of Pusey, Maynes & Breish Co., 1 N.L.R.B. 482; Matter of National Motor Bearing Co., 5 N.L.R.B. 409. And only 'net earnings' are deducted, allowance being made for the expense of getting new employment which, but for the discrimination, would not have been necessary. Matter of Crossett Lumber Co., 8 N.L.R.B. 440.

Even though a strike is caused by an unfair labor practice the Board does not award back pay during the period of the strike. Matter of Sunshine Hosiery Mills, 1 N.L.R.B. 664. Employees who are discriminatorily discharged are treated as strikers if during a strike they refuse an unconditional offer of reinstatement. Matter of Harter Corp., 8 N.L.R.B. 391. Originally back pay was ordered from the date of application for reinstatement, Matter of Sunshine Hosiery Mills, supra, but later orders have started back pay five days after application. Matter of Tiny Town Togs, 7 N.L.R.B. 54.

If there is unjustified delay in filing charges before the Board, a deduction is made for the period of the delay. Matter of Inland Lime & Stone Co., 8 N.L.R.B. 944. Similar action is taken when a case is reopened after having been closed or withdrawn. Matter of C.G. Conn, Ltd., 10 N.L.R.B. 498. And if the trial examiner rules in favor of the employer and the Board reverses the ruling, no back pay is ordered for the period when the examiner's ruling stood unreversed. Matter of E.R. Haffelfinger Company, 1 N.L.R.B. 760; and see the order in the present case.

The Board has refused to order any back pay where discriminatory discharges were made with honest belief that they were required by an invalid closed-shop contract. Matter of McKesson & Robbins, Inc., 19 N.L.R.B. p. 778.

If the business conditions would have caused the plant to be closed or personnel to be reduced, back pay is awarded only for the period which the worker would have worked in the absence of discrimination. Matter of Ray Nichols, Inc., 15 N.L.R.B. 846. At times fluctuations in personnel so complicate the situation that a formula has to be devised for the distribution of a lump sum among the workers who have been discriminated against. Matter of Eagle-Picher Mining & Smelting Co., 16 N.L.R.B. 727.

The rate of pay used in computing awards is generally that at the time of discrimination, but adjustments may be made for subsequent changes. Matter of Lone Star Bag & Bagging Co., 8 N.L.R.B. 244; cf. Matter of Acme Air Appliance Co., 10 N.L.R.B. 1385. Normal earnings in tips or bonuses have been taken into account. Matter of Club Troika, 2 N.L.R.B. 90; Matter of Central Truck Lines, 3 N.L.R.B. 317.

1 The entire paragraph in which this statement appears reads: 'We have found that the respondent has discriminated in regard to hire and tenure of employment of certain individuals named above. In accordance with our usual practice we shall order the reinstatement or the reemployment of such individuals. The respondent contends that the Board lacks power to order the reinstatement of any striker who has obtained other regular and substantially equivalent employment. We have found that none of the strikers discriminated against has obtained other regular and substantially equivalent employment within the meaning of the Act. Nevertheless, even if any striker had obtained such employment, we would, for the reasons set forth in Matter of Eagle-Picher Mining & Smelting Co., still order reinstatement by the respondent.'

It is to be noted, of course, that in the Eagle-Picher case the Board's remarks were made in answer to the argument advanced here, that s 2(3) narrows the application of the term 'employees' in s 10(c).

It is worth noting, too, that in that case the Board stated: 'Further to effectuate the purposes and policies of the Act, and as a means of removing and avoiding the consequences of the respondents' unfair labor practices, we shall, in aid of our cease and desist order, order the respondents to take certain affirmative action, more particularly described below.' 16 N.L.R.B. 727, 831.

2 The Board found that none of the employees had obtained other substantially equivalent employment. The Circuit Court of Appeals reversed this finding in part. The reversal is not challenged here, but that is immaterial since the Court now decides that the Board has the power to order reinstatement even though the employees have found other substantially equivalent employment, provided that the policies of the Act will be effectuated.

3 Emphasis added.

4 Emphasis added.

5 Emphasis added.

6 The labor dispute which gave rise to this proceeding occurred in 1935.

812 F.3d 768
United States Court of Appeals,
Tenth Circuit.

NATIONAL LABOR RELATIONS BOARD, Petitioner,
v.
COMMUNITY HEALTH SERVICES, INC., d/b/a Mimbres Memorial Hospital and Nursing Home, Respondent.
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy,
Allied Industrial and Service Workers International Union, Intervenor.

No. 14–9614.
|
Jan. 20, 2016.

Synopsis

Background: Union filed complaint alleging that hospital's decision to reduce hours of its full-time, respiratory-department employees violated National Labor Relations Act. After Court of Appeals upheld National Labor Relations Board's order granting petition, 483 F.3d 683, the National Labor Relations Board, 361 NLRB No. 25 (N.L.R.B.), 200 L.R.R.M. (BNA) 1637, 2014-15 NLRB Dec. P 15856, 2014 WL 4202633, declined to deduct employees' interim earnings from other employment when calculating backpay. Board filed petition for enforcement.

The Court of Appeals, McHugh, Circuit Judge, held that Board adequately explained its decision.

Petition granted.

Gorsuch, Circuit Judge, dissented and filed opinion.

Attorneys and Law Firms

***770** Kaitlin Kaseta, Charleston, SC (Bryan T. Carmody, Carmody & Carmody LLP, Glastonbury, CT, on the briefs), for Respondent.

Milakshmi V. Rajapakse, Attorney (Robert J. Englehart, Supervisory Attorney, Richard F. Griffin, Jr., General Counsel, Jennifer Abruzzo, Deputy General Counsel, John H. Ferguson, Associate General Counsel, and Linda Dreeben, Deputy Associate General Counsel, with her on the briefs), National Labor Relations Board, Washington, D.C., for Petitioner.

Before TYMKOVICH, Chief Judge, GORSUCH, and McHUGH, Circuit Judges.

McHUGH, Circuit Judge.

I. INTRODUCTION

This challenge to the National Labor Relations Board's (the Board) petition for enforcement questions whether the Board may disregard interim earnings when calculating backpay awards for employees whose labor injury falls short of unlawful termination. Respondent Mimbres Memorial Hospital and Nursing Home (the Hospital) argues the Board failed to provide

adequate support for its decision to disregard interim earnings and therefore requests that we reverse the Board's backpay calculation. We defer to the Board's policy-based rationale in support of its remedial decision and affirm and enforce its order.

II. BACKGROUND

A. The Unfair Labor Practice Allegations and Proceedings

The complicated procedural history of this case stems from the Hospital's 1999 decision to reduce the hours of its full-time, respiratory-department employees. *Cmty. Health Servs., Inc.,* 342 N.L.R.B. 398, 400–02 (2004). As a result of this reduction in hours, the United Steelworkers of America, District 12, Subdistrict 2, AFL–CIO, a union representing respiratory-department employees under an exclusive collective bargaining agreement, filed charges against the Hospital on behalf of the impacted employees. Based on these allegations, the Board's General Counsel filed a complaint with the Board, asserting the Hospital had violated § 8(a)(1), (5) of the National Labor Relations Act (the Act or NLRA), 29 U.S.C. § 158. The Board ultimately agreed and ordered the Hospital to "make whole any employee for any loss of earnings and other benefits suffered as a result of its unlawful actions." *Cmty. Health Servs., Inc.,* 342 N.L.R.B. at 404. On petition for review in this court, we enforced the Board's order in whole. *NLRB v. Cmty. Health Servs., Inc.,* 483 F.3d 683 (10th Cir.2007).

B. The Compliance Proceedings

The case proceeded to the compliance phase, where an administrative law judge (ALJ) determined the Hospital owed thirteen current and former employees approximately $105,000 in backpay. *Cmty. Health Servs., Inc.,* No. 28–CA–16762, 2010 WL 3285384 (N.L.R.B. Div. of Judges July 28, 2010). In arriving at this amount, the ALJ rejected the Hospital's argument that any income an employee had earned from secondary employment during the backpay period—i.e., interim earnings—should be deducted from that employee's backpay calculation. *Id.*

***771** In reaching that conclusion, the ALJ applied a backpay formula the Board first pronounced in *Ogle Protection Service, Inc.,* 183 N.L.R.B. 682 (1970). In *Ogle,* the Board determined that interim earnings should not be deducted from backpay awards when the underlying violation is something other than wrongful termination of employment. 138 N.L.R.B. at 683. The Board in *Ogle* apparently presumed that employees who remain employed by the wrongdoing employer will not make interim earnings. *Id.* Here, the ALJ determined that application of the *Ogle* formula was appropriate because to hold otherwise "would have the effect of imposing a duty on employee victims of an unfair labor practice to moonlight in order to minimize the impact of the unlawful conduct for the benefit of the wrongdoer." *Cmty. Health Servs.,* 2010 WL 3285384.

The Hospital filed exceptions and supporting briefs to the Board, challenging the ALJ's decision. But in its Compliance Order, the Board affirmed the ALJ's rulings, findings, and conclusions. *Cmty. Health Servs., Inc.,* 356 N.L.R.B. No. 103, 2011 WL 702298, at *18 (Feb. 28, 2011).

The Hospital next petitioned the United States Court of Appeals for the District of Columbia [1] for review of the Board's Compliance Order. *Deming Hosp. Corp. v. NLRB,* 665 F.3d 196 (D.C.Cir.2011). The D.C. Circuit rejected the Board's interpretation of *Ogle* and the Board's concern that deducting interim earnings would impose a duty to moonlight on the victims of wrongful hour reductions. *Id.* at 200. The circuit court further explained that the Compliance Order conflated two distinct concepts: an employee's duty to mitigate (which is nonexistent when there is no cessation of employment) and the "rules governing when backpay should be reduced by interim earnings." *Id.*

The D.C. Circuit also noted that, since *Ogle,* the Board had been inconsistent in its approach to calculating backpay in the absence of a cessation of employment. *Id.* at 201. In light of this unclear precedent, the court ruled the Board had not adequately

explained its rationale for refusing to consider interim earnings here. It therefore remanded the Compliance Order "for a more thorough analysis of the issue." *Id.*

On remand, the Board issued a Supplemental Order reaffirming its original ruling. *Cmty. Health Servs., Inc.,* 361 N.L.R.B. No. 25, slip op. (Aug. 25, 2014). The Board identified the sole issue on remand as "whether the Board should deduct an employee's interim earnings from other employment when calculating backpay in cases where the employee suffers no cessation of employment with the wrongdoing respondent-employer and has no duty to mitigate by seeking interim employment" and concluded that "the deduction of interim earnings in this situation would not best effectuate statutory policy." *Id.* at *1. In reaffirming its prior conclusion, the Board provided five new policy justifications for its choice of remedy. Specifically, the Board explained that declining to deduct interim earnings where there is no cessation of employment (1) encourages employment and production, (2) is more consistent with the Board's policy of not deducting interim earnings obtained from work performed above and beyond an employee's duty to mitigate, (3) ***772** better accounts for the hardships that arise when taking on secondary employment, (4) discourages employers from engaging in dilatory conduct such as delaying compliance with an order to rescind unfair labor practices, and (5) prevents a windfall to the wrongdoing employer. *Id.* at *7–*9. Although the Board acknowledged the existence of some inconsistent precedent on this issue, it argued that the cases in which it "inadvertently" deducted interim earnings from backpay calculations "represent a tiny fraction of the hundreds of cases" in which the Board declined to deduct the interim earnings of employees whose injuries fall short of unlawful termination. *Id.* at *7. Based on these considerations, the Board reaffirmed its prior backpay order, concluding that "important statutory policies strongly support a practice of declining to deduct interim earnings when applying the *Ogle Protection Service* backpay formula for cases involving economic loss but no cessation of employment." *Id.* at *9.

Next, General Counsel filed an application in this court for enforcement of the Board's decision, and the Hospital responded in opposition. We exercise jurisdiction under 29 U.S.C. § 160(e), (f).

III. DISCUSSION

On this petition for enforcement, we are asked to determine whether the Board provided sufficient support for its decision to exclude interim earnings from backpay calculations when the employer has wrongfully reduced employee hours, but not terminated employment. The Hospital contends the Board's Supplemental Order is inadequate, arguing the Board's reliance on *Ogle Protection Service, Inc.,* 183 N.L.R.B. 682 (1970), is flawed and its policy justifications are unfounded. General Counsel contends the Board selected a reasonable remedy that is in line with the policies underlying the NLRA.

The Board's power to award backpay arises under § 10(c) of the NLRA, which permits the Board to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). Because a backpay award is "only an approximation," the Board "has considerable discretion in selecting a method reasonably designed to approximate the amount of pay" due to a wronged employee. *NLRB v. Velocity Express, Inc.,* 434 F.3d 1198, 1202 (10th Cir.2006) (internal quotation marks omitted). On review of a backpay order, our task is narrow. *See id.* ("The NLRB's power to order backpay is a broad, discretionary one, 'subject to limited judicial review.' " (quoting *Fibreboard Corp. v. N.L.R.B.,* 379 U.S. 203, 216, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964))). We will not disturb the Board's remedial decision unless it is "arbitrary or unreasonable," or, in other words, "is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the NLRA." *Id.* (brackets and internal quotation marks omitted).

It is through this deferential lens that we assess the Hospital's opposition to the Board's Supplemental Order. We first review the Board's interpretation of *Ogle* and its progeny, and we then turn to the Hospital's criticism of the Board's policy justifications.

A. The Supplemental Order Properly Interpreted Ogle

To properly assess the Board's application of its decision in *Ogle,* we begin by explaining the Board's historical approach to two underlying concepts: the duty to mitigate and the calculation of backpay awards.

***773 1. Board Precedent Regarding the Duty to Mitigate and Backpay Calculations**

First, we consider the duty to mitigate. Under longstanding Board and Supreme Court precedent, employees who believe they have been unlawfully terminated have a duty to seek out substitute employment while they await a Board decision on that issue. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 199–200, 61 S.Ct. 845, 85 L.Ed. 1271 (1941) (recognizing the Board's power to "give appropriate weight to a clearly unjustifiable refusal to take desirable new employment" when calculating backpay). Although the Board and courts frequently refer to this obligation as a duty to mitigate, the term is somewhat of a misnomer because the motivation for the obligation is more "the healthy policy of promoting production and employment" than "the minimization of damages." *Id.*

Where unlawfully terminated employees are under an obligation to seek work, the policy holds that backpay calculations logically should include a deduction for interim earnings. Without such a deduction, employees who are willing to bet on the outcome of the claims against the former employer or whose short-term financial needs are minimal would have little incentive to comply with their mitigation obligation. Instead, they could wait for a favorable decision from the Board to make them whole. The duty to seek interim employment gives these employees an incentive to remain productive during the period the claims against the former employer are unresolved.

Conversely, employees who are not unlawfully terminated but suffer other labor injuries—e.g., reduction in hours or wage—have no duty to seek secondary employment pending a decision on their unfair labor practices claim. *See 88 Transit Lines, Inc.,* 314 N.L.R.B. 324, 325 (1994) (explaining that employees who are not discharged are not required "as part of any mitigation obligation, to obtain additional replacement work from some other employer during the backpay period"). But some employees who are unable to wait for the outcome of an NLRB action will make up the lost hours with supplemental work despite the lack of any legal duty to do so. The fact that employees who have no duty to seek secondary employment may nevertheless do so raises the question of whether the Board should account for such interim earnings when calculating a backpay award.

The Board's two seminal backpay decisions—*F.W. Woolworth, Co.,* 90 N.L.R.B. 289 (1950), and *Ogle Protection Service, Inc.,* 183 N.L.R.B. 682 (1970)—do not squarely address this issue. In *Woolworth,* the Board sought a method of curtailing employers' incentive to delay reinstating wrongfully terminated employees. [2] Because the wrongfully terminated employee has a duty to seek interim employment, the longer the employer waited to reinstate the injured employee, "the greater would be the reduction in back-pay liability," and the greater the likelihood the employee would find higher paying employment and reject an offer of reinstatement. *Woolworth,* 90 N.L.R.B. at 292. *Woolworth* remedied this problem by ***774** instituting a quarterly backpay formula, through which the Board subtracts the employees' interim earnings in each quarter from what the employees would have earned from the wrongdoing employer during that same quarter, had they not been terminated. *Id.* at 292–93. Under this formula, interim earnings made in prior quarters have no impact on the backpay calculation for subsequent quarters, and vice versa. For example, if an employee suffered lost pay before securing interim employment, the employer could not avoid paying that amount based on the employee's success in finding a higher paying job in a subsequent quarter.

Ogle, on the other hand, involved employees who had not been unlawfully terminated, and thus had no duty to mitigate, but who were otherwise injured when their employer repudiated the terms of a collective bargaining agreement. 183 N.L.R.B. at 683. In *Ogle,* the Board concluded that *Woolworth's* "quarterly computation is unnecessary and unwarranted" in cases that do not "involve cessation of employment status or interim earnings that would in the course of time reduce backpay." *Id.* The Board therefore held that the *Woolworth* formula is not applicable where there is no cessation of employment, apparently failing to anticipate that employees who are not terminated may nonetheless be motivated to seek secondary employment if, for example, the employer's unfair labor practices result in reduced wages or hours. As a result, the Board did not clearly address in *Ogle* whether backpay awards should be reduced by interim earnings in cases where there is no cessation of employment and therefore no duty to mitigate. [3]

2. The Board's Assessment of *Ogle* in the Supplemental Order

With this backdrop in mind, we turn to the Board's discussion of *Ogle* in its Supplemental Order. The Board acknowledged that "the literal language of *Ogle Protection Service* does not compel the conclusion that interim earnings, where proven, should not be deducted in cases where there is no job loss." *Cmty. Health Servs., Inc.,* 361 N.L.R.B. No. 25, 2014 WL 4202633, at *7 (Aug. 25, 2014). The Board also recognized that in at least six of its prior decisions, it allowed for the deduction of interim earnings where there was no cessation of employment. *Id.* at *6 (citing to *Atlantis Health Care Group (P.R.) Inc.,* 356 N.L.R.B. No. 26, 2010 WL 4859824, at *1 (Nov. 15, 2010); *Willamette Industries,* 341 N.L.R.B. 560, 564–565 (2004); *Quality House of Graphics,* 336 N.L.R.B. 497, 516–517 (2001); *Ironton Publications,* 313 N.L.R.B. 1208, 1208 n. 4 (1994); *Consumers Asphalt Co.,* 295 N.L.R.B. 749, 752 (1989); and *Ford Bros.,* 284 N.L.R.B. 211, 211–12 (1987)). But the Board indicated ***775** that any reference to the deduction of interim earnings in these cases was "inadvertently mistaken, rather than intentional" and that they "represent a tiny fraction of the hundreds in which *Ogle Protection Service* has been correctly cited and applied." *Id.* at *7. Notwithstanding these cases to the contrary, the Board expressed that its general policy "has been to preclude the deduction of interim earnings from other jobs when applying *Ogle Protection Service* to remedy employees' monetary losses where there is no cessation of employment and attendant duty to mitigate damages." *Id.*

The Hospital takes issue with the Board's analysis of *Ogle* and its progeny, contending the Board was merely speculating when it described the decisions in which it deducted interim earnings, despite no cessation of employment, as "inadvertently mistaken." Instead, the Hospital argues these decisions demonstrate that, until now, the Board has never expressly declined to deduct interim earnings in cases that do not involve a cessation of employment, and at best, the Board has been inconsistent in its approach to backpay calculations in such cases.

We agree with the Hospital that the Board's precedent has been unclear. But in its Supplemental Order, the Board acknowledges this inconsistency and the need to adopt a consistent approach for future cases.[4] Thus, while the Board did not sufficiently address its inconsistent precedent in the original Compliance Order, we are satisfied that in its Supplemental Order, the Board adequately acknowledged its anomalous decisions and correctly characterized *Ogle* and its progeny. We therefore reject the Hospital's invitation to overturn the Supplemental Order based on the Board's *Ogle* analysis.

B. The Board's Policy Justifications Were Reasonable

We turn next to the Board's policy justifications for concluding that interim earnings should not be deducted from backpay awards when there has been no cessation of employment.[5] Because of the ***776** deference we owe to the Board's remedial decision, our limited role is to determine whether the Board's policy justifications represent "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the NLRA." *NLRB v. Velocity Express, Inc.,* 434 F.3d 1198, 1202 (10th Cir.2006) (brackets and internal quotation marks omitted). These policies include "the promotion of industrial peace, the prevention of unfair labor practices and protection for victimized employees." *Dayton Tire & Rubber Co. v. NLRB,* 591 F.2d 566, 570 (10th Cir.1979); *see also Nathanson v. NLRB,* 344 U.S. 25, 27, 73 S.Ct. 80, 97 L.Ed. 23 (1952) ("A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice."); 29 U.S.C. § 151 (declaring the policies of the NLRA). In its Supplemental Order, the Board described five policy reasons for its decision. We address each rationale in turn to determine whether it fairly aligns with the policies of the NLRA.

1. Encouraging Production and Employment

First, the Board reasoned that deducting interim earnings from backpay calculations in this context would discourage production and employment by making employees who seek additional work no better off than their counterparts who remain underemployed. *Cmty. Health Servs., Inc.,* 361 N.L.R.B. No. 25, at *7. As the Board noted, "by declining to deduct interim

earnings absent a cessation of employment, we offer employees a greater incentive to voluntarily seek interim employment, thereby affirmatively promoting production and employment." *Id.* (internal quotation marks omitted). In support of its reasoning, the Board turned to *Phelps Dodge Corp. v. NLRB,* in which the Supreme Court relied on the same underlying policy to justify the imposition of a duty to mitigate and the deduction of interim earnings, including amounts "which the workers 'failed without excuse to earn,' " where there has been an unlawful cessation of employment. 313 U.S. 177, 200, 61 S.Ct. 845, 85 L.Ed. 1271 (1941).

Although it is seemingly counterintuitive to use the rationale underlying the duty to mitigate in cases where no such duty exists, the goal of promoting production and employment is advanced in both instances. In wrongful termination cases, employees know their backpay award will be reduced by imputed interim earnings if they breach their duty to mitigate and are motivated to seek actual employment. Likewise, where the violation does not involve the cessation of employment, employees who have no duty to mitigate will be encouraged to seek supplemental employment if they can retain the benefit of that effort. Although the extent to which productivity is impacted is greater in a termination case, we are not convinced the Board's reliance on this rationale in a case where there is no cessation of employment constitutes a patent attempt to achieve ends contrary to those that can be said to fairly effectuate the goals of the NLRA. This is so even though promoting production is not one of the NLRA's express policy objectives because, ***777** as the Supreme Court stated in *Phelps Dodge Corp.,* "[t]his consideration in no way weakens the enforcement of the policies of the Act." *Id.*

2. Rewarding "Extra Effort"

Second, the Board posited that declining to deduct interim earnings in this situation is more consistent with its backpay calculations in other contexts. *Cmty. Health Servs., Inc.,* 361 N.L.R.B. No. 25, at *7. Specifically, the Board analogized employees who have a duty to mitigate but go above and beyond that duty with employees who have no mitigation duty but nonetheless obtain additional work. Under established Board policy, employees who perform more work than required are entitled to retain the benefit of such "extra effort." *See N.L.R.B. Casehandling Manual,* pt. 3, § 10554.3 (2014), https://www.nlrb.gov/reports-guidance/manuals, (explaining in the context of employees who have a duty to mitigate, "only interim earnings based on the same number of hours as would have been available at the gross employer should be offset against gross backpay"). Through this policy, the Board rewards the employees who do more than is required, rather than the wrongdoing employer. *See In re Center Constr. Co.,* 355 N.L.R.B. 1218, 1221 (2010) ("[I]f a diligent backpay claimant chooses to work additional overtime during interim employment it should operate to his advantage not that of the employer required to make him whole for a discriminatory discharge."); *EDP Med. Comput. Sys.,* 293 N.L.R.B. 857, 858 (1989) ("A backpay claimant who chooses to do the extra work and earn the added income made available on the interim job may not be penalized by having those extra earnings deducted from the gross backpay owed by the Respondent." (internal quotation marks omitted)). The Board reasoned it should similarly reward employees who take on additional work in the absence of any obligation to do so by not deducting the interim earnings that result from their extra efforts. *Id.*

The Hospital challenges this policy justification by advancing a different definition of "extra effort." In contrast with the Board's definition, which equates extra effort with any work employees perform beyond their legal obligation, the Hospital would define extra effort as work employees perform beyond what they would have done for the noncompliant employer. In this case, for example, the Hospital unlawfully reduced its respiratory-department employees' hours from forty hours to between thirty-six and thirty-two per week. Under the Hospital's definition, "extra effort" would mean any work employees completed for a secondary employer during the backpay period that exceeded the four to eight hours per week necessary to meet a forty-hour work week. [6]

Although the Board could have adopted either version, we will uphold its definition of extra effort for purposes of fashioning an appropriate remedy unless the choice conflicts with the policies of the NLRA. We see no such conflict here.

3. Accounting for Additional Hardships

Third, the Board justified its decision to ignore interim earnings through its observation that an employee who seeks work from a secondary employer generally suffers additional hardships, "such as resolving scheduling conflicts between the two jobs and

traveling to a second workplace." ***778** *Cmty. Health Servs.,* 361 N.L.R.B. No. 25 at *8. By allowing the employee to retain the benefit of undertaking these hardships, the Board's policy "acknowledge[s] these practical considerations and encourage[s] employees to address their financial situations contemporaneously." *Id.*

The Board could have conceivably accounted for some of these hardships by requiring the wrongdoing employer to reimburse its employees for the costs associated with working a second job, such as travel expenses. *See Crossett Lumber Co.,* 8 NLRB 440, 497 (1938) (discussing reimbursement for travel expenses in the context of wrongfully terminated employees who found new employment). But not all hardships an employee suffers when juggling two jobs are so tangible. For example, it would be impractical, if not impossible, to ascribe a dollar amount to the difficulties associated with resolving scheduling conflicts or accommodating the demands of two employers. *See Cmty. Health Servs., Inc.,* 361 NLRB No. 25 at *8 ("[T]he employee whose hours or wages have been unlawfully reduced continues to work for the wrongdoing employer and must adjust any outside employment hours to accommodate that employer's demands."). Therefore, by declining to deduct interim earnings from backpay awards in this context, the Board's decision better addresses these intangible hardships.

The Hospital does not disagree that employees who work a second job while remaining employed by the wrongdoing employer may face these added obstacles. But it nonetheless challenges the Board's reliance on this rationale because General Counsel put forth no evidence of any additional hardships the employees actually suffered in this case. But we are not convinced General Counsel was required to introduce such evidence or that the Board needed to make specific findings on this issue. The Board articulated a general policy that will apply beyond the facts of this case. In doing so, "the Board is not confined to the record of a particular proceeding." *NLRB v. Seven–Up Bottling Co. of Miami,* 344 U.S. 344, 349, 73 S.Ct. 287, 97 L.Ed. 377 (1953). Rather, the Board may rely on its "[c]umulative experience," which "begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated." *Id.*

When applying its general remedial policy to the facts of this case, the Board was required to consider any unique circumstances that would make the remedy's "application to [the] particular situation oppressive and therefore not calculated to effectuate a policy of the Act." *Id.* But the Hospital, not General Counsel, had the burden of putting forth evidence demonstrating the existence of unique circumstances. *See Velocity Express,* 434 F.3d at 1203 ("[Respondent] had the burden of proof on mitigation of its backpay obligation."); *Hansen Bros. Enters.,* 313 N.L.R.B. 599, 600 (1993) ("[T]he Respondent had the burden of showing why any modifications should be made to the amounts set forth in the backpay specification."). Although the Hospital contends it was deprived of an opportunity to discover any such evidence, its discovery requests in the NLRB proceedings pertained only to general evidence regarding the affected employees' interim earnings. The Hospital never requested discovery regarding whether any of those employees who made interim earnings suffered added hardships. Moreover, even if the Hospital had put forward evidence demonstrating the added-hardships rationale does not apply to all of the affected employees here, the other justifications for the Board's policy decision would remain intact. The Board therefore acted reasonably in fashioning a ***779** remedy based on its cumulative experience that employees who take on secondary employment will generally confront added hardships.

4. Preventing Dilatory Conduct

Fourth, the Board explained that the potential for an employer to engage in dilatory conduct similar to that which prompted it to adopt the *Woolworth* formula is present when an employer unlawfully reduces hours or wages. *Cmty. Health Servs.,* 361 N.L.R.B. No. 25 at *9. The Board reasoned that deducting interim earnings from a backpay calculation would create an incentive for wrongdoing employers to delay rescinding their unlawful conduct, "knowing that the longer an employee worked a second job, the greater could be the reduction in backpay owed." *Id.* The Board explained that declining to deduct interim earnings in this context has the same deterrent effect as the quarterly computation has in the context of an unlawful termination. *Id.*

The Hospital acknowledges the Board's remedy would have this deterrent effect, but argues the Board could simply have applied the *Woolworth* formula in this context to achieve the same result. But so long as the Board provides reasonable support for its selection of remedies and its rationale aligns with the policies of the Act, we will not second guess the Board's choice. *Velocity Express,* 434 F.3d at 1202. Thus, although the Board could have adopted the *Woolworth* formula in noncessation cases

and reduced back pay awards by quarter based on interim earnings, it was not required to do so. Where the remedy chosen by the Board does not conflict with the goals of the NLRA, we defer to the Board's decision.

5. Allocating Windfalls

Finally, the Board considered the benefits conferred on the employer and employee by the alternative approaches to calculating backpay under the present circumstances. On the one hand, the Board concluded that deducting interim earnings when an employee has no obligation to seek additional work "would represent an unwarranted windfall to the employer and discourage compliance with the law." *Cmty. Health Servs.,* 361 N.L.R.B. No. 25, at *8. Alternatively, however, if interim earnings are not deducted, the Board acknowledged that the employee may enjoy a windfall by collecting backpay and interim wages that total more than the employee would have earned in the absence of a violation. The Board ultimately concluded that where one of the parties will obtain a windfall, it is more appropriate for it to be the employee whose extra effort resulted in the interim earnings, rather than the recalcitrant employer. *See United Aircraft Corp.,* 204 N.L.R.B. 1068, 1073 (1989) (explaining that the Board is not concerned if an employee is made "more than 'whole' " as a result of "extra effort"). Thus, in selecting between two imperfect remedies, the Board expressed its preference for the one that requires the employer to pay the full amount of backpay, while permitting the employees to retain the benefit of their extra effort. The Board concluded this was preferable to adopting a remedy that would reduce the wrongdoing employer's liability while treating the industrious employees no better than those who do nothing.

And we cannot agree with the Hospital's argument that the potential for a windfall to the employee makes the Board's remedy punitive and therefore impermissible. *See Republic Steel Corp. v. NLRB,* 311 U.S. 7, 12, 61 S.Ct. 77, 85 L.Ed. 6 (1940) ("[T]he [Board's] power to command affirmative action is remedial, not punitive."). Under the Board's remedy, the Hospital is ***780** not required "to do more than make [the employees] whole for the loss of earnings suffered as a result of [their] unlawful [reduction in hours]." *United Aircraft Corp.,* 204 N.L.R.B. at 1073. The interim earnings are unrelated to the loss of earnings caused by the employer's wrongdoing. Instead, those earnings are the result of the employees' extra effort in working a second job, despite no obligation to do so. Thus it is the employees, not the employer, who make themselves more than whole. The Board's remedy does not require the Hospital to pay more than the extent of the injury it caused and does not impose a fine or other penal consequence. It is therefore not impermissibly punitive.

In summary, the Board provided reasonable justifications for declining to deduct interim earnings in cases where there is no cessation of employment. Although other reasonable remedies undoubtedly exist, so long as the Board's selected remedy is not contrary to the policies of the NLRA, we must defer to its remedial choice.

IV. CONCLUSION

For the reasons explained above, we affirm and enforce the Board's Supplemental Order.

GORSUCH, Circuit Judge, dissenting.

The NLRB's order effectively seeks to adopt a new rule governing the calculation of backpay in cases where a collective bargaining employer unlawfully reduces the hours of unionized employees. There can, of course, be no doubt that Congress has invested the Board with considerable power to shape labor relations in this country and to provide remedies like backpay in response to employer misconduct. But in our legal order federal agencies must take care to respect the boundaries of their congressional charters. They may not treat similarly situated classes of persons differently without a rational explanation. And they may not depart from their own existing rules and precedents without a persuasive explanation. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Respectfully, I believe the NLRB's new rule fails to abide each of these settled legal principles and, in that way, seeks to make new law unlawfully.

Since 1935 Congress has tasked the Board with the job of "eliminat[ing] the causes of certain substantial obstructions to the free flow of commerce" by promoting collective bargaining. 29 U.S.C. § 151. In aid of that expansive charge, Congress has endowed the Board with considerable remedial authority. If and when it should find that an employer subject to its jurisdiction has engaged in an unlawful labor practice, the Board may issue an order "requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies" of the Act. 29 U.S.C. § 160(c).

Over the last eighty years, the Board has developed a finely reticulated set of rules aimed at implementing these statutory directives. Of special relevance in this case about backpay, the Board has held that when an employer unlawfully fires an employee or reduces her hours the employer must pay all the wages the employee lost as a result. *N.L.R.B. Casehandling Manual,* pt. 3, § 10536.1. At the same time, this general rule sometimes yields to more specific ones in order to avoid over- or under-compensating the employee. So, for example, after an unlawful labor action an employee may find a new job or increase her hours at a pre-existing second job and in that way replace some or all of her lost wages. Allowing the employee ***781** in these circumstances to keep both her "interim earnings" and a full backpay award would mean she'd be paid twice for the same hours, leaving her better off than she would have been but-for the employer's misconduct. To avoid this sort of "windfall" the Board has, from its first order and still to this day, generally deducted interim earnings from its backpay awards. *In re Pa. Greyhound Lines, Inc.,* 1 N.L.R.B. 1 (1935); *N.L.R.B. Casehandling Manual,* pt. 3, § 10554. Indeed, if the employer can prove the employee could've found a second job after being unlawfully fired but unreasonably refused the work, the employee's intentionally forgone interim earnings may also be deducted from a backpay award. *N.L.R.B. Casehandling Manual,* pt. 3, § 10558.1. At the same time, though, if the employee incurs costs in finding or retaining a second job thanks to the employer's misconduct, those costs are fully compensable. *Id.* § 10555. And if in the second job the employee takes on "extra work"—working hours beyond those she would otherwise have spent with the wrongdoing employer—compensation for that extra work remains hers and isn't used to offset any backpay award. *Id.* § 10554.3. All of these additions and subtractions share the common aim of ensuring that a backpay award restores the employee to the same position she would've enjoyed but-for the employer's misconduct, without a windfall accruing to either employer or employee.

Now eighty years on, the Board seeks to carve out a class of cases from its tested and pretty ancient backpay procedures. When the employer unlawfully reduces the employee's hours to zero (termination cases), the Board says it will continue to employ its traditional backpay rules. But when the employer unlawfully reduces the employee's hours to anything short of zero (hours-reduction cases), the Board now says it will never, under any circumstances, deduct interim earnings from a backpay award. Thus treating cases that seem to differ mostly in degree as different in kind.

The hospital-employer in our case first challenged the Board's new carve-out rule for hours-reduction cases in the D.C. Circuit. There the Board tried to suggest that its new rule wasn't really anything new at all but compelled by an existing administrative decision, *Ogle Protection Service, Inc.,* 183 N.L.R.B. 682 (1970). The D.C. Circuit quickly exposed this claim as mistaken. Yes, the D.C. Circuit acknowledged, the Board in *Ogle* ordered backpay and authorized no deductions for interim earnings. But, the court observed, *Ogle* wasn't an hours-reduction case and the employees there had no interim earnings that could have been deducted from their backpay awards. Accordingly, the D.C. Circuit observed, *Ogle* just "does not address" hours-reduction cases where (as here) the employer does proffer evidence of interim employee earnings that might be deducted. *Deming Hosp. Corp. v. NLRB,* 665 F.3d 196, 200 (D.C.Cir.2011). In fact, the D.C. Circuit noted, in many past hours-reduction cases the Board *has* ordered the deduction of proven interim earnings. *See id.* at 201 (citing examples). And the Board's own casehandling manual states that interim earnings deductions are generally appropriate with only a few exceptions—and hours-reduction cases are nowhere among those exceptions. *See N.L.R.B. Casehandling Manual,* pt. 3, § 10554.

Forced to acknowledge that its carve-out rule represents a departure from preexisting practice, the Board offered an alternative rationale in its defense. Now the Board argued that, in response to unlawful reductions in their hours, employees should not face a duty to seek out secondary employment—to mitigate their losses ***782** —like employees in termination cases do. For its part the D.C. Circuit noted that employees in termination cases have a duty to mitigate their losses in the sense that, if they refuse to take new work, they will have their backpay award reduced by the amount of intentionally forgone income they

could've earned. And for purposes of the appeal, the D.C. Circuit and hospital-employer accepted that there's a sound reason to avoid imposing a parallel duty to mitigate on employees in hours-reduction cases—because in hours-reduction cases employees seeking secondary work will have to work around the demands of their still-existing primary employer and may not be able to secure a replacement job or as many hours in a replacement job as the employee might wish. At the same time, the court noted, this consideration speaks only to a need to waive any duty to seek secondary employment in hours-reduction cases—to eschew backpay deductions when employees *don't* have interim earnings. It does not provide a rational basis for distinguishing between termination and hours-reduction cases when employees are able to and do choose to find other work—when employers *do* have interim earnings during the backpay period. Given all this, the D.C. Circuit held that the Board's "explanation for its refusal to consider interim earnings is inadequate" and remanded the matter for reconsideration. *Deming Hosp. Corp.,* 665 F.3d at 201.

Now the Board has tried again, and the hospital-employer has petitioned for review again—this time to our court. In an apparent abundance of caution the Board has offered five new rationales to replace the two the D.C. Circuit found wanting. But though the Board's rationales may now be more prolific, I do not find them more persuasive for it.

1. "Promoting Production and Employment." First and primarily the Board argues that its new policy of refusing to deduct interim earnings in hours-reduction cases will allow employees who take on second jobs to keep both their interim earnings and backpay for the same hours they would have worked for their primary employer. Of course this means a whole class of employees (those in hours-reduction cases who seek and win second jobs) won't be restored to the same position they would've been in but-for the employer's misconduct, but will be made better off instead. The Board accepts that its new rule creates an employee "windfall" in just this way and seemingly at odds with its prior practice. Yet it defends this consequence not as a bug in the design of its new rule but as its whole point. Promising employees double payment for the same hours, the Board says, will offer them a "greater incentive to voluntarily seek interim employment" and in this way advance the policy of "promoting production and employment." *Cmty. Health Servs., Inc.,* 361 N.L.R.B. No.25, 2014 WL 4202633, at *7; *see* Maj. Op. at 776–77.

It seems to me that this line of argument fundamentally misconceives the Board's remedial charter. The Board's statutory charge isn't to promote full employment. *See* 29 U.S.C. § 151. It's not some sort of reincarnation of the Works Progress Administration. Instead, Congress invested the Board with the more prosaic—if still vital—job of providing "backpay" arising from "unfair labor practices." 29 U.S.C. § 160(c). And the Supreme Court has held that this statutory charter means exactly what it says—allowing the Board to restore the "actual losses" employees suffer—no more or less. *Phelps Dodge v. NLRB,* 313 U.S. 177, 197–98, 61 S.Ct. 845, 85 L.Ed. 1271 (1941). Yet, rather than seeking to restore the earnings employees would have enjoyed but-for the employer's misconduct, the Board's new rule candidly seeks to pursue ***783** a quite different and entirely extra-statutory objective—the promotion of "production and employment"—and to achieve that end it abandons any pretense of seeking to fulfill its duty of ensuring compensation for actual losses. The Supreme Court long ago rejected Board efforts to use its remedial backpay authority to pursue policy ends other than those specified by the NLRA. Back in the 1940s, and in words equally fitting here, the Court held that while the Board may freely pursue "remedial objectives which the Act sets forth," it is not licensed to pursue "a distinct and broader policy with respect to unemployment." *Republic Steel Corp. v. NLRB,* 311 U.S. 7, 12–13, 61 S.Ct. 77, 85 L.Ed. 6 (1940); *see also Phelps Dodge,* 313 U.S. at 197–98, 61 S.Ct. 845 (holding that the NLRA limits the Board's backpay authority to restoring "actual losses"). I do not see how we might come to a different conclusion today.

In saying this much, I hardly mean to suggest the Board lacks leeway in carrying out its remedial charge. Any attempt to recreate a lost but-for world and calculate losses due to a defendant's misconduct always requires a degree of estimation. As well, the Board must balance its two statutory remedial duties—providing backpay for actual losses and promoting reinstatement—and those two duties can sometimes conflict in interesting and difficult ways. *See, e.g., NLRB v. Seven–Up Bottling Co. of Miami,* 344 U.S. 344, 73 S.Ct. 287, 97 L.Ed. 377 (1953). Finally, the Supreme Court has observed that, when a backpay award *does* aim to restore "actual losses," its virtue may be additionally recommended by its capacity to promote employment because, in *that* scenario, the consideration of extra-statutory policies like that one "in no way weakens the enforcement of the policies of the Act." *Phelps Dodge,* 313 U.S. at 200, 61 S.Ct. 845. But none of these principles suffices to save the Board's order in this case. After all, no one before us disputes that the Board's existing and longstanding backpay rules allow it to supply employees with all of their actual losses in hours-reduction cases. The Board itself doesn't even attempt to suggest its new carve-out rule

offers a superior way to calculate actual losses. Instead, the Board seeks to justify its new carve-out backpay rule exclusively on the ground that it will better promote an entirely distinct policy that lies beyond its statutory authority to pursue.

Besides exceeding its congressional charter, the Board's rationale faces still two more problems. In the first place, a consistent (non-arbitrary) application of its new rule would seem to forbid the deduction of interim earnings for *both* termination and hours-reduction cases. After all, if double pay for the same hours will encourage you to take on outside work when the hours in your primary job are reduced to something short of zero, it will encourage you to take on outside work in cases when the hours in your primary job are reduced to zero too. Nothing about the Board's rationale is rationally confined to hours-reduction cases. Yet it's those cases alone the Board today wishes to carve out, without any explanation why. Beyond even that, by enforcing a backpay regime that is markedly more generous in hours-reduction cases than termination cases the Board's new rule would seem to create a paradoxical incentive for employers to engage in behavior even more inimical to the "promotion of production and employment"—pushing them in marginal cases toward termination and away from hours-reductions in order to reduce their backpay liability. Yet another problem the Board neither ponders nor offers reason for disregarding.

2. "Rewarding Extra Work." If its primary rationale should fail, the Board argues ***784** alternatively that its new carve-out rule is justified by the "well established" principle found in § 10554.3 of its casehandling manual providing that "[i]n cases where a discriminatee worked substantially more hours for an interim employer than he or she would have worked for the gross employer, only interim earnings based on the same number of hours as would have been available at the gross employer should be offset against gross backpay." *N.L.R.B. Casehandling Manual,* pt. 3, § 10554.3.

By its terms, however, this provision can be fairly described as no better than irrelevant. Section 10554.3 merely provides that an employee gets to keep interim earnings for hours above and beyond those she would have worked at the original employer—promising that the employee can always retain earnings from a true second or "moonlighting" job. And exactly none of this is at issue here. Everyone before us readily accepts that the sort of wages § 10554.3 discusses belong to the employee. The only question presented in this case is what to do about earnings for those hours the employee would have worked for the original employer but-for the unlawful action—and on that question § 10554.3 stands mute.

Maybe the Board's citation to § 10554.3 is meant less than literally, as a sort of analogy. Maybe the Board means to suggest that, just as an employee shouldn't have her backpay hours reduced for hours *beyond* those she could have worked at her employer, she shouldn't *ever* have her hours reduced for taking on a second job when she didn't have to. But if that's the analogy that's intended, it's one that fails. It fails because the point of § 10554.3 is to ensure that the employee is made whole for her actual losses by guaranteeing that her backpay award isn't reduced by earnings she would have enjoyed whether or not her primary employer engaged in an unfair labor practice. Section § 10554.3 removes from the backpay analysis interim earnings without a causal connection to the employer's misconduct. The rule is, in this way, all about helping create an accurate picture of what the world would've looked like but-for the employer's misconduct—and in that way all about helping fulfill the Board's statutory remedial charge. Meanwhile, the Board's new carve-out rule has again (and admittedly) nothing to do with its statutory charter. The Board doesn't attempt to defend its new rule on the ground that it helps create a more accurate picture of an employee's actual losses. Or that it has anything to do with that purpose at all. Instead, it argues the rule aims to reward "extra work" in the very particular (and very different) sense that, thanks to the windfall it offers employees, it encourages them to take on second jobs and, in that way, promotes "production and employment." So it is the Board's second, "extra work" rationale at best folds right back into its first and returns us to all the problems we've already encountered.

3. "Accounting for Additional Hardships." Here the Board points to the fact that, unlike employees in termination cases, employees who face reductions in their hours and proceed to seek a second job must "adjust any outside employment hours to accommodate [the primary] employer's demands." So, for example, they have to "resolv[e] scheduling conflicts between the two jobs and traveling to a second workplace." By refusing to deduct interim earnings, the Board seems to imply, its new rule will ensure that the particular costs borne by employees in hours-reduction cases are fully compensated.

The problem is the Board's existing rules already do this. Under its existing remedial regime, the Board is indubitably ***785** free to compensate an employee for *any* costs incurred in taking on or holding a second job thanks to the employer's unlawful actions —including costs associated with resolving scheduling conflicts or traveling between workplaces. *N.L.R.B. Casehandling Manual,* pt. 3, § 10555. Indeed, the Board's order identifies no class of costs its existing remedial rules fail to capture. And before departing from its existing rules the Board must offer some reason for doing so, some reason why its new rule might be rationally preferred to its existing authorities. It doesn't even try.

Perhaps the Board might respond by suggesting that some costs employees suffer are intangible and incalculable—and that its new carve-out rule does a better job of compensating for such costs. But it's far from clear the Board means to pursue such an argument. After all, the Board itself cites by way of support the entirely tangible and calculable costs associated with "traveling to a second workplace." And even if it were fair to read the Board as making a sort of "intangible cost" argument, it would still face its problems. For the Board nowhere explains how its statutory charge to order backpay entails with it the authority to afford tort-like remedies for psychic and other losses not associated with lost wages. And even on its own terms the Board's argument proves too much. While employees in hours-reduction cases may face unique costs in traveling between and juggling two jobs, it's surely not the case that they alone suffer intangible hardships: you might even expect the intangible human costs associated with wrongful terminations to be worse than those associated with wrongful hours-reductions. Yet the Board's new rule seeks to distinguish between the two types of cases when it comes to intangible hardships—and does so without offering an explanation why the one situation should receive solicitude the other does not.

4. "Preventing Dilatory Conduct." Here the Board points out that the duty to provide backpay sometimes can have unintended consequences on "the companion remedial requirement" of reinstatement—by giving employers an incentive to prolong their unlawful labor practices while an employee's interim earnings grow and the employer's corresponding backpay obligation diminishes. The Board suggests its new carve-out rule will help curb this incentive.

I don't see how. No one doubts that the Board must create remedial rules that balance between the statutorily authorized remedies of backpay and reinstatement. No one doubts either that pursuing one remedy without an eye on the other can create strange incentives like the one the Board has identified. But many decades ago the Board identified and devised a solution to the very problem it points to today. Before *In re F.W. Woolworth Co.,* 90 N.L.R.B. 289 (1950), the Board's blanket deduction of interim earnings almost perfectly achieved the policy of making employees whole when it came to backpay—they received no more and no less than they would have received at their original job. But employers would sometimes delay reinstatement to reduce their backpay obligations, a result inimical to the Board's second statutorily prescribed remedial objective and preventing "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Id.* at 292. The Board's solution, approved by the Supreme Court in *Seven–Up,* was a quarterly deduction formula that, while sometimes resulting in a less-than-perfect award of backpay, effectively eliminated the employer's incentive to drag out reinstatement and thus achieved a reasonable balance ***786** between the Board's two remedial charges. 344 U.S. at 345–48, 73 S.Ct. 287. In our case, the Board acknowledges that it faces the same problem it solved in *Woolworth.* And it doesn't disparage the *Woolworth* solution or even question that it adequately eliminates the unwanted employer incentive. In fact, it continues to apply the *Woolworth* solution to termination cases. And (again) I just don't see how the agency might be permitted to depart from a well-established policy or eschew an obvious alternative without offering some reasoned explanation consistent with its statutory charter.

5. "Allocating Windfalls." Finally, the Board contends that, if it deducts interim earnings, employers will receive a windfall. But if it refuses to deduct interim earnings, employees will receive a windfall. One side or the other will inevitably come out better than they would have but-for the unlawful labor practice, the Board says, so it should have the discretion to allocate the windfall as it wishes. And because the employee seeking additional work is promoting production and employment through her extra effort (back once more to that doubtful rationale), that's tie-breaker enough.

This is perhaps the Board's most curious argument yet. Over eight decades the Board has taken pains to develop a set of rules that prevents windfalls for either side. To prevent employee windfalls, the Board has long deducted interim earnings. And to

prevent employer windfalls, the Board's existing rules and precedents afford it the power to order the employer to (1) pay backpay without deduction if an employee chooses not to find a second job in hours-reduction cases, (2) pay any and all costs an employee incurs if she does take on a second job, and (3) ensure any backpay deductions for interim earnings are limited to the hours the employee would've worked for the wrongdoing employer. In this light, it's hard to see what windfall might fall into the employer's lap—or how, should the problem arise, the Board could not lawfully get at it. For again, the Board's existing remedial precedents and rules permit it to order compensation for *all* actual losses. Strangely, the Board ignores all this —all the careful handiwork of generations of Board members aimed at securing a tailored remedy approximating actual losses —nowhere explaining why those efforts fail only now and only in the context of hours-reduction cases.

In the end, it's difficult to come away from this case without wondering if the Board's actions stem from a frustration with the current statutory limits on its remedial powers—a frustration that it cannot pursue more tantalizing goals like punishing employers for unlawful actions or maximizing employment; that it is limited instead to the more workmanlike task of ensuring employees win backpay awards that approximate the actual losses they've suffered. A frustration that seems to parallel the frustration the Board experienced when it sought in *Republic Steel* and *Phelps Dodge* to issue similarly expansive extra-statutory remedies. But then as now frustration should not beget license. In our legal order the proper avenue for addressing any dissatisfaction with congressional limits on agency authority lies in new legislation, not administrative ipse dixit. I respectfully dissent.

All Citations

812 F.3d 768, 205 L.R.R.M. (BNA) 3245, 166 Lab.Cas. P 10,844

Footnotes

1 Under 29 U.S.C. § 160(f), a party "aggrieved by a final order of the Board" may obtain review of the order "in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia."

2 Before the Board decided *F.W. Woolworth, Co.,* 90 N.L.R.B. 289 (1950), it calculated backpay "by subtracting what an employee actually earned during the entire backpay period from what she would have earned during that period had the unlawful action not occurred." *Deming Hosp. Corp. v. NLRB,* 665 F.3d 196, 199 (D.C.Cir.2011); *see also Pennsylvania Greyhound Lines, Inc.,* 1 NLRB 1, 51 (1935) (calculating a backpay award by determining what the employee would have earned from the noncompliant employer during the backpay period, "less the amount which each [employee] earned subsequent to discharge").

3 In creating the exception to the *Woolworth* formula, the Board in *Ogle* explained that a quarterly computation is unnecessary for "a violation of the Act which does not involve cessation of employment status *or interim earnings that would in the course of time reduce backpay.*" *Ogle Prot. Serv., Inc.,* 183 N.L.R.B. 682, 683 (1970) (emphasis added). Thus, *Ogle* could be limited to cases where there is neither a cessation of employment nor interim earnings. Under this reading, when an employee makes interim earnings during the backpay period, the *Woolworth* formula would apply irrespective of whether there has been a cessation of employment. But the Hospital has not advanced this reading. Instead, the Hospital, the Board, and the D.C. Circuit all agree that *Ogle* does not clearly address the present issue. And even if it did, the Board is free to reconsider its position with the benefit of specific facts, so long as the new remedy aligns with the NLRA's underlying policies. *NLRB v. Curtin Matheson Scientific, Inc.,* 494 U.S. 775, 787, 110 S.Ct. 1542, 108 L.Ed.2d 801 (1990) ("[A] Board rule is entitled to deference even if it represents a departure from the Board's prior policy.").

4 Although inconsistent guidance from the Board could raise fair notice concerns, the Hospital has not made a fair notice argument in the proceedings before the Board, or in its appellate briefing. We therefore lack the power to consider this issue. 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc. v. NLRB,* 456 U.S. 645, 665, 102 S.Ct. 2071, 72 L.Ed.2d 398 (1982) (concluding that § 160(e) deprives appellate courts of jurisdiction to consider issues "not raised during the proceedings before the Board"); *see also Davis v. McCollum,* 798 F.3d 1317, 1320 (10th Cir.2015) ("[Appellant] waived any potential challenge to that conclusion by failing to address it in his opening brief on appeal.").

5 As to the breadth of the Board's Supplemental Order, we interpret it as declining to deduct any interim earnings, regardless of their source. Thus, interim earnings made from a new second job are treated the same as those made from increased hours at a preexisting second job. We acknowledge the NLRB's Casehandling Manual lends some support for distinguishing between interim earnings an

employee makes by increasing hours at a preexisting second job from those made at a new second job. *See N.L.R.B. Casehandling Manual,* pt. 3, § 10554.4 (2014), https://www.nlrb.gov/reports-guidance/manuals. Specifically, section 10554.4 indicates that if an employee "held a second job prior to the unlawful action and then increased the hours of employment at that job during the backpay period, earnings derived from the increase in hours are deductible interim earnings." But we interpret the Board's decision here as limiting the applicability of section 10554.4 and all other rules regulating interim-earnings calculations to cases involving a cessation of employment. The Casehandling Manual itself has signaled as much, noting in its overview of the Interim Earnings section that "In *Community Health Services, Inc., d/b/a Mimbres Memorial Hospital,* 361 NLRB No. 25 (2014), the Board held that it would 'declin[e] to deduct interim earnings when applying the *Ogle Protection Service* backpay formula for cases involving economic loss but no cessation of employment.' " *Id.* § 10550.1 (alterations in original) (footnote omitted). Therefore, while section 10554.4 remains in force for all cessation cases, the Board has clarified that it is inapplicable in cases like this one because interim earnings from any source are no longer relevant.

6 The Hospital would exclude earnings made from secondary work the employee held prior to the Hospital's unlawful action.

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616 F.Supp.2d 1055
United States District Court, D. Oregon.

Nancy DELIMA, Plaintiff,
v.
HOME DEPOT U.S.A., INC., Defendant.

Civil No. 06–328–JE.
|
April 23, 2008.

Synopsis

Background: Former employee brought gender discrimination action against home improvement retailer after her employment was terminated. Both parties moved to strike and for summary judgment.

Holdings: The District Court, Haggerty, Chief Judge, adopted the opinion of Jelderks, United States Magistrate Judge, which held that:

fact issue existed as to whether disparity in pay between department heads constituted discrimination under the Equal Pay Act (EPA);

fact issue existed as to whether retailer discriminated in favor of male employees during Title VII's limitations period;

fact issue existed as to whether retailer violated Oregon wage-discrimination statutes;

fact issues existed on former employee's unlawful discharge claims under Title VII and Oregon law;

former employee failed to establish retailer's failure to promote her violated Title VII and Oregon law;

night operations manager's conduct was not sufficiently severe or pervasive to create a hostile work environment under Title VII or Oregon law; and

former employee failed to establish that retailer retaliated against her in response to her opposition to discrimination in violation of Title VII and Oregon law.

Motions granted in part and denied in part.

Attorneys and Law Firms

***1064** Craig A. Crispin, Patty T. Rissberger, Portland, OR, for Plaintiff.

Paul M. Ostroff, Leah C. Lively, Eric D. Wilson, Lane Powell PC, Portland, OR, D. Michael Reilly, Lane Powell PC, Seattle, WA, for Defendant.

ORDER

HAGGERTY, Chief Judge.

Magistrate Judge Jelderks issued a Findings and Recommendation (F & R) [111] in this action, recommending that defendant's motion for summary judgment [52] should be GRANTED in part and DENIED in part, GRANTING plaintiff's motion to strike [72] and GRANTING in part and DENYING in part defendant's motions to strike [88, 104]. On March 31, 2008, the matter was referred to this court. When a party objects to any portion of a Findings and Recommendation, the district court must conduct a *de novo* review of that Findings and Recommendation. 28 U.S.C. § 636(b)(1)(B); *McDonnell Douglas Corp. v. Commodore Bus. Mach. Inc.,* 656 F.2d 1309, 1313 (9th Cir.1981).

The Findings and Recommendation provided a thorough analysis of the facts. This factual analysis is not objected to by petitioner, and need not be repeated here.

Defendant makes two objections to the F & R. First, defendant argues that plaintiff's wage claim pursuant to O.R.S. § 652.220 is time-barred. Second, defendant ***1065** argues that plaintiff's Title VII wage claim is time-barred.

In finding that plaintiff's state wage claim pursuant to O.R.S. § 652.220 was not time-barred, the F & R concluded that the statute of limitations under O.R.S. § 659A was applicable, and therefore plaintiff could recover under Oregon statutes for any unlawful discrimination on her compensation after December 10, 2003 (one year prior to the filing of her BOLI complaint). Defendant objects, and argues that O.R.S. § 652.230 contains the relevant statute of limitations. O.R.S. § 652.230 provides:

> (1) Any employee whose compensation is at a rate that is in violation of ORS 652.220 shall have a right of action against the employer for the recovery of: (a) The amount of unpaid wages to which the employee is entitled for the one year period preceding the commencement of the action; and [liquidated damages and attorney's fees].

O.R.S. § 652.230. Instead of creating a separate statute of limitations for claims brought pursuant to O.R.S. § 652.220, however, O.R.S. § 652.230 merely places a limitation on the period for which damages may be recovered. This court adopts the conclusion of the F & R and finds that plaintiff's claim under O.R.S. § 652.220 is not time-barred.

Defendant argues that plaintiff's Title VII wage claim is barred under *Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007). On this issue, the F & R found that:

> though the applicable statute of limitations precludes plaintiff's recovery under Title VII for any pay decisions implemented before February 13, 2004, [defendant's] motion for summary judgment on plaintiff's Title VII pay claim should be denied because material issues of fact exist as to whether pay raises [defendant] implemented for any similarly situated male employees after that date reflected discrimination in favor of that male employee.

F & R p. 46. Defendant asserts that the F & R erred by holding that pay raises awarded to other employers restarted the 300–day statute of limitations on her Title VII wage claim. This court agrees with the F & R's conclusion that "there is nothing in the

Ledbetter decision that precludes the statute of limitations from starting to run again if the employer subsequently discriminates, on the basis of gender, in establishing or raising the pay of another employee." F & R p. 46.

The court has given the file of this case a *de novo* review, and has also carefully evaluated the Findings and Recommendation, the objections, and the entire Record. The Judge's reasoning and recommendations are sound, correct, and entitled to adoption.

CONCLUSION

This court adopts the F & R[111]. Accordingly, defendant's motion for summary judgment [52] is GRANTED in part, and DENIED in part, as set forth in the F & R.

IT IS SO ORDERED.

FINDINGS AND RECOMMENDATION

JELDERKS, United States Magistrate Judge:

Plaintiff Nancy Delima brings this employment related action against defendant Home Depot U.S.A., Inc., dba the Home Depot (Home Depot). Defendant Home Depot moves for summary judgment, and both parties move to strike certain material related to that motion. Defendant's motion for summary judgment should be granted in part and denied in part as set out below. Plaintiff's motion to strike is granted, and defendant's motion to strike ***1066** is granted in part and denied in part as discussed below.

FACTUAL BACKGROUND

On August 25, 2001, defendant Home Depot hired plaintiff Delima to work as a night freight associate at its store in Troutdale, Oregon. In that position, plaintiff was paid $10.00 per hour and worked on a team that received freight, stocked shelves, and prepared the store to do business on the following day.

During her first week on the job, plaintiff received a "new employee" orientation package which included defendant Home Depot's policy prohibiting harassment and discrimination, and instructions to report inappropriate conduct. Plaintiff also received training on Home Depot's safety policies, and was told that she would be warned or terminated if she violated those policies. The policies included a "banner barricade" policy requiring employees to use barricades to block customers or employees from entering aisles where pallets of merchandise are being placed overhead, and a policy prohibiting the use of a "rabbit button" that increases the speed of certain equipment.

Home Depot's "Code of Conduct" sets out guidelines for disciplining employees for safety violations, and states that managers who fail to enforce its provisions may be terminated. Plaintiff knew that supervisors could be held responsible for safety violations committed by associates.

Rick Baird worked as the Troutdale Home Depot Human Resources Manager (HR Manager) from August, 2002, until April, 2004. In that position, Baird was responsible for setting the pay rate for new employees at the Troutdale store. Pay rates were set within ranges for various positions. According to his deposition testimony, in setting an employee's pay, Baird considered the new employee's existing skills, training, and experience, prior pay history, the pay of existing employees who held the same position, the rate of pay requested by the new employee, and the urgency of filling the position.

In January, 2002, Home Depot adopted written Pay Administration Guidelines concerning wage policies and practices. Home Depot determines pay increases based upon written performance reviews prepared by an employee's supervisor. The reviews

include narrative evaluations and rate "overall performance" on a scale ranging from "outstanding" to "improvement required"; rate "leadership" from "exemplary" to "deficient"; and rate "potential" from "high" to "placement issue." Employees receive two written performance evaluations a year, and are considered for pay raises every February, based upon those reviews.

When Home Depot employees transfer from one store to another in Oregon, they are generally paid at the same rate as they earned at the store from which they transferred.

When a Home Depot employee is promoted, the new wage rate is based upon the employee's current pay, job experience, skill and knowledge, and documented performance. Pay increases for promotions generally range from 6% to 12%. [1]

Before she began working for Home Depot, plaintiff worked for Hollywood Video from 1990 until 1994. She earned $9.23 per hour in that position. She next worked for Target as a stocker for 13 months beginning in August, 1995. Plaintiff earned $6.75 per hour in that position. After that, plaintiff did not work outside ***1067** the home until she was hired by Home Depot in August, 2001.

When she filled out an application to work for Home Depot, plaintiff did not indicate what rate of pay she desired, because she intended to negotiate her starting wage. Plaintiff was told that the night freight position she accepted would require her to operate "heavy" equipment [2], and that the starting rate of pay would be around $10 per hour. Plaintiff had not operated heavy equipment before, and was trained and licensed to operate this equipment within the first week of her employment.

Plaintiff received a generally positive performance review on October 5, 2002, and received a $.65 per hour raise two days later. According to her affidavit submitted in support of her opposition to the motion for summary judgment, plaintiff was satisfied with that raise because Home Depot managers misrepresented that the greatest raise for any Home Depot associate was $.75 per hour.

Home Depot hired Ross Sears, a male employee, within a few days of hiring plaintiff. Both plaintiff and Sears were paid $10.00 per hour initially. In October, 2002, when plaintiff's pay was increased to $10.65 per hour, Sears' pay was increased to $11.50 per hour.

On November 19, 2002, Baird promoted plaintiff to the night freight team supervisor position and increased plaintiff's pay to $12.00 per hour. This amounted to a 12.67% raise. Plaintiff's supervisor recommended the promotion.

In her position as night freight supervisor, plaintiff was responsible for scheduling associates, drafting performance summaries, disciplining associates who violated safety policies, scheduling freight deliveries and signing for goods, ensuring that freight was unloaded and that overstocked merchandise was stored overhead, and for having the store clean by the time it opened.

On February 3, 2003, plaintiff's pay was increased from $12.00 per hour to $12.75 per hour. At the time of the raise, plaintiff received a performance review that rated her overall as a "performer," rated her leadership as "acceptable," and assessed her potential at the "grow in position" level. Plaintiff complained about the raise to Baird and Patrick Patterson, the assistant store manager. Patterson told her that it was the best he could do at the time.

Ken Meno was hired as the night operations manager at Home Depot's Troudale store in June, 2003. Plaintiff has testified that she complained to Meno about her raise, and that she told Meno that she was given an insufficient raise because of her gender. Meno was replaced by Mark Yamashita as the night operations manager in January, 2004.

In a performance review dated July 31, 2003, Meno assigned plaintiff an overall performance rating of "performer," rated plaintiff's leadership as "acceptable," and rated her potential as "grow in position." Meno had initially rated plaintiff's overall performance and leadership higher, and revised the marks downward based upon the advice of Baird and Patterson.

In early February, 2004, Meno was reassigned to a merchandising Assistant Store Manager position. In a performance evaluation dated February 2, 2004, Meno assigned plaintiff the same performance ratings he had assessed in plaintiff's earlier evaluation. According to Meno's declaration submitted in support of plaintiff's opposition to the motion for summary ***1068** judgment, while Meno was an assistant manager, the store manager required that he "downgrade [plaintiff's] performance reviews two levels from Outstanding to Performer." Meno adds that he has no doubt "that these performance reviews were downgraded because of [plaintiff's] gender," and that he "was never required to downgrade any other male department head evaluations."

At the same time she received the February, 2004 performance evaluation, plaintiff received a 13% pay increase, which raised her pay from $12.75 per hour to $14.40 per hour. Baird testified that this raise was unusually high, and that plaintiff had been "lower in the pay band" of similar managers before the raise.

During the time in which plaintiff worked as a freight team department supervisor, 25 other employees at the Troutdale Home Depot worked at times as supervisors in the various Home Depot departments. Home Depot asserts that, including plaintiff, six of these supervisors were female, and that three of the female supervisors earned more than plaintiff. Home Depot asserts that the other two females, who earned less than plaintiff, became supervisors nearly two years after plaintiff was promoted. Plaintiff disputes this assertion, noting that, according to documentation Home Depot submitted to the Oregon Bureau of Labor and Industries (BOLI), the Troutdale Home Depot employed only two other female supervisors while plaintiff worked for Home Depot as a supervisor. Plaintiff adds that both of these females were paid more than she was because they transferred to the Troudale store from other stores at a higher rate of pay.

Some male supervisors were paid more than plaintiff, and some were paid less. According to paragraph 10 of the declaration of Alisa Grandy, Regional Human Resources Manager for Home Depot's Pacific Northwest Region, other department supervisors who earned more than plaintiff did so because of legitimate factors such as greater qualifications, education, work experience, and job skills; higher wage pay while working for previous employers; a higher starting wage with Home Depot than plaintiff's; longer tenure with Home Depot; and higher evaluations under Home Depot's merit system, based upon factors unrelated to gender. For the reasons briefly noted in the discussion section below, plaintiff's motion to strike these assertions is granted.

Home Depot employs both day and night assistant store managers (ASMs). Plaintiff was interested in being promoted to a night assistant store manager position. When her deposition was taken, plaintiff stated that she applied for the night operations ASM position after Meno left in January, 2004, and was replaced by Yamashita. Home Depot has submitted documents indicating that plaintiff did not apply for the ASM position, and asserts that plaintiff testified that she told Meno before he left that, though she was interested in his position, she knew she did not have the required experience. Plaintiff contends that the documents Home Depot cites should be stricken because they are not properly authenticated and are hearsay. She further asserts that, though she did tell Meno that she lacked the required experience for the ASM position, she did so when Meno first became her supervisor, not when he later left.

The transcript of plaintiff's deposition supports plaintiff's assertion as to the timing of her remark that she lacked the experience required for the ASM position: When asked when she first expressed an interest in the "night ops job," plaintiff said that she "expressed it to Ken Meno when he first came in," and that she knew ***1069** she "didn't have the experience at the time" because she still needed training.

Yamashita was selected for the night ASM position in January, 2004, when Meno left. He had been a freight supervisor for 26 months when he was selected. Yamashita had been named Night Operations Manager of the Year in 2002, and had received very positive performance evaluations in 2003.

Yamashita left the night ASM position in August, 2004. Plaintiff applied for the position, which was not filled. Home Depot asserts that the position remained open because of budgetary restrictions. Plaintiff contends that budgetary restrictions did not prevent Home Depot from filling the position.

Home Depot offers Department Supervisor Training (DST) to employees who are interested in becoming Assistant Store Managers. This 36–hour training course is offered a few times a year at Home Depot's offices in Tigard.

Plaintiff requested DST training. Home Depot asserts that plaintiff would not make herself available for training during the day, when it was offered, and that it arranged for plaintiff to take that training by herself after her shift at the Troutdale store, with Meno available to answer questions.

Plaintiff completed one unit of DST training. Home Depot asserts that plaintiff was offered another DST class "on short notice but declined to participate." Plaintiff denies that she would not make herself available during the day for DST training, and asserts that Baird gave her a two-day oral notice of the training, but declined to schedule her for training. She further asserts that "male employees were placed on a schedule for DST training, with two or more weeks notice."

Home Depot asserts that on April 24, 2003, plaintiff was disciplined and received a "final counseling" for violating its "banner barricade" policy and for using the "rabbit switch" while operating machinery. A document in the record titled "Discipline Process Tracking" notes a violation of "ignoring banner barrier requirements during initial open hours," and "running ERJ with rabbit button on sales floor." The document indicates that Baird conducted a "final counseling session," and that plaintiff was concerned that the next violation would result in her termination. Plaintiff contends that she never received any disciplinary notices for safety issues or received a performance evaluation that indicated that she had any safety issues. In her declaration submitted in support of her opposition to the motion for summary judgment, plaintiff asserts that she never saw the document in question before this litigation, and that the "counseling session" referenced in that document did not occur.

Baird has testified that plaintiff had a number of performance problems, including "a sustained problem with attendance and with availability for any kind of activities outside of her very rigidly scheduled shift which was a graveyard shift." He added that plaintiff had problems with "punctuality," and "availability for shifts outside of her normally scheduled shift." Baird testified that plaintiff "would never attend any store team meetings," and that "there were a number of safety issues" involving plaintiff.

In July, 2004, Ryan Pieratt became the Store Manager of the Troutdale Home Depot. Pieratt told plaintiff that she needed experience on the day shift, and has testified that plaintiff's chances for a promotion were hurt because she would not work days.

The record before the court includes a copy of a Home Depot document entitled "Department Supervisor to Assistant Manager," which describes the characteristics ***1070** of a "Department Supervisor ready for promotion." The required characteristics listed include customer and leadership skills, a good safety record, and the ability to enforce safety policies.

As noted above, Yamashita became the night operations ASM in January, 2004. In that position, he worked closely with plaintiff. Plaintiff has testified that Yamashita was a "practical joker" who made jokes at the expense of her and others.

Plaintiff went on maternity leave several months after Yamashita became the night operations ASM. When she returned from maternity leave, plaintiff arranged with Ryan Pieratt, the store manager, to start her shifts at a later time for a few months. According to plaintiff's declaration, though these later starts had been agreed upon, shift meetings that she had formerly run as a Night Supervisor were rescheduled from later in the shift to immediately at the beginning of the shift after she returned.

Yamashita met with the freight crew at the start of the shift, and would give plaintiff a hard time if she arrived during the meeting. Plaintiff testified that Yamashita knew that she would be late because of her arrangement with the store manager, and that he would "put her down" in front of the crew with comments about their supervisor being late again, and not setting an example.

When plaintiff returned from maternity leave, Yamashita arranged for plaintiff to take breaks in the training room during her shift to express breast milk for her baby. Plaintiff testified that, on three occasions, Yamashita used the overhead page system to tell other employees to report to the training room while she was expressing milk, and rattled the door handle himself and sniggered several other times while she was in that room. She testified that no other employees entered the room, and that she

considered Yamashita's conduct a joke the first time he made the announcement on the page system. Plaintiff also testified that Yamashita made comments about bringing cereal for the pumped milk that she stored in the managers' refrigerator. According to her declaration, plaintiff reported Yamashita's conduct to Meno, who in turn reported the conduct to the store manager. According to Meno's declaration, Pieratt ignored Meno's reports concerning Yamashita's treatment of plaintiff, and no corrective action was taken. Meno also states that Pieratt treated plaintiff less favorably than male employees and was not as responsive to plaintiff's complaints about issues with subordinates. Meno states that Pieratt characterized plaintiff's complaints as "whining," and told him that he was frustrated at having to deal with "women and all their issues."

Plaintiff complained to Baird that Yamashita was managing the freight team and usurping her managerial authority. She also complained to him about what she considered to be Yamashita's unsafe operation of equipment. After Baird spoke with him about these complaints, Yamashita told the freight team that he was very upset that someone had complained about him to management. Plaintiff testified that Baird told her he would not tell Yamashita who had complained, but that Yamashita saw plaintiff in Baird's office just before he told the freight crew that he was upset about the complaints. She further testified that Yamashita told the freight crew that whoever had complained was "in for it" because he did not like "back stabbers." She added that some members of the freight team told Yamashita that he deserved the complaints because of his conduct. Plaintiff asserts that, after seeing her talking with Baird shortly before he was reprimanded, Yamashita put "two and two together," and subsequently assigned her "cruddy jobs."

***1071** Plaintiff testified that Home Depot later terminated Yamashita after he allowed the freight team, including herself, to play football during a lunch break. She testified that she had understood that "horseplay" was a violation of the work conduct rules, and that an associate had been injured while playing football. In his declaration submitted in support of plaintiff's opposition to the motion for summary judgment, Jeff Pulicella, a Department Supervisor during this period, stated that Pieratt told him that Yamashita was terminated because he falsified documents, and would not have been terminated for the safety violations. Pieratt has testified that Yamashita was terminated both for safety violations and for falsifying documents.

Pulicella has submitted a declaration stating that, though he was paid nearly $2 per hour more than plaintiff while he and plaintiff were working as department supervisors, they did the same work and held the same title, and there was nothing in his experience or education that justified a difference in their pay. In addition, Pulicella stated that Pieratt offered him a fully flexible schedule, and assured him that he could come in late and leave early as often as he needed to without affecting his pay rate or opportunities for advancement. Pulicella also stated that, shortly after Pierrat became a store manager, he told Pulicella that he "would be getting rid of" plaintiff, and that, "as a woman," plaintiff "could not handle the guys on the freight team."

On November 9, 2004, Randy Kerr, a Home Depot loss prevention specialist, observed Kamil Samad, an employee on the night freight team, disregard the banner barricade policy. After Kerr reported this conduct, Pieratt terminated Samad. When Pieratt told plaintiff that Samad would be terminated for the safety violation, plaintiff told him it was "bullshit" and walked out. Plaintiff has testified that this exclamation reflected her opinion that Samad "was the hardest working person on the team," and that she had been trying to have four or five other employees terminated because of their behavior, work ethics, and attendance. She added that she walked out after expressing her displeasure because Samad was entering the room and "they" wanted her out "while they terminated her." According to plaintiff's declaration, Pieratt was aware that the violations for which Samad was terminated had occurred on other shifts as well, but that the safety policies were only enforced "when minorities were involved." Plaintiff adds that she was the only "minority" on the night freight team after Samad was terminated, and that the "only other woman on the freight team quit" on the day plaintiff was terminated.

On November 11, 2004, plaintiff was called into a meeting with Pieratt and Amy McDonald, who had begun working as the Troudale Home Depot HR manager in September, 2004. Pieratt asked plaintiff why she had made the "bullshit" comment. Plaintiff told him that others had committed safety violations far more serious than the one for which Samad was terminated. Pieratt has testified that he then terminated plaintiff after talking with Samad and finding that "they did not follow standard operating procedures at night with regard to safety" and "[a]fter discussing with [plaintiff] and finding out that that was true...."

In his declaration, Pulicella states that from Peirrat's statements, it was clear that plaintiff would not have been terminated if she was not female. He also states that Pieratt told him that he had been aware that various departments violated the banner barricade policy during the night shift, and that he did not enforce the policy "until some time after [plaintiff] was terminated ***1072** from employment." In his declaration, Meno states that he is unaware of any time during his employment with Home Depot when "any supervisor or manager ... was terminated for disagreeing with a personnel decision or for condoning a safety violation." He adds that he had "personally challenged a termination decision of an associate for safety," and was not terminated.

Meno was plaintiff's direct supervisor beginning in June, 2003. Meno states that he considered plaintiff an exemplary employee whose performance exceeded that of any other department supervisor he had supervised. Meno states that plaintiff was able to perform both the Assistant Manager duties and the duties of her own position when Meno was not at the store. Meno opines that, as of February, 2004, plaintiff was fully capable of performing the Night Operations Manager duties. He also opines that, as of July 31, 2003, plaintiff was "on track" to be promoted to the Assistant Store Manager position by the end of July, 2004.

Meno's declaration further states that, when he became her supervisor, Meno realized that plaintiff was not being treated fairly, compared to her male counterparts, in several areas. As examples, Meno cites plaintiff's work on the night shift without a salaried manager present, Home Depot's failure to provide plaintiff Department Supervisor Training (DST), and plaintiff's rate of pay, which Meno characterizes as substantially lower than that of her male counterparts in the Troutdale Home Depot and at other Home Depot stores in the district. Meno states that he made several unsuccessful attempts through management to schedule plaintiff for formal DST classes, and finally obtained the course materials for plaintiff to work through on her own. Meno also states that he compared plaintiff's rate of compensation to that of her male counterparts in conversations he had with Joyce Snead, Home Depot's District Manager. Meno states that, though he raised the issue of the disparity between plaintiff's pay and the pay of male employees with store managers, the human resource manager, the district manager, and two employee relations managers, plaintiff did not receive a pay increase for more than eight months.

From November, 2002, through February, 2004, plaintiff was the lowest paid department supervisor at the Troutdale Home Depot. Baird, who testified that plaintiff was "clearly" the lowest paid department supervisor, said that plaintiff's pay was based upon her performance. After Meno complained that plaintiff was being paid less than comparable male employees, Baird asked for documentation of her performance that would justify higher pay. As noted above, Baird instructed Meno to downgrade the performance evaluation that Meno prepared.

Before bringing this action, plaintiff filed administrative complaints of gender-based discrimination with the Oregon Bureau of Labor and Industries (BOLI) and the Equal Employment Opportunity Commission. In a Notice issued on December 9, 2005, BOLI stated that it had found no substantial evidence that Home Depot had retaliated against plaintiff based upon her alleged opposition to unlawful discrimination, and had found substantial evidence of "disparate treatment, termination" based upon plaintiff's gender.

PLAINTIFF'S CLAIMS

Plaintiff brings several state and federal claims of gender-based discrimination.

The first claim, brought pursuant to Title VII, alleges that Home Depot discriminated against plaintiff in the terms and conditions of her employment, and terminated her, because of her gender. This claim alleges that plaintiff suffered lost ***1073** wages and benefits, and continues to suffer these losses. Based upon this claim, plaintiff seeks recovery of "future lost wages and benefits and lost earning capacity in amounts to be determined at trial."

The second claim, which is also based upon Title VII, alleges that Home Depot unlawfully discriminated against plaintiff and terminated her "because she opposed defendant's practice of discriminating against her on the basis of her sex in the terms and conditions of her employment."

The third claim is brought pursuant to the federal Equal Pay Act, 29 U.S.C. § 206(d)(1). This claim alleges that Home Depot did not pay plaintiff wages that were equal to those paid to its comparable male employees.

The fourth claim alleges that Home Depot violated Or.Rev.Stat. § 652.220 by discriminating "between the sexes in the payment of wages for work of comparable character, the performance of which requires comparable skills." In the alternative, or in addition, this claim alleges that Home Depot "paid plaintiff wages at a rate less than that at which it paid male employees for work of comparable character, the performance of which requires comparable skills." This claim seeks recovery of allegedly unpaid wages and liquidated damages pursuant to Or.Rev.Stat. § 652.230(2).

The fifth claim alleges that plaintiff's termination was wrongful under Oregon law because it "was motivated in substantial part in response to and in retaliation for plaintiff's exercise of her important rights as an employee to be free from retaliatory and discriminatory treatment based on her protected classifications." This claim further alleges that adequate remedies do not exist under plaintiff's statutory claims for relief. Plaintiff seeks recovery of punitive damages, as well as attorney fees and costs, on this claim.

The sixth claim alleges that Home Depot violated Or.Rev.Stat. § 659A.030 by discriminating against plaintiff in the terms and conditions of her employment and by terminating plaintiff on the basis of her gender.

The seventh claim alleges that Home Depot violated Or.Rev.Stat. § 659A.030 by retaliating against plaintiff in various ways based upon her opposition to gender-based discrimination.

DISCUSSION

I. *Motions to Strike*

Before analyzing defendant's motion for summary judgment, I will briefly address the parties' motions to strike.

A. *Plaintiff's motion to strike*

Plaintiff moves to strike the assertion, set out in Alisa Grandy's declaration, that the higher pay of all department supervisors who were paid more than plaintiff reflected legitimate factors such as greater qualifications, education, work experience and job skills, higher wages from previous employers, longer tenure, or higher evaluations. Plaintiff contends that Grandy is not competent to present evidence as to the basis for the pay decisions in question because she was not involved in those decisions.

I agree. Though it appears that Grandy is qualified to present evidence about Home Depot's wage policies and the factors that its managers are supposed to consider when establishing pay rates for employees, Grandy was not involved in the particular pay decisions at issue in this litigation. In the absence of evidence that she participated in the decisions, Grandy's assertion that all the decisions were based upon legitimate factors is not based upon the requisite personal knowledge. Home Depot's contention that paragraph 10 of ***1074** Grandy's declaration is admissible under Fed.R.Evid. 1006 is not persuasive. That Rule, which provides that voluminous records may be presented to the court in the form of a summary, is inapplicable: Paragraph 10 does not include a condensation of voluminous records, but instead reflects Grandy's opinion, based upon her purported review of employment records. Accordingly, plaintiff's motion to strike this paragraph is granted.

B. *Defendant's motions to strike*

1. *Declaration of Jeff Pulicella*

Defendant moved to strike the declaration of Jeff Pulicella, or, in the alternative, for the opportunity to take Pulicella's deposition. During oral argument on October 11, 2007, I denied the motion to strike Pulicella's declaration, and granted the motion to take Pulicella's deposition. Defendant moves separately to strike paragraphs 2, 3, 6, 10, 11 and 12 of Pulicella's declaration. [3]

Paragraph 2 of Pulicella's declaration states that Pulicella was offered a job without filling out an application, and without Home Depot knowing anything about his background other than that he had been a police officer for 11 years.

Home Depot moves to strike this paragraph on the grounds that Pulicella has no personal knowledge of what Home Depot knew about his background, and provided no foundation for his knowledge of what factors Home Depot may have used in establishing his initial pay. I deny the motion to strike this portion of Pulicella's declaration because I interpret Pulicella's statement as referring to what he told Home Depot—a matter about which Pulicella could be expected to have personal knowledge. Though Pulicella subsequently testified that he informed Home Depot that he had experience supervising painting crews before he started working for Home Depot, he testified that he was offered a job in an earlier meeting, and did *not* testify that he referred to that experience in the earlier meeting. His testimony and declaration are therefore not inconsistent.

Paragraph 3 of the declaration states that, when he was hired, Pulicella had no relevant prior experience in construction or remodeling, other than work on his own home, and that he had no relevant prior retail experience. That paragraph adds that any information Home Depot has to the contrary is false. Home Depot moves to strike this paragraph on the grounds that though the statements "may be relevant to show that Pulicella lied on his application," they are not relevant to any claim in this action. It adds that the only facts that are relevant are those that were known to Home Depot when it determined Pulicella's compensation. Home Depot also asserts that this statement is inconsistent with Pulicella's testimony that he had supervised a painting crew.

I grant the motion to strike the portion of paragraph 3 of Pulicella's declaration stating that Pulicella had no prior painting experience before he was hired because it is inconsistent with Pulicella's deposition testimony. I deny the motion to strike the balance of paragraph 3.

Paragraph 6 of Pulicella's declaration states that Pulicella had much more first hand experience working with plaintiff than did Pierrat or Baird, that plaintiff was "an exemplary employee" whose "top priority was to ensure there were no safety ***1075** violations," and that plaintiff was as qualified as Pulicella to work as a department head.

Home Depot contends that this paragraph should be stricken because Pulicella is not competent to testify as to whether or not plaintiff was an exemplary employee, as to plaintiff's priorities, or as to whether plaintiff had the qualifications that Home Depot considered necessary for the department head position.

I disagree. A trier of fact crediting Pulicella's testimony about the duration and closeness of the working relationship between Pulicella and plaintiff could conclude that Pulicella was competent to testify as to plaintiff's qualities as an employee. A trier of fact who concluded that Pulicella had worked closely with plaintiff could reasonably conclude that Pulicella had a knowledge of plaintiff's priorities that was based upon observation and experience, and could conclude that Pulicella had the knowledge and experience required to state an opinion as to whether plaintiff was as qualified as Pulicella to work as a department supervisor. I therefore deny the motion to strike paragraph 6.

Paragraph 10 of Pulicella's declaration states that Pulicella did not have any skills, experience, or education that justified a difference in pay when he and plaintiff both worked as freight team department heads. This paragraph adds that, based upon plaintiff's performance, Pulicella did not believe there was any basis for paying plaintiff less than other department heads were paid. This paragraph also states that Pulicella was familiar with factors used to determine employees' rates of pay, and that Pulicella researched pay rates at other stores.

Home Depot contends that Pulicella lacks the personal knowledge of the factors it used to determine employee's rates of pay, and that he has not established a foundation for his statement that there was no basis to pay plaintiff less than other employees

working as department heads. It also contends that Pulicella's statement that he was familiar with the factors used to determine pay rates and researched pay rates at other stores is inconsistent with his testimony that he had never seen a copy of Home Depot's administrative guidelines.

It appears that Pulicella had sufficient knowledge about plaintiff's experience and skills and the knowledge and skills required to work as a freight team department head to offer an opinion as to whether there was a justifiable basis for paying her less than he was paid. It appears that Pulicella had enough experience working at Home Depot to form an admissible opinion as to whether there was a basis for paying plaintiff less than other department heads were paid. Pulicella's testimony that he had not seen a copy of Home Depot's administrative guidelines is not necessarily inconsistent with his declaration that he knew what factors were considered in determining rate of pay, because he could have learned of the relevant factors from other sources. I therefore deny the motion to strike paragraph 10.

In the 11th paragraph of his declaration, Pulicella states that he was very familiar with plaintiff's commitment to safety, and knew that plaintiff was not terminated for tolerating or condoning safety violations. This paragraph states that "Pierrat's statements made clear" to Pulicella that plaintiff would not have been terminated if she was not female.

Home Depot contends that this portion of paragraph 11 should be stricken because it lacks foundation and "is merely Pulicella's conclusory, subjective opinion of Pieratt's motivations." It also argues that Pulicella's assertion that Pieratt stated that plaintiff could not handle the guys on the freight team is inconsistent with Pulicella's ***1076** testimony that Pieratt said that the members of the team did not respect plaintiff because she was female. I disagree. Pulicella's declaration provides a sufficient foundation for his opinion that, but for her gender, plaintiff would not have been terminated. In addition, Pulicella's declaration about Pierett's statements concerning plaintiff's problems with the night crew is not necessarily inconsistent with his testimony on that issue. The motion to strike paragraph 11 is therefore denied.

In paragraph 12 of his declaration, Pulicella states that he had observed that plaintiff was treated differently than her male counterparts at Home Depot. As an example of this treatment, he states that, when he told management that his male associates on the night shift were underpaid, pay increases were made "outside the normal pay increase cycle." Pulicella adds that Peirrat told him he could do this by "getting approval at the district level," but that Peirrat ignored plaintiff when she raised the issue of her pay.

Home Depot contends that these statements should be stricken because Pulicella has not identified the male associates who allegedly received pay increases, because he did not establish that other employees were "proper comparators," and because he "has no personal knowledge of how Home Depot made pay decisions for its associates." I disagree, and deny the motion to strike these statements. Based upon the personal experience at Home Depot described in his declaration, it appears that Pulicella had the knowledge required to provide admissible testimony about the matters set out in paragraph 12 of his declaration.

2. *Declaration of Ken Meno*

Home Depot moves to strike all or portions of paragraphs 2, 3, 5, 7, 8, 14, and 15 of the declaration of Ken Meno.

Paragraph 2 includes Meno's statements that plaintiff had worked without the support of a salaried manager for several months before he arrived, and that she subsequently worked without such a manager even after he left the Troutdale store. Meno further stated that this was in contrast to other stores in the district in which male freight operation department heads worked with a salaried manager, and that plaintiff "was not receiving management support in addressing several issues."

Home Depot contends that these statements should be stricken because Meno has not shown a foundation for his purported knowledge of whether a team was working without a manager, stated how he knew how other stores in the district were operating, or stated how he knew that plaintiff was not receiving support on "several issues." I disagree. In portions of paragraph 2 to which Home Depot does not object, Meno states that he spent several days reviewing personnel files, talking to other managers, and meeting with "the team" when he took over as Night Operations Manager. He also states that he had worked in several

other stores before working at the Troutdale Home Depot. This experience appears to provide a sufficient basis for Meno's statements regarding practices in other stores, and for his assertion that plaintiff did not receive managerial support before he began working at the Troutdale store. Though Meno did not specify the "several issues" on which he found plaintiff was not receiving support, those issues appear to be sufficiently identified in the remainder of Meno's declaration. The motion to strike is therefore denied as to the preceding statements. The motion is granted as to Meno's statement that plaintiff continued to work without a salaried manager present after Meno left the Troutdale ***1077** store, because nothing in Meno's declaration indicates how Meno obtained this knowledge.

Paragraph 3 includes Meno's statements that plaintiff needed to receive advanced notice of training classes because these were held during the day, which would require plaintiff to change her sleep patterns and schedule child care. It also includes Meno's assertion that plaintiff's male counterparts were sometimes notified of training sessions a month in advance, but plaintiff was given only a few days notice before classes were held.

Home Depot moves to strike these statements on the grounds that Meno "had no personal knowledge of what was more important for plaintiff or why," and whether other employees may have had issues of sleep and child care that would have made their advanced receipt of notice of training programs no less important. Home Depot also asserts that the statements regarding other employees' advance notification should be stricken because Meno provided no foundation for his conclusion that others received more advance notice than did plaintiff, and because Meno failed to identify the "male counterparts" who received more notice.

Based upon a careful review of Meno's entire declaration, I conclude that Meno has established a sufficient foundation for these statements, with the exception of the assertion that, because of sleep and child care issues, plaintiff had a greater need for advanced notification of scheduled training than did other employees. Accordingly, the motion to strike is granted as to that portion of paragraph 3 of Meno's declaration, and is denied as to the balance of the paragraph.

In the challenged portion of the 5th paragraph of his declaration, Meno states that any male with plaintiff's performance would have received at least an "achiever" rating in the performance evaluation. Meno adds that he has no doubt that plaintiff's performance reviews were downgraded because of plaintiff's gender, and that Seibert and Martindale did not work with plaintiff or have the opportunity to review her performance "other than possibly a rare or sporadic occasion."

Home Depot moves to strike these statements on the grounds that Meno lacked the personal knowledge of how other employees would have been rated or why plaintiff's supervisors downgraded her review. It also contends that Meno did not have personal knowledge of whether Seibert or Martindale had an opportunity to observe plaintiff's performance.

I disagree, and deny the motion to strike this portion of Meno's declaration. Based upon a review of Meno's declaration as a whole, it appears that Meno had sufficient experience with the review process to offer an admissible opinion as to whether any other employee who performed as did plaintiff would have received at least an "achiever" rating. His statement that he had no doubt that plaintiff's performance review was downgraded because of plaintiff's gender addresses not a fact, but an opinion as to which it appears he is qualified to testify, based upon his experience. It also appears that Meno's work at Home Depot afforded him the opportunity to draw reasonable conclusions about the opportunities that Seibert and Martindale had to observe and review plaintiff's performance.

In the challenged portion of the 7th paragraph of his declaration, Meno states that he had a conversation with Joyce Speed, the District Manager, that confirmed the importance, under Home Depot's pay guidelines, of paying employees in the District "equitably." This portion also includes Meno's assertion that, in reviewing rates of pay, he "discovered that Nancy Delima was paid significantly less ***1078** than other male DH's with similar lengths of service."

Home Depot contends that these statements should be stricken because Meno does not have the personal knowledge required to provide evidence on these matters, has not provided a foundation for his knowledge of the factors used to determine pay rates for various individuals, and has failed to identify the "male DH's" who were paid more than plaintiff was paid.

These arguments are not persuasive. Meno's statement about his conversation with Speed provides a foundation for his assertion that the importance of equitable pay under Home Depot's pay policy was confirmed. Meno set out the basis of his conclusion that plaintiff was not paid equitably, which was the disparity in pay between plaintiff and "other male DH's with similar lengths of service" in the District. This provides a sufficient basis for Home Depot to challenge Meno's conclusion, because it is expected to have employment records showing the length of service of other male department heads in the District at the time Meno states that he made this comparison. I therefore deny the motion to strike these statements.

In the portion of the 8th paragraph of Meno's declaration which Home Depot challenges, Meno asserts that no individual from Home Depot "ever raised any legitimate reasons as to why [plaintiff] was so poorly compensated," and that Meno never "witness[ed] any reason why Nancy should not receive an increase." Home Depot also challenges Meno's assertion that the store manager could have obtained approval from the district manager for an "out of cycle pay increase," and that plaintiff's "greatest percentage increase" resulted from Meno's approval of a raise for her while he was the acting store manager.

I grant the motion to strike Meno's statement that no one from Home Depot ever raised any legitimate reason as to why plaintiff was so "poorly compensated," because I agree that Meno could not know if *anyone* working for defendant *ever* gave a legitimate reason for plaintiff's compensation. I deny the motion as to the balance of the statements, however, because Meno can testify as to whether he ever saw any reason why plaintiff should not have received a raise: It appears that, from his experience working for Home Depot, Meno would know whether a store manager could obtain approval for an "out of cycle" pay raise. It also appears that Meno would know whether plaintiff's greatest percentage increase resulted from his approval of her raise.

In the portion of paragraph 14 which Home Depot challenges, Meno states that, during the time he worked for Home Depot, he was never aware of a supervisor or manager being terminated for disagreeing with a personnel decision or for condoning violation of a safety policy. Home Depot also challenges Meno's statement that he challenged the decision to terminate an associate "for safety," and was not terminated.

Home Depot contends that these statements should be stricken because Meno did not provide a foundation for his knowledge of "why *all* Home Depot supervisors or managers were terminated," and has not "identified a foundation for his allegations of why supervisors were or were not terminated."

These objections fail. Meno did not categorically state that no supervisors or managers were terminated for disagreeing with a personnel decision of condoning a safety violation while he worked for Home Depot. Instead, he simply stated that he "was unaware" of such occurrences. Meno has the required knowledge to testify as to whether he was aware of certain events. He also has the personal knowledge required ***1079** to state that he challenged a particular termination decision, and was not terminated.

Home Depot challenges all of the statements set out in paragraph 15 of Meno's declaration, in which Meno lists 11 ways in which Home Depot's operations and management are centralized. Home Depot contends that Meno has no human resources experience with Home Depot, and that he has not established a foundation for knowledge of the information listed in this paragraph.

Based upon Meno's experience described in the declaration, it appears that Meno would be expected to have sufficient knowledge to testify as to statements 2, 3, 4, 5, 6, 7, 8, and 10. The motion to strike is therefore denied as to those statements. Because it is not clear from the declaration that Meno's experience would have given him the knowledge to testify as to statements 1 and 9 in paragraph 15, the motion to strike is granted as to these statements.

3. *Plaintiff's Declaration*

Home Depot moves to strike portions of paragraphs 4, 6, 7, 10, and 11 of plaintiff's declaration.

In the portion of the 4th paragraph that Home Depot seeks to strike, plaintiff states that, in June of July 2003, she complained to Meno that her rate of pay was discriminatory.

Home Depot moves to strike this statement on the grounds that it is inconsistent with plaintiff's deposition testimony about her complaints concerning pay increases. Home Depot cites plaintiff's testimony stating that she had a meeting in February 2003 in which she complained that she was not being paid enough, but that she did not, at that time, attribute the inadequacy of her pay to gender discrimination. Home Depot asserts that plaintiff cannot create an issue of fact through a declaration that contradicts prior deposition testimony.

From the brief portion of plaintiff's deposition testimony cited in Home Depot's motion to strike, it is not possible to determine whether plaintiff's declaration is inconsistent with her deposition testimony. Plaintiff's assertion that she told Meno in mid 2003 that her pay was discriminatory is not necessarily inconsistent with a complaint to different managers in February of that year that did not cite gender discrimination as the reason for her inadequate pay. The deposition question eliciting plaintiff's response did not ask plaintiff to list every subsequent complaint about the pay reflected in the cited exhibit, and plaintiff could have concluded after February 2003 that her pay was discriminatory. Because plaintiff's declaration is not necessarily inconsistent with the cited deposition testimony, the motion to strike this portion of the declaration is denied.

In the portion of the 6th paragraph of plaintiff's declaration that Home Depot moves to strike, plaintiff states that she was willing to make herself available during the day for DST training, that Baird declined to schedule her for such training with the two weeks notice given to male employees, and that the DST documentation provided by Home Depot is inaccurate to the extent that it shows that she received any formal training.

Home Depot seeks to strike plaintiff's statement that she received no formal training and that DST documentation to the contrary provided by Home Depot was inaccurate because it is inconsistent with plaintiff's deposition testimony that she took one class of DST training. It moves to strike plaintiff's assertion that male employees were provided with two weeks of notice of training opportunities on the grounds that plaintiff has not provided a ***1080** foundation for her purported knowledge of the notice provided to those employees.

The motion to strike is granted as to plaintiff's assertion that she received no formal training, and to the extent that plaintiff states that male employees received two weeks notice that training would be offered. The motion is denied as to plaintiff's assertion that she was willing to make herself available for DST training during the day, because Home Depot has cited no deposition testimony that contradicts that assertion, and plaintiff's willingness to make herself available for training during the day is a matter about which she is competent to testify.

In the portion of the 7th paragraph of plaintiff's declaration to which Home Depot objects, plaintiff states that she has never seen a document entitled “Discipline Process Tracking” that references a “final counseling session” with Baird dated April 24, 2003, and references a violation for ignoring a banner barricade. Plaintiff also states that she was never given a “counseling session” that was referred to in the document. Home Depot objects to these statements on the grounds that they are inconsistent with plaintiff's deposition testimony in which, having been shown the document and asked if she recalled having any discussion with Baird about the banner requirement in early 2003, she replied that she “remember[ed] having a discussion with him.”

I deny the motion to strike the challenged portion of paragraph 7 because it is not necessarily inconsistent with plaintiff's deposition testimony. In her declaration, plaintiff states that she was not given a “counseling session” as represented in the discipline tracking document. That is not necessarily inconsistent with plaintiff's deposition testimony that she recalled having a discussion about the matter with Baird, because plaintiff and Baird could have discussed the banner barricade requirements without any mention of plaintiff's alleged violation, and have discussed a violation by plaintiff without the conversation rising to the level of formal “counseling” implied by the record of the “discipline process tracking” document in question.

In the portion of paragraph 10 to which Home Depot objects, plaintiff states that, after returning from maternity leave in May 2004, she told Meno that Yamashita had teased her about expressing milk for her baby, had paged employees to go into the training room while she was expressing milk, and had taunted her by shaking the handle to the room and saying that he would bring cereal for the milk she stored in the refrigerator.

Home Depot contends that these statements are inconsistent with plaintiff's deposition testimony that she did not recall asking Meno to talk to Yamashita about this conduct but was "pretty sure he did." Home Depot also objects to the statements as inconsistent with plaintiff's testimony that she complained generally about Yamashita's management style, but did not testify "that he had harassed her or treated her differently because she was a woman."

I deny the motion to strike these particular statements, because plaintiff's declaration is not necessarily inconsistent with her deposition testimony. Plaintiff's declaration that she told Meno that Yamashita harassed her is not inconsistent with her deposition testimony that she does not recall asking Meno to talk with Yamashita about his conduct. In addition, though portions of plaintiff's deposition testimony have been omitted from the record submitted to the court, it appears that plaintiff testified that she complained about the incidents involving Yamashita set out in paragraph 10 of her declaration. On page 214 of the plaintiff's deposition, counsel for Home Depot asked plaintiff if she had told ***1081** everything that she recalled about the complaints she made concerning Yamashita. In response, plaintiff asked counsel whether he was referring to "just the harassment ones or any complaints?" This certainly suggests that plaintiff had characterized Yamashita's conduct as harassment.

In the portion of the 11th paragraph of plaintiff's declaration to which Home Depot objects, plaintiff states that Pieratt was aware that the violation for which Samad had been terminated had occurred on other shifts, "but chose not to enforce the policy, except when minorities were involved."

Home Depot contends that this statement should be stricken because plaintiff had no personal knowledge about Pieratt's awareness or why he had chosen to enforce a policy. I agree, and grant the motion to strike this statement.

II. *Defendant's Motion for Summary Judgment*

A. *Standards for Evaluating Motions for Summary Judgment*

Federal Rule of Civil Procedure 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party may discharge this burden by showing that there is an absence of evidence to support the nonmoving party's case. *Id.* When the moving party shows the absence of an issue of material fact, the nonmoving party must go beyond the pleadings and show that there is a genuine issue for trial. *Id.* at 324, 106 S.Ct. 2548.

The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987). Reasonable doubts concerning the existence of a factual issue should be resolved against the moving party. *Id.* at 630–31. The evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in the nonmoving party's favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1985). No genuine issue for trial exists, however, where the record as a whole could not lead the trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

B. *Plaintiff's Wage Claims Under the Equal Pay Act, Title VII, and Oregon Statutes*

The Equal Pay Act (EPA), Title VII, and Or.Rev.Stat. § 652.220 all prohibit gender-based discrimination in compensation.

In her complaint, plaintiff alleges generally that, during the course of her employment, "male employees were paid more for performing substantially similar work than plaintiff." Though she does not specifically identify particular pay decisions as discriminatory in her complaint, from the material submitted in support of and opposition to the motion for summary judgment, it appears that plaintiff's claim of discriminatory pay under the EPA, Oregon Law, and Title VII appears to center on two sets of decisions concerning plaintiff's pay. In the first of these, on October 7, 2002, plaintiff's pay was raised from $10.00 per hour to $10.65 per hour. Plaintiff contends that this raise violated state and federal law because a male co-worker received a larger raise. Plaintiff also contends that she was paid at a discriminatory rate after she was promoted to a supervisor ***1082** position on November 19, 2002. Plaintiff contends that her initial pay in that position and the raises she subsequently received reflected gender-based discrimination.

In its memoranda in support of the motion for summary judgment, Home Depot analyzes these periods as if they were pleaded as distinct and separate claims, and argues that it is entitled to summary judgment as to each "claim" based upon the applicable statute of limitations and other factors. However, plaintiff has not in fact brought distinct "claims" as to the various decisions made affecting her pay. Accordingly, in the discussion below, I do not consider the various pay determinations as separate "claims," and will not recommend granting partial summary judgment as to particular pay decisions. Instead, I simply address plaintiff's wage discrimination claim under each of the statutes upon which plaintiff relies.

1. *Wage Claim Under Equal Pay Act*

A two-year statute of limitations applies to violations of the Federal Equal Pay Act that are not "willful." 29 U.S.C. § 216 (applying statute of limitations set out in 29 U.S.C. § 255(a)). A three-year statute of limitations applies to violations that are "willful." *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 135, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988); *see* 29 U.S.C. § 255(a). An employer can commit a "willful" violation without "knowingly" violating the statute. *Alvarez v. IBP, Inc.,* 339 F.3d 894, 908–09 (9th Cir.2003), *aff'd,* 546 U.S. 21, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005). Instead, the three-year statute of limitations applies if the employer "disregarded the very 'possibility' that it was violating the statute." *Id.* at 909 *(citing Herman v. RSR Sec. Servs. Ltd.,* 172 F.3d 132, 141 (2nd Cir.1999)).

In order to make out a prima facie claim of gender-based discrimination under the EPA, a female plaintiff must show that her employer paid different wages to men who were performing substantially equal jobs under similar working conditions. *Maxwell v. City of Tucson,* 803 F.2d 444, 446 (9th Cir.1986); *Gunther v. County of Washington,* 623 F.2d 1303, 1313 (9th Cir.1979), *aff'd,* 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981).

Defendant Home Depot contends that plaintiff's claims under the EPA and Title VII are governed by the same "substantial equality" standards, and that plaintiff cannot establish that she was not paid the same as males who were performing substantially equal jobs under the same or similar work conditions. Defendant contends that, though plaintiff has identified male employees "who appear to have received a higher wage than herself," she cannot show that these employees performed substantially equal work under the same or similar working conditions. It asserts that plaintiff's night freight team supervisor position was unique, and that plaintiff cannot establish that her work required substantially the same skill, effort, and responsibility, and took place under substantially the same working conditions, as any of the other department supervisor positions at the Troutdale Home Depot.

Home Depot also contends that plaintiff's claim under the EPA is barred by the statute of limitations, because the last pay determination of which plaintiff complains was made on February 2, 2004, more than two years before March 9, 2006, the date of the filing of this action. Home Depot also contends that it is entitled to summary judgment on this claim because plaintiff cannot make out a prima facie case of unlawful discrimination or overcome certain defenses to pay disparity permitted under the EPA.

***1083** I disagree. Home Depot acknowledges that, unlike analyzing claims of discriminatory pay brought under Title VII, in analyzing claims brought under the EPA, "each alleged discriminatory paycheck may be considered a new, discreet discriminatory action." Def. Mem in Support of Mot. for Sum. Jud. at 17 *(citing Gandy v. Sullivan County,* 24 F.3d 861, 864

(6th Cir.1994)). Therefore, the pay raise plaintiff received on February 2, 2004, which plaintiff asserts was discriminatory, is not beyond the two-year EPA statute of limitations for non-willful discrimination.

Plaintiff has made out a prima facie case of unlawful gender-based discrimination in compensation, and has cited evidence supporting the conclusion that all department heads at the Troudale Home Depot are appropriate wage comparators. Plaintiff has also produced substantial evidence supporting the conclusion that she was paid less than at least one male comparator, Pulicella, after March 9, 2004. Descriptions in the record of the duties and experience of Pulicella and plaintiff create issues of fact as to whether the disparity in these employees' pay was more likely than not based upon gender. In addition, plaintiff has shown the existence of evidence from which a trier of fact could conclude that Home Depot's purported legitimate reasons for the disparity were not the true reasons, but were pretextual. This includes evidence that Home Depot management required a supervisor to downgrade plaintiff's performance evaluation, and evidence that the manager who terminated plaintiff had said that he "would be getting rid of" plaintiff because he thought that women were ill-suited to plaintiff's position.

Even if the February 2, 2004 raise was beyond the statute of limitations period, I would recommend denying Home Depot's motion for summary judgment on the EPA claim because plaintiff has shown the existence of evidence creating material issues of fact as to whether Home Depot willfully violated the EPA. This evidence includes Meno's assertion that he was required to downgrade plaintiff's performance evaluation, and that he told Home Depot's human resources personnel, store managers, district manager, and employee relations specialist that plaintiff's pay was discriminatory. This evidence, along with evidence that Home Depot did not adjust plaintiff's rate of pay for more than eight months after Meno made these statements, raises a triable issue of fact as to whether Home Depot knowingly or recklessly paid plaintiff less than similarly situated male employees. Pieratt's transfer of Pulicella to the freight supervisor position, where it appears that he performed the same work plaintiff performed, but was paid substantially more, also supports plaintiff's assertion that Home Depot willfully discriminated against her in determining her compensation. Evidence that Pieratt stated that, as a woman, plaintiff was not well suited to supervise the freight team also supports plaintiff's assertion that Home Depot intentionally discriminated in establishing her compensation.

Home Depot's assertion that it is entitled to summary judgment because any pay disparity between plaintiff and male comparators is permitted under exceptions to the EPA also fails. These exceptions permit pay disparities resulting from a seniority system, a merit system, a system that measures earnings or quantity or quality of production, or from a differential based on any factor other than gender. 29 U.S.C. § 206(d)(1); *Maxwell,* 803 F.2d at 446. The defendant has the burden of pleading and proving these affirmative defenses. *Kouba v. Allstate Ins. Co.,* 691 F.2d 873, 875 (9th Cir.1982).

***1084** Home Depot contends that its published employment policies and the testimony of the Troutdale Home Depot HR Manager, the relevant Regional HR Manager, and the relevant District HR Manager, establish that it "sets the wages of its employees through a merit system as well as other nondiscriminatory business reasons based on factors other than sex." It asserts that these policies and this testimony establish that plaintiff's pay was based upon merit, as evaluated by her supervisors according to established standards, and upon relevant experience and education criteria.

I disagree. Home Depot's adoption of an objective, gender-neutral pay policy, and the testimony of Home Depot managers that pay decisions are made on legitimate factors such as experience, education, and performance, does not conclusively establish that those policies were followed in pay decisions affecting plaintiff. As noted in the section above discussing the motions to strike, Grandy's assertion that plaintiff's rate of pay was based only on legitimate factors such as qualifications, education, experience, and job skills is inadmissible because Grandy did not participate in the decisions concerning plaintiff's pay. In addition, as is also noted above, the record includes evidence that one of plaintiff's supervisors was required to downgrade plaintiff's performance evaluation, and evidence that the manager who ultimately terminated plaintiff had opined that women were not suited for plaintiff's supervisory position. There is also evidence supporting the conclusion that plaintiff had more relevant experience than at least one comparator whose pay was considerably higher, and that Home Depot did not adjust plaintiff's pay for many months after a supervisor had opined that plaintiff was being unfairly compensated because of her gender. This, and other evidence in the record, creates material issues of fact as to whether Home Depot can prevail on any of its affirmative defenses.

2. *Wage Claim Under Title VII*

Where, as here, a plaintiff initiates proceedings with a state agency, a claim must be brought within 300 days of the allegedly unlawful conduct. See 42 U.S.C.2000e–5(e)(1). Plaintiff filed her BOLI complaint on December 9, 2004, and timely filed her action in this court. Plaintiff therefore may recover under Title VII for any discriminatory conduct, including discrimination in compensation, that occurred up to 300 days earlier than that date. Accordingly, any discriminatory conduct occurring after February 12, 2004, is within the statute of limitations period for Title VII.

In *Ledbetter v. Goodyear Tire & Rubber Co., Inc.,* 550 U.S. 618, 127 S.Ct. 2162, 2174, 167 L.Ed.2d 982 (2007), the Supreme Court rejected the argument that each paycheck received following a discriminatory pay determination constitutes a separate, actionable violation of rights under Title VII, and restarts the statute of limitations period. Instead, the Court concluded that the statute of limitations period for bringing a discriminatory pay claim under Title VII begins to run when the employer establishes an employee's pay at an allegedly discriminatory rate.

The holding in *Ledbetter* bars plaintiff from recovering under Title VII for any discrimination in pay reflected in the amount of her February 2, 2004 raise. However, it is not clear that plaintiff's potential to recover under Title VII for discriminatory pay is entirely foreclosed under that decision. Plaintiff contends that, though *Ledbetter* precludes the argument that each paycheck restarts the statute of limitations period, subsequent raises for other employees that unfairly favor employees not of a plaintiff's gender can ***1085** restart the running of the statute of limitations.

I agree. Certainly, in the more common situation, a plaintiff complains that a decision directly affecting her own pay reflects intentional gender-based discrimination, and that decision starts the running of the statute of limitations. However, I agree that there is nothing in the *Ledbetter* decision that precludes the statute of limitations from starting to run again if the employer subsequently discriminates, on the basis of gender, in establishing or raising the pay of another employee.

Plaintiff also contends that, after she received her last raise in February, 2004, Home Depot's increase of the pay of a male employee performing substantially similar work reflected gender-based discrimination against plaintiff. Based upon my review of the record, I conclude that there are material issues of fact as to whether this contention is well-founded. Accordingly, though the applicable statute of limitations precludes plaintiff's recovery under Title VII for any pay decisions implemented before February 13, 2004, Home Depot's motion for summary judgment on plaintiff's Title VII pay claim should be denied because material issues of fact exist as whether pay raises Home Depot implemented for any similarly situated male employee after that date reflected discrimination in favor of that male employee.

Except for the statute of limitations issue, claims of pay discrimination brought under Title VII are evaluated like those brought under the EPA. In *Forsberg v. Pacific Northwest Bell Tel. Co.,* 840 F.2d 1409, 1418 (9th Cir.1988), the Ninth Circuit observed that "[e]qual pay claims asserted under Title VII must satisfy the same substantial equality test applied to claims asserted under the EPA." Title VII claims are also subject to the same affirmative defenses. *Maxwell,* 803 F.2d at 446.

These additional issues were addressed above in analyzing Home Depot's motion for summary judgment on plaintiff's EPA claim. For the reasons set out above, defendant's motion for summary judgment on the compensation component of plaintiff's Title VII claim should be denied. [4]

3. *Wage Claim Under Oregon Statutes*

Under Or.Rev.Stat. § 652.230(1), a claim of unequal pay brought pursuant to Or.Rev.Stat. § 652.220 may be brought for "unpaid wages to which the employee is entitled for the one-year period preceding the commencement of the action." Under Or.Rev.Stat. § 659A.030(a), a plaintiff may recover for damages incurred because of unlawful discrimination for a one-year period preceding the filing of a complaint with BOLI. Under Or.Rev.Stat. § 659A.820(1), a plaintiff must file a complaint with BOLI within one

year of the alleged unlawful discrimination in compensation. Because plaintiff filed her BOLI complaint on December 9, 2004, she can recover under Oregon statutes for any unlawful discrimination in her compensation after December 10, 2003.

Home Depot contends that plaintiff's wage claim under Oregon law fails for several reasons. It contends that, though *Ledbetter* expressly governs only plaintiff's Title VII claims, that decision bars her state-law claims as well, because the Oregon Supreme Court would likely apply *Ledbetter* if presented with the same issue under Oregon law. Home Depot acknowledges that the Oregon Supreme Court has ***1086** not addressed this issue, but asserts that it would likely reach the same conclusion because Oregon courts consider federal court decisions interpreting Title VII instructive in interpreting Oregon statutes prohibiting various types of employment discrimination. *See, e.g., Cantua v. Creager,* 169 Or.App. 81, 98–99, 7 P.3d 693 (2000); *A.L.P. Inc. v. Bureau of Labor and Industries,* 161 Or.App. 417, 422–23, 984 P.2d 883 (1999); *Winnett v. City of Portland,* 118 Or.App. 437, 442, 847 P.2d 902 (1993); *Harris v. Pameco Corp.,* 170 Or.App. 164, 176, 12 P.3d 524 (2000). Home Depot also contends that plaintiff's wage claims fail under Oregon law for the same reasons they fail under the EPA "because Oregon courts have recognized that comparators under ORS 652.220 must be similarly situated to the plaintiff, and that an employees 'different skills and experience' can 'justify a salary differential.' "

Home Depot's motion for summary judgment on the Oregon statutory wage claim should be denied. Though Oregon courts generally consider federal decisions interpreting Title VII instructive in evaluating claims under similar Oregon statutes, it is not clear that the Oregon Supreme Court would apply the holding of *Ledbetter* to claims under Oregon law. The Oregon Supreme Court might find that federal decisions interpreting the federal EPA, under which each discriminatory paycheck restarts the statute of limitations, are more consistent with Oregon statutes specifically addressing wage discrimination. Even if the reasoning of *Ledbetter* were applied, for reasons discussed above, material issues of fact exist as to whether plaintiff can establish that decisions concerning her compensation that were implemented after December 10, 2003, reflected gender-based discrimination.

C. *Plaintiff's Non Wage–Based Gender Discrimination Claims Under Title VII and ORS § 659A.030*

Both Title VII and ORS § 659A.030 prohibit employers from terminating, refusing to promote, or otherwise discriminating against employees in the terms and conditions of their employment on the basis of gender. 42 U.S.C. § 2000e–2(a)(1); Or.Rev.Stat. § 659A.030(a)-(b).

1. *Termination*

Claims of gender-based discrimination are analyzed under the burden-shifting procedure set out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). [5] Under this analysis, a plaintiff may establish a *prima facie* case of unlawful discrimination by showing that she is a member of a protected class, performed satisfactorily, was terminated, and the employer demonstrated a continued need for the same services and skills by seeking a replacement with similar qualifications. *E.g., Pejic* ***1087** *v. Hughes Helicopters, Inc.,* 840 F.2d 667, 672 (9th Cir.1988) (citing *Sengupta v. Morrison–Knudsen Co., Inc.,* 804 F.2d 1072, 1075 (9th Cir.1986)).

Establishing a *prima facie* case creates a presumption of unlawful discrimination, and shifts the burden to the defendant, who must produce evidence that the adverse employment action was not taken for impermissibly discriminatory reasons. *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). If the defendant produces such evidence, the presumption of unlawful discrimination disappears, and the plaintiff must show by a preponderance of the evidence that the defendant's proffered reason for the adverse employment decision was merely a pretext for a discriminatory motive. *Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 889 (9th Cir.1994) *(citing Lowe v. City of Monrovia,* 775 F.2d 998, 1007 (9th Cir.1985)). To do so, the plaintiff must produce "specific, substantial evidence of pretext." *Id.* at 890 *(quoting Steckl v. Motorola, Inc.,* 703 F.2d 392, 393 (9th Cir.1983)). Pretext may be established either by showing that "a discriminatory reason more likely motivated the employer or ... that the employer's proffered explanation is unworthy of credence." *Chuang v. University of California Davis,* 225 F.3d 1115, 1123 (9th Cir.2000). The plaintiff always retains the ultimate burden of persuading the trier

of fact that the defendant intentionally discriminated for unlawful reasons. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 142–43, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

Defendant contends that plaintiff cannot make out a prima facie case of unlawful discharge under Title VII or ORS § 659A.030 because she cannot establish that she was performing her job satisfactorily when she was terminated. Home Depot contends that plaintiff was fired because she failed to enforce its established safety standards, and that failure to enforce those standards constitutes unsatisfactory performance. Home Depot notes that its written Code of Conduct provides for discipline, including termination, of supervisors who do not enforce its safety policies. Defendant further contends that, even if plaintiff could establish a prima facie case of unlawful discrimination, she has not produced "specific, substantial evidence" of pretext in response to its articulated non-discriminatory reasons for her termination.

There is no question that Home Depot had a written policy allowing for the termination of supervisors who did not enforce its safety policies. Likewise, there is no question that plaintiff's failure to enforce Home Depot's safety policies was cited as a reason for her termination. However, plaintiff has shown the existence from which a reasonable trier of fact could conclude both that plaintiff's performance was objectively satisfactory, notwithstanding her purported failure to enforce safety policies, and that plaintiff's failure to adequately enforce safety policies was not the real reason for her termination. There is evidence supporting the conclusion that gender discrimination was a factor in plaintiff's termination. Plaintiff's performance evaluations were satisfactory, and would have been more favorable if a supervisor who worked closely with plaintiff had not been instructed to downgrade her evaluation. In addition, the record includes the opinions of a supervisor and a co-worker that plaintiff was an exceptionally competent and productive employee. Evidence that plaintiff was paid less than males performing the same or similar work at Home Depot supports an inference that plaintiff's termination may have been discriminatory. There is evidence that, though Yamashita was ostensibly terminated for safety violations, his falsification ***1088** of documents was the real cause for his termination. There is evidence that Pierrat, who terminated plaintiff, had opined that, "as a woman," plaintiff could not supervise men on the freight team, and that Pierrat had said that he "would be getting rid of" plaintiff before she was terminated. There is evidence that Pieratt was aware of safety violations before plaintiff was terminated, but did not enforce safety policies until plaintiff was terminated. There is evidence that no male supervisors were ever terminated for "condoning" safety violations. In addition, evidence that in October 2004, Pieratt moved Pulicella to the night freight supervisor position to perform the same work plaintiff performed could support an inference that Home Depot was preparing to terminate plaintiff before the safety violation incident that Home Depot cites as the reason for her termination.

From all this evidence, a trier of fact might reasonably conclude both that plaintiff's performance was objectively satisfactory, and that the proffered reason for plaintiff's termination was pretextual. Home Depot's motion for summary judgment on the termination component of plaintiff's Title VII and Oregon statutory claim should be denied.

2. *Failure to promote*

Defendant Home Depot asserts that plaintiff has not specifically pleaded a claim of discriminatory failure to promote, but that it "appears that plaintiff has attempted to state a claim for discriminatory failure-to-promote under Title VII and ORS 659A.030." I am satisfied that plaintiff's allegations are sufficient to plead a claim for failure to promote under the "notice pleading" requirements of the Federal Rules of Civil Procedure. In paragraph 19 of her complaint, plaintiff explicitly alleges that defendant retaliated against plaintiff by failing to promote her to a night operations manager position. This is sufficient to state a claim for failure to promote under Title VII and parallel state law.

In order to establish that denial of a promotion violated Title VII and parallel state statutes, a plaintiff must first make out a prima facie case showing that: 1) she belonged to a protected class, 2) she applied for and was qualified for an available position, 3) she was rejected, despite her qualifications, and 4) the position remained available and the employer continued to consider applicants who had comparable qualifications. *E.g., Lyons v. England,* 307 F.3d 1092, 1112 (9th Cir.2002) *(citing McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). If a plaintiff satisfies that burden, the burden-shifting analysis noted in the discussion of plaintiff's wrongful termination claim above applies. *See id.*

Plaintiff's failure to promote claim is based upon Home Depot's refusal to assign plaintiff to a night operations Assistant Store Manager (ASM) position. Defendant contends that plaintiff cannot establish that she was qualified to work in an ASM position. It asserts that her contention that she applied for the ASM position in January, 2004, is "directly contradicted by Home Depot's business records." Home Depot further asserts that plaintiff herself admits that she did not have the necessary training when she first applied for the ASM position. Home Depot contends that the record establishes that ASM vacancies were either filled by more qualified candidates or "left vacant altogether." It further asserts that, even if plaintiff could make out a prima facie case of discriminatory failure to promote, she cannot establish that its proffered reasons for promoting other candidates or not filling the positions are false.

Plaintiff asserts that she applied for the night operations ASM position twice, first ***1089** in January, 2004, and later in August, 2004. However, Home Depot's records refute plaintiff's assertion that she applied for an ASM position in January, 2004, and plaintiff has conceded that she was not qualified for the position at that time. The record also establishes that plaintiff had not completed the DST training required to qualify for an ASM position, and that plaintiff had not obtained the customer and merchandising experience required to qualify for the ASM position. The record further establishes that, because of budgetary concerns, Home Depot did not fill the ASM position that plaintiff applied for in August, 2004.

Under these circumstances, plaintiff cannot establish that she was qualified for an ASM position or that Home Depot continued to seek to fill the position after plaintiff had applied. Accordingly, plaintiff cannot establish a *prima facie* discriminatory failure to promote claim, and Home Depot is entitled to summary judgment on the portion of plaintiff's Title VII and state law claims that is based upon Home Depot's allegedly discriminatory failure to promote plaintiff.

3. *Failure to Train*

In the general allegations that precede the enumeration of the claims in her complaint, plaintiff states she "received less training and thereby less promotional opportunity than similarly situated male associates." Though she did not specifically address training in her claims for relief, plaintiff addresses failure to train as a separate claim in her memorandum in opposition to the motion for summary judgment.

Home Depot contends that plaintiff did not plead a separate failure to train claim. This argument is well taken. The only reference to training in plaintiff's complaint alleges that plaintiff's receipt of "less training" afforded plaintiff "less promotional opportunity" than that available to similarly situated male associates. Plaintiff's allegations concerning training support her claim that she was unlawfully denied a promotion, and do not state a distinct failure-to-train claim. Accordingly, I consider the training allegations as part of the failure to promote claim, and will not analyze training as a separate claim. [6]

4. *Hostile Environment Claim*

In order to establish a prima facie case of a gender-based hostile work environment under Title VII or parallel state law, a plaintiff must show that she was subjected to verbal or physical conduct because of her gender, that the conduct was unwelcome, and that the conduct was sufficiently severe or pervasive to alter the terms of her employment. *Manatt v. Bank of America,* 339 F.3d 792, 798 (9th Cir.2003). Discriminatory ridicule and insult can create a hostile work environment. *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). In order to be actionable, the conduct must be both objectively offensive, and the plaintiff must have subjectively considered it offensive as well. *Id.* at 22, 114 S.Ct. 367. In evaluating a hostile environment claim, the frequency and severity of the conduct, whether the conduct "is physically threatening or humiliating, or a mere offensive utterance," and whether the conduct "unreasonably interferes with the employee's work performance" must be considered. *Clark County School Dist.* ***1090** *v. Breeden,* 532 U.S. 268, 270–71, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001).

Plaintiff's hostile environment case is based upon the conduct of Yamashita cited in the background section above. This included a few incidents in which Yamashita rattled the door handle to the training room when she was expressing milk, made a comment about bringing in cereal for the milk, and made a few announcements on the PA system that employees should report to the

training room while plaintiff was expressing milk, none of which resulted in another employee entering the room while plaintiff was present.

Home Depot contends that this conduct is not sufficiently extreme or pervasive to support a hostile environment claim, because it was not sufficient to alter the conditions of her employment. It also asserts that, even if the conduct in question was sufficiently severe or pervasive to support a hostile environment claim, it is entitled to summary judgment under defenses noted in *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). This "Ellerth/Faragher" defense may apply when an employee's supervisor has created a hostile work environment, but the supervisor's harassment has not resulted in a tangible adverse employment action such as termination, demotion, or reassignment to an undesirable position. *See Ellerth,* 524 U.S. at 765, 118 S.Ct. 2257; *Faragher,* 524 U.S. at 807, 118 S.Ct. 2275. Under these circumstances, an employer may assert an affirmative defense based upon the care it has taken to prevent and promptly correct any sexually harassing behavior, and upon a plaintiff's unreasonable failure to take advantage of preventative or corrective opportunities provided by the employer, or to otherwise avoid harm. *Faragher,* 524 U.S. at 807–08, 118 S.Ct. 2275. An employer's "stated policy suitable to the employment circumstance" is a factor in analyzing the employer's responsibility to prevent and correct harassing behavior. *Faragher,* 524 U.S. at 808, 118 S.Ct. 2275.

Plaintiff has not responded to any of Home Depot's arguments concerning the hostile environment component of her Title VII and state statutory claim. Whether or not this reflects plaintiff's conclusion that she cannot prevail on this claim, I am satisfied that summary judgment is appropriate as to the "hostile environment" component of this action for two reasons. First, though Yamashita's conduct was boorish and rude, it was simply not sufficiently severe or pervasive to alter the terms and conditions of plaintiff's employment and create a hostile work environment, as that term is interpreted in relevant decisions. Second, even if the conduct in question could support a hostile environment claim, based upon the record before the court, a reasonable trier of fact could find only in Home Depot's favor on the affirmative Ellerth/Farager defense. The record establishes that Home Depot had an anti-harassment policy which provides employees with multiple avenues to present confidential complaints of harassment, and provides for investigation of allegations of harassment and for discipline of individuals who are found to have engaged in harassment. The record further establishes that, though plaintiff was trained in this policy and was aware of its provisions, she did not report any of Yamashita's conduct to the appropriate managers as required under Home Depot's policies. Though plaintiff testified that she told Baird that she did not like the way Yamashita was running the freight team, she denied telling Baird that she had been subjected to sexually harassing comments or conduct.

***1091** Defendant's motion for summary judgment should be granted as to the hostile environment component of this action.

5. *Retaliation Claims Under Title VII and ORS 659A.030*

Plaintiff's retaliation claim under federal and state statutes alleges that Home Depot discriminated against plaintiff and terminated plaintiff because she opposed its practice of discriminating against her on the basis of her gender. To establish a prima facie case of retaliation under Title VII or parallel state law, a plaintiff must establish that 1) she engaged in protected activity; 2) her employer took adverse employment action against her; and 3) that a causal nexus exists between the alleged protected activity and the adverse employment action. *Stegall v. Citadel Broad. Co.,* 350 F.3d 1061, 1065–66 (9th Cir.2003); *Harris v. Pameco Corp.,* 170 Or.App. 164, 176, 12 P.3d 524 (2000). To establish a retaliation claim, a plaintiff must establish by a preponderance of the evidence that an adverse employment action was motivated, at least in part, by her protected activity, and that, but for that activity, she would not have been subjected to that action. *Villiarimo v. Aloha Island Air, Inc.,* 281 F.3d 1054, 1064–65 (9th Cir.2002). The employer's awareness that the plaintiff had engaged in protected activity is a required element in establishing a retaliation claim. *Cohen v. Fred Meyer, Inc.,* 686 F.2d 793, 796 (9th Cir.1982).

Defendant concedes that plaintiff "may" satisfy the first two of these requirements, because there is evidence in the record "to suggest that she told Meno and Baird that she believed her gender impacted her rate of pay." It asserts, however, that she cannot establish any causal link between her complaint about her pay and her termination, because there is no evidence that plaintiff ever complained about allegedly discriminatory compensation to Pieratt, who made the decision to terminate her. Defendant also asserts that there is "undisputed" evidence that plaintiff was terminated "following reports of egregious safety violations by

associates on the night freight crew." Defendant adds that the record establishes that plaintiff knew she could be held responsible under Home Depot's policies for safety violations committed by her crew, and that "it is uncontested that when confronted with evidence that an employee on her freight team had committed multiple safety violations and was being discharged, Plaintiff responded by telling Pieratt, the store manager, that his decision was 'bullshit.' "

In her memorandum supporting her opposition to Home Depot's motion for summary judgment, plaintiff has not responded to these arguments or addressed the retaliation claim. In evaluating the motion as to this claim, however, I have considered plaintiff's arguments concerning the common law wrongful discharge claim discussed below: If plaintiff could show evidence supporting the conclusion that Home Depot terminated her in part because of her opposition to unlawful discrimination, that evidence would also support her retaliation claim under federal and state statutes.

As noted below, I conclude that, though the record before the court creates material issues of fact as to whether Home Depot discriminated against plaintiff on the basis of her gender, it does not include evidence supporting the conclusion that Home Depot retaliated against plaintiff in response to her opposition to discrimination. Though material issues of fact exist as to whether the safety issues that Home Depot cited as the basis for plaintiff's termination were pretextual, there is no evidence that Pieratt, who terminated plaintiff, was aware of any conduct by plaintiff ***1092** undertaken in opposition to unlawful discrimination. In the absence of such evidence, Home Depot is entitled to summary judgment on plaintiff's claims of unlawful retaliation that are based upon state and federal statutes.

D. *Plaintiff's Common Law Wrongful Termination Claim*

In the absence of any contrary statutory or contractual provisions, Oregon law generally permits an employer to discharge an employee at any time and for any reason. *Holien v. Sears, Roebuck & Co.,* 298 Or. 76, 83, 689 P.2d 1292 (1984). A narrow exception applies for those circumstances in which strict enforcement of this "at-will rule" would be contrary to public policy and no adequate statutory remedy is otherwise available. *Carlson v. Crater Lake Lumber Co.,* 103 Or.App. 190, 796 P.2d 1216 (1990); *Kofoid v. Woodard Hotels, Inc.,* 78 Or.App. 283, 287, 716 P.2d 771 (1986). *See also Draper v. Astoria School Dist. No. 1C,* 995 F.Supp. 1122, 1131 (D.Or.1998) (common law wrongful discharge claims not recognized in Oregon where adequate alternative remedy has been established by statute). Terminating an employee because of her gender will not support a claim for wrongful termination under Oregon common law. *E.g., Kofoid,* 78 Or.App. at 287, 716 P.2d 771. Termination in response to an employee's opposition to unlawful discrimination will support such a claim. *See id.*

Home Depot contends that plaintiff's common law wrongful termination claim fails because the record will not support the conclusion that any of its actions regarding plaintiff's discharge were wrongful. It contends that this claim also fails because plaintiff cannot show that she was terminated in response to her resistance or opposition to unlawful discrimination. Home Depot asserts that, though there is evidence that plaintiff may have complained to Baird and Meno about her allegedly disparate pay, there is no evidence that she ever "engaged in such oppositional conduct with Pieratt, who was the decision-maker responsible for her discharge." Home Depot notes that Baird and Meno had both left the Troudale store where plaintiff worked sometime before Pieratt terminated her.

In support of her opposition to Home Depot's motion for summary judgment on the wrongful termination claim, plaintiff recites the allegations in her complaint. She further cites *Goodlette v. LTM, Inc.,* 128 Or.App. 62, 874 P.2d 1354 (1994), in support of her contention that Home Depot's "motion to dismiss" her wrongful discharge claim should be denied.

Plaintiff's reliance on her pleadings and upon *Goodlette* is misplaced. In reversing the trial court's grant of summary judgment in the defendant employer's favor, the *Goodlette* court noted that the employer had essentially asserted that it was entitled to summary judgment because the plaintiff could not "state a claim" for wrongful termination under the facts she had alleged. *Id.* at 64, 874 P.2d 1354. Noting that the relevant question before it was "whether plaintiff's complaint alleges that she was discharged for resisting discrimination," the *Goodlette* court concluded that "the complaint here succeeds in alleging resistance to discrimination." *Id.* at 66, 874 P.2d 1354.

Here, Home Depot correctly concedes that plaintiff's complaint adequately states a wrongful termination claim. Accordingly, the question now is not, as in *Goodlette,* whether the complaint states a wrongful termination claim, but whether plaintiff has shown the existence of evidence from which a reasonable trier of fact could find in her favor on that claim.

As noted above, plaintiff has shown the existence of sufficient evidence that her ***1093** termination was discriminatory to defeat Home Depot's motion for summary judgment. She has also produced evidence that she complained to Baird and Meno about gender discrimination. However, she has not produced evidence that Pieratt, the manager who decided to terminate her, was aware of any of her conduct that opposed unlawful discrimination. In the absence of such evidence, Home Depot is entitled to summary judgment on the wrongful termination claim.

E. *Claim for Back Pay*

As noted above, plaintiff was terminated on November 11, 2004. When her deposition was taken, plaintiff testified that she had never obtained another job after she was terminated by Home Depot. She testified that she had decided to "stay home" with her children "after about a year...." When asked if, after November, 2005, she had stopped looking for work in the newspaper, on line, and when she walked into a store, plaintiff replied: "Yes. Unless I walk into a store that I want to work at and because I know they have a night shift and they have a position open or something." In her declaration submitted in support of her opposition to the motion for summary judgment, plaintiff states that she looked for work nearly every day for a year, and then "decided to stay home and continue to seek out opportunities to work nights."

Home Depot contends that plaintiff's claim for back pay is barred "as of the date she withdrew from the job market" because a plaintiff seeking back-pay under Title VII and Or.Rev.Stat. § 659A.030 has a duty to mitigate damages by seeking comparable employment after being terminated. It asserts that plaintiff "admitted during her deposition that she withdrew from the job market within a year of leaving Home Depot in favor of remaining a stay-at-home-mom."

An employer bears the burden of establishing that a former employee has not made reasonable efforts to find employment following termination. *E.g., Odima v. Westin Tucson Hotel,* 53 F.3d 1484, 1497 (9th Cir.1995). To do so, the employer generally must show that substantially equivalent positions were available during the time in question, that the employee could have obtained an equivalent position, and that the employee failed to use reasonable diligence in seeking another job. *Id.* However, the employer need not prove that comparable positions were available if it can establish "that the employee made no reasonable efforts to seek such employment." *Haeuser v. Department of Law,* 368 F.3d 1091, 1100 (9th Cir.2004).

Based upon plaintiff's deposition testimony, I conclude that summary judgment should be granted limiting the period of back pay that plaintiff might recover. Plaintiff's testimony that she stopped looking for work unless she walked into a store where she wanted to work which she knew had a night shift and "a position open or something" does not describe a job search that satisfied plaintiff's obligation to mitigate her damages. "Reasonable diligence" in searching for work requires a more active effort to find employment. Defendant therefore should not be required to pay plaintiff back pay for any period after November, 2005.

CONCLUSION

Defendant's motion for summary judgment (# 52) should be GRANTED as to plaintiff's claims of retaliation and failure to promote under state and federal statutes, as to plaintiff's hostile environment claim, as to plaintiff's wrongful termination claim under Oregon common law, and as to any claim for back pay after November, 2005. The motion should be DENIED as to the balance of plaintiff's claims.

***1094** Plaintiff's motion to strike (# 72) is GRANTED.

Defendant's motions to strike (# 88 and # 104) are GRANTED in part and DENIED in part as set out in Section I.B. above.

SCHEDULING ORDER

The above Findings and Recommendation are referred to a United States District Judge for review. Objections, if any, are due March 7, 2008. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date.

A party may respond to another party's objections within 10 days after service of a copy of the objection. If objections are filed, review of the Findings and Recommendation will go under advisement upon receipt of the response, or the latest date for filing a response.

Feb. 19, 2008.

All Citations

616 F.Supp.2d 1055

Footnotes

1 Plaintiff asserts that Baird did not follow Home Depot policy when he set her pay rate after she was promoted to a supervisor position.

2 Though Home Depot characterizes the equipment as "heavy," it is not "heavy equipment" as that term is generally used in the context of construction and manufacturing.

3 After taking Pulicella's deposition, defendant submitted a second motion to strike these paragraphs. In analyzing the motion to strike Pulicella's declaration, I have considered the arguments Home Depot offers in support of both motions.

4 Even if I have erred in concluding that plaintiff's Title VII wage claim is not barred by the statute of limitations under *Ledbetter,* it appears that all the evidence that would support her Title VII wage claim would be admissible as to the EPA claims.

5 Plaintiff's claims under Oregon statutes are subject to the same analysis under both state and federal law. *See, e.g., School Dist. No. 1 v. Nilsen,* 271 Or. 461, 469, 534 P.2d 1135, 1139 (1975); *Meltebeke v. Bureau of Labor and Indus.,* 120 Or.App. 273, 282, 852 P.2d 859 N. 4, 120 Or.App. 273, 852 P.2d 859 (1993) (Edmonds, J., specially concurring), *aff'd,* 322 Or. 132, 903 P.2d 351 (1995); *Hillesland v. Paccar, Inc.,* 80 Or.App. 286, 294, 722 P.2d 1239, *rev. denied,* 302 Or. 299, 728 P.2d 531 (1986). Contrary to plaintiff's assertion that the "shifting burden" framework does not apply to claims brought under state law, the Ninth Circuit has held that, in evaluating motions for summary judgment brought against state-law claims in federal court, the evidence must be examined "in accordance with *McDonnell Douglas'* burden-shifting model." *Snead v. Metropolitan Prop. & Cas. Ins. Co.,* 237 F.3d 1080, 1093 (9th Cir., *cert. denied,* 534 U.S. 888, 122 S.Ct. 201, 151 L.Ed.2d 142 (2001)).

6 Though plaintiff has not pleaded a separate failure to train claim, evidence concerning the training opportunities afforded plaintiff may be relevant to other claims, to the extent that it supports the conclusion that Home Depot generally discriminated against plaintiff on the basis of her gender.

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364 F.3d 368
United States Court of Appeals,
First Circuit.

Albert JOHNSON, Plaintiff, Appellee/Cross–Appellant,
v.
SPENCER PRESS OF MAINE, INC., Defendant, Appellant/Cross–Appellee,
Spencer Press, Inc., Defendant.

Nos. 03–1999, 03–2069.
|
Heard March 2, 2004.
|
Decided April 16, 2004.

Synopsis

Background: Former janitorial employee filed Title VII religious discrimination case against former employer. The United States District Court for the District of Maine, D. Brock Hornby, J., entered judgment on jury verdict finding employer liable for harassment of employee on account of his religion and awarded $400,000 in compensatory damages and $750,000 in punitive damages, reduced to statutory cap of $300,000. Employer appealed from denial of its motion for new trial and also challenged punitive damages award and jury instructions. Employee cross-appealed district court's holding that he was not entitled to any back pay or front pay after he was fired from his next job for misconduct.

Holdings: The Court of Appeals, Lynch, Circuit Judge, held that:

jury could have easily concluded based on the evidence that employee was harassed because of his religion;

it was not against clear weight of the evidence for jury to find that harassment endured by employee was sufficiently severe or pervasive to affect term, condition or privilege of employment;

court would decline to address whether punitive damages award was excessive since compensatory damages award itself was greater than statutory cap;

district court did not abuse its discretion in omitting from instructions to jury on requirement that harassment be severe or pervasive a statement that conduct had to be extreme;

district court erred in permanently cutting off employee's ability to receive further back pay or front pay once he was fired for misconduct from position he took after leaving discriminatory employer, based on his failure to mitigate damages; but

although employee was unable to work thereafter because of depression and panic and anxiety disorders, evidence was insufficient to support his claim that his total disability was attributable to harassment he encountered at discriminating employer.

Affirmed.

Cyr, Senior Circuit Judge, filed concurring opinion.

Attorneys and Law Firms

***371** U. Charles Remmel, II, with whom Jennifer A. Archer and Kelly, Remmel & Zimmerman were on brief, for appellant/cross-appellee.

Eric J. Uhl, with whom Moon, Moss, McGill & Shapiro, P.A. was on brief, for appellee/cross-appellant.

***372** Before LYNCH, Circuit Judge, CYR, Senior Circuit Judge, and HOWARD, Circuit Judge.

Opinion

LYNCH, Circuit Judge.

These are cross-appeals in a Title VII religious discrimination case. A jury found Spencer Press of Maine liable for the harassment of its employee Albert Johnson on account of his religion and awarded compensatory and punitive damages, respectively $400,000 and $750,000, the sum of which was reduced to the statutory cap of $300,000. 42 U.S.C. § 1981a(b)(3)(D); Me.Rev.Stat. Ann. tit. 5, § 4613(2)(B)(8)(e)(iv). Johnson was repeatedly harassed over the course of his nine-year employment in Spencer Press's janitorial department by his supervisor, Steven Halasz.

Spencer Press appeals from the denial of its new trial motion, arguing that the evidence did not show that the harassment was because of Johnson's religion and did not show that it was severe and pervasive. Spencer Press also challenges the punitive damages award and the jury instructions. We reject these contentions and affirm.

Johnson cross-appeals the district court's holding that he was not entitled to any back pay or front pay after he was fired from his next job, after leaving Spencer Press, for misconduct. He also argues that the district court erred in rejecting the contention that he was unable to get a subsequent job because he was psychologically disabled, and that Spencer Press is responsible for this disability because it stems from the harassment he endured while he was an employee there.

We affirm the limitation on Johnson's front pay and back pay, but we do so on alternative grounds. We hold that it is error to cut off, as a matter of law, the ability of a successful Title VII plaintiff to receive further back pay or front pay once he is fired for misconduct from the position he takes after leaving the discriminatory employer. As a result, we reach a second issue on which Johnson's cross-appeal ultimately fails; Johnson was unable to work because he was totally disabled and the evidence was insufficient to support Johnson's claim that this disability was attributable to the harassment he endured at Spencer Press. We affirm.

I.

On April 3, 2002, plaintiff Albert Johnson filed suit against his former employer, Spencer Press of Maine, Inc.,[1] alleging that he had been discriminated against and harassed on the basis of, inter alia,[2] his religion in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and the Maine Human Rights Act, Me.Rev.Stat. Ann. tit. 5, § 4551 *et seq.* (West 2002).[3] The complaint sought all available forms of relief, including compensatory and punitive damages and front and back pay. Spencer ***373** Press promptly moved for summary judgment on these claims. The district court denied the motions as to Johnson's underlying discrimination and harassment claims and as to the availability of punitive damages, but held, as a matter of law, that Johnson was not entitled to any front pay or back pay for any time after December 8, 2000. Johnson was fired for misconduct on that date from Hannaford Brothers, his employer immediately after he left Spencer Press.

The case proceeded to trial before a jury on April 28, 2003 and lasted four days. The testimony presented at trial, which is recounted in the light most favorable to Johnson, *O'Rourke v. City of Providence,* 235 F.3d 713, 717 (1st Cir.2001), established the following account.

Johnson received a B.S. in Bible Studies from Valley Forge Christian College in 1978 and served as a pastor at the Beech Ridge Assembly of God Church from May 1979 to October 1981. In 1981, Johnson resigned from his position at the church and found a new job at the Paul Dever State School for the mentally retarded, which he stayed in until July 1990. Despite leaving his official position at the church, Johnson remained very active in religious activities.

In November of 1991, Johnson began working as a custodian at Spencer Press, a printing company. After Johnson started at Spencer Press, he expressed to both his supervisor at the time and his co-workers a desire to have Sundays off from work. Although Johnson had to work most Sundays, his first few months at Spencer Press were incident-free.

Stephen Halasz became the supervisor of the custodial department at Spencer Press in May of 1992. Some time shortly thereafter, Johnson expressed to Halasz a desire to have Sundays off, if possible. Johnson had also had discussions with co-workers in which he revealed his religious beliefs. Starting either in late 1992 or early 1993, Halasz began asking Johnson about his religious views. Halasz testified that he understood the reason that Johnson did not like to work on Sundays was because he wanted to go to church. Halasz also testified that he was aware that Johnson was religious before he found out in 1995 that Johnson used to be a minister.

Soon after Halasz was promoted to the position of supervisor, he started making inappropriate and lewd comments to Johnson. Johnson recounted one incident in late 1992 in which Halasz told him to "help hold my dick" and another incident in which Halasz said Johnson looked tired and told a co-worker that "if Al fucks like he works, then he must be slow as a nigger." Halasz made multiple other inappropriate and sexually explicit comments to Johnson throughout 1992 and 1993.

At least two of these remarks specifically targeted Johnson's religious beliefs. At one point, Halasz tried to show Johnson a Playboy magazine and said that he "must be Catholic" because he got flustered whenever Halasz made comments about sex. Johnson said that on another occasion in 1992, Halasz proclaimed to another custodian that "Al doesn't fuck, drink or smoke, he must be a Catholic." Halasz admitted to making derogatory remarks to Johnson and teasing him for being Catholic. He also said that he remembered calling Johnson a Catholic when he refused to look at a Playboy magazine.

Upset by Halasz's treatment of him, Johnson started in 1994 to keep notes of "significant" events that he considered "hostile or demeaning." Johnson kept notes of numerous instances of harassment by Halasz that occurred from 1992 until May 2000, when Johnson left Spencer Press. These included Halasz's comments that Johnson should suck Halasz's dick, that Halasz hoped a deer would "run[ ] out ***374** of the woods and suck[ ][his] cock," and that Johnson should give his boss a "blow job." Halasz did not make comments like these to any of the other custodians at Spencer Press. One of Johnson's former co-workers, Patrick Hubbard, confirmed that Halasz consistently and frequently called Johnson names such as "fucking queer," "fucking cock sucker," and "fucking lazy." Hubbard testified that he never heard Halasz call any other workers by these names.

A significant percentage of the derogatory comments that Halasz made from 1994 to 2000 involved Johnson's religion. Halasz called Johnson a "religious freak" and told Johnson that he was tired of his "religious bullshit." According to Johnson, Halasz told him that because of his religious beliefs he "wasn't out basically getting pussy." On April 27, 2000, a day before Johnson tendered his resignation to Spencer Press, Halasz told Johnson that "he was getting real tired of hearing that [Johnson] couldn't work overtime on Sundays, that [he] was involved in church and classes, and [that Halasz] didn't like it." Halasz then asked Johnson "if you could work overtime ... and make $120 or love Jesus, what would you do?" When Johnson answered that he would love Jesus, Halasz screamed "well, why don't you take Mary and turn her upside down and pull her dress over her head."

Halasz's derogatory remarks involving religion were also corroborated by the testimony of Johnson's former co-worker. Karen Hart, who worked with Johnson as a custodian in 1999, testified that Halasz harassed Johnson about his religion and called him

a "religious freak." Hart recalled Halasz telling Johnson that "I don't want to hear about your religious bullshit" and, on another occasion, that he should "go work with people that are Jehovah Witnesses and keep your comments to yourself [because] I don't want to hear about the religious stuff." Halasz also told Johnson that Johnson's job was more important than his church affairs. Halasz made these comments, according to Hart, "on a daily basis" while she was working at Spencer Press. Hart testified that she was so distraught by these comments that she told Halasz that he "shouldn't be harassing [Johnson] about his religion."

Johnson's testimony that Halasz consistently harassed him about his religious beliefs was also corroborated by Norma Crawford, a friend of Johnson. Crawford testified that Johnson frequently called her from work when he was upset and told her that he was being harassed at work because of his religion. On several of these occasions, according to Crawford, Johnson was crying when he called her. Crawford testified that Johnson told her about Halasz's comment regarding the Virgin Mary.

Johnson also testified about several instances in which Halasz threatened to kill him with a hand grenade, run him over with a car, and shoot him with a bow and arrow. At one point, Halasz took a knife out of its sheath and put the point of it under Johnson's chin.

Johnson complained to the human resources department about the treatment he was receiving from Halasz about six different times over the course of his employment. Each time, he was told that there was nothing that could be done and, that if he did not like the treatment he was receiving, he could leave the company. At one point, the human resources person to whom Johnson complained told him that she could not pursue his complaints about Halasz because if she did she would be fired. Johnson also filed several requests to transfer into another division within Spencer Press, each of which was denied.

On April 28, 2000, Halasz resigned his position from Spencer Press. He had been experiencing frequent panic attacks ***375** at work, and at one point he had needed to be taken to the hospital in an ambulance as a result of a panic attack. He also had suffered from severe depression. On May 2, he began another job at Hannaford Brothers, a supermarket chain.

Johnson subsequently filed a complaint with the Maine Human Rights Commission and the Equal Employment Opportunity Commission. After Johnson filed these complaints, Halasz came to Johnson's house and threatened to beat him up if he maintained his complaints. He also told Johnson that as a result of the complaints, he had been forced to take harassment classes at Spencer Press and that he had learned that he had discriminated against Johnson on the basis of his religion.

On May 1, 2003, a jury returned a verdict in which it concluded that Spencer Press harassed Johnson because of his religion or religious beliefs and that Johnson was constructively discharged from Spencer Press because of that harassment. The jury also found that Spencer Press had not independently taken any specific adverse employment action against Johnson on the basis of his religion. The jury awarded Johnson $400,000 in compensatory damages and $750,000 in punitive damages. Spencer Press did not file a Rule 50 motion for judgment as a matter of law.

Spencer Press did move for a new trial pursuant to Fed. R. Civ. Proc. 59, arguing that there was insufficient evidence to support the jury's verdict. That motion was denied, and judgment was entered in favor of Johnson on the harassment claim. Pursuant to 42 U.S.C. § 1981a(b)(3)(D), the sum of compensatory and punitive damages was capped at $300,000. Johnson was also awarded $1,227.94 in back pay, which represented Johnson's wage loss between May 2, 2000 and December 8, 2000, the period he was employed at Hannaford Brothers.

Spencer Press appeals both the district court's denial of its motion for a new trial and the underlying judgment. Johnson cross-appeals the district court's ruling limiting the availability of front and back pay.

II. Direct Appeal

A. *Denial of Spencer Press's Motion for a New Trial*

We review the district court's denial of Spencer Press's motion for a new trial for an abuse of discretion. [4] *Marrero v. Goya of P.R., Inc.,* 304 F.3d 7, 14 (1st Cir.2002). In doing so, we recognize that motions for a new trial are generally "directed to the trial court's discretion and th[e] remedy is sparingly used." *Dall v. Coffin,* 970 F.2d 964, 969 (1st Cir.1992) (internal quotation marks omitted). A district court should only grant such motions if "the outcome is against the clear weight of the evidence such that upholding the verdict will result in a miscarriage of justice." *Ramos v. Davis & Geck, Inc.,* 167 F.3d 727, 731 (1st Cir.1999) (internal quotation marks omitted).

The jury found in favor of Johnson on his workplace harassment claim based on religion. Spencer Press argues that ***376** there was no causal link to religion and that the harassment was not severe and pervasive. To prevail on a harassment claim based on a supervisor's conduct, Johnson needed to carry his burden that: (1) he was a member of a protected class; (2) he was subject to uninvited harassment; (3) the offending conduct was because of his religion; (4) the harassment was sufficiently severe or pervasive to affect the terms and conditions of employment; (5) the offending conduct was both objectively and subjectively offensive; and (6) there was a basis for employer liability. *Rivera v. P.R. Aqueduct & Sewers Auth.,* 331 F.3d 183, 189 (1st Cir.2003); *O'Rourke,* 235 F.3d at 728. Spencer Press argues that the jury's conclusion in favor of Johnson was against the clear weight of the evidence on both prongs (3) and (4).

In advancing the claim that any harassment was not due to religion, Spencer Press relies heavily on *Rivera,* in which we noted a "conceptual gap between an environment that is offensive to a person of strong religious sensibilities and an environment that is offensive because of hostility to the religion guiding those sensibilities." 331 F.3d at 190. [5] Although Spencer Press admits that there may have been several isolated incidents in which the harassment manifested itself in comments implicating religion, it argues that this was not sufficient for the jury to conclude that Johnson was harassed *because of* his religion.

The district court did not abuse its discretion in declining to grant a new trial. Soon after Halasz was promoted to custodial supervisor, he became aware that Johnson was a religious person. At approximately the same time, he started making extremely inappropriate and lewd comments to Johnson. At first, only some of these remarks explicitly targeted Johnson's religion: Halasz repeatedly said that Johnson "must be Catholic" because he did not want to do certain things. Gradually, though, the harassment came to focus unabashedly on Johnson's religious views. Halasz repeatedly called Johnson a "religious freak," told him not to talk about "religious bullshit," said that because of his religion he was not getting sex, and told him to "take [the Virgin] Mary and turn her upside down and pull her dress over her head."

Almost all of the inappropriate comments concerning Johnson's religion focused on a consistent theme: that Johnson was too chaste and sober for Halasz's taste and that this was because of Johnson's religious beliefs. Halasz did not make similarly inappropriate and offensive comments to other Spencer Press employees. Given the consistency of the harassment that specifically invoked Johnson's religion and the more frequent harassment that did not, the jury could easily have concluded that the underlying motivation—religious discrimination—was the same for each. The jury also could have easily concluded that this motivation stemmed from Halasz's animosity towards Johnson's religious beliefs; indeed, Halasz explicitly attributed Johnson's chastity and sobriety to his religious convictions. As explained in *Rivera,* "conduct need not be explicitly religious to constitute harassment because of religion." 331 F.3d at 190 n. 2; *see Venters v. City of Delphi,* 123 F.3d 956, 973 (7th Cir.1997) (religious ***377** harassment can be established through indirect comments that are not on their face about religion); *cf. Landrau–Romero v. Banco Popular De Puerto Rico,* 212 F.3d 607, 614 (1st Cir.2000) ("Alleged conduct that is not explicitly racial in nature may, in appropriate circumstances, be considered along with more overtly discriminatory conduct in assessing a Title VII harassment claim.").

For similar reasons, we reject Spencer Press's argument that it was against the clear weight of the evidence for the jury to find that the harassment endured by Johnson was sufficiently "severe or pervasive" to affect a "term, condition, or privilege of employment." *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). Whether the harassment was severe or pervasive "must be answered by reference to 'all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " *Marrero v. Goya of Puerto Rico, Inc.,* 304 F.3d 7,

18 (1st Cir.2002) (quoting *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)). "Subject to some policing at the outer bounds, it is for the jury to weigh those factors and decide whether the harassment was of a kind or to a degree that a reasonable person would have felt that it affected the conditions of her employment." *Id.* (internal quotation marks omitted).

The description of facts set forth earlier provides more than ample support for the jury's conclusion. Halasz repeatedly and continuously insulted Johnson and mocked his religious convictions. The harassment occurred throughout Johnson's work day, including when he was attempting to perform his custodial duties. On multiple occasions, Halasz threatened Johnson with violence and once he actually placed the point of a knife under Johnson's chin. In sum, there was more than ample evidence to support the jury's conclusion that the harassment was severe and pervasive. *See White v. N.H. Dep't of Corr.,* 221 F.3d 254, 260–61 (1st Cir.2000) (finding that "disgusting comments" and conversations that occurred "everyday" could support a finding that harassment was severe and pervasive).

B. *Spencer Press's Challenge to the Punitive Damages Award*

Spencer Press argues that the jury did not have sufficient evidence to award punitive damages because Halasz was not acting "in a managerial capacity" during the course of Johnson's employment. *Kolstad v. Am. Dental Ass'n,* 527 U.S. 526, 545–46, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999). Spencer Press admits that the jury rationally could have rejected its affirmative defense to an award of punitive damages that it had exercised reasonable care to avoid harassment and to eliminate it when it might occur. *Id.* at 545, 119 S.Ct. 2118.

The availability of punitive damages is not a live issue. The jury awarded Johnson $400,000 in compensatory damages and $750,000 in punitive damages. Acting pursuant to 42 U.S.C. § 1981a(b)(3)(D) and Me.Rev.Stat. Ann. tit. 5, § 4613(2)(B)(8)(e)(iv), both of which cap the sum of punitive and compensatory damages for employers with over 500 employees, the district court entered judgment for Johnson for $300,000. [6] Because the compensatory damages award was itself greater than the statutory cap, the ***378** award would have been the same regardless of whether the jury awarded any punitive damages. *See Quint v. A.E. Staley Mfg. Co.,* 172 F.3d 1, 14 (1st Cir.1999) (declining to address whether a compensatory damages award was excessive because the award of punitive damages exceeded the statutory cap); *Hogan v. Bangor & Aroostook R.R. Co.,* 61 F.3d 1034, 1037 (1st Cir.1995) (avoiding the issue of punitive damages because the jury's award of compensatory damages was the same as the statutory cap).

C. *Spencer Press's Challenge to the Jury Instructions on the Severe or Pervasive Requirement*

Spencer Press argues that the district court erred in its explanation to the jury of the requirement that the harassment be "severe or pervasive." Spencer Press preserved the objection.

The district court instructed the jury that, to succeed on his harassment claim, Johnson must show:

> that the harassment was sufficiently severe or pervasive so as to alter the conditions of his employment and create an abusive working environment....
>
> Religiously discriminatory remarks, innuendos, ridicule, and intimidation can be sufficiently severe or pervasive in their accumulated effect to alter the conditions of employment and create an abusive working environment. But offhand comments, rudeness, occasional teasing and isolated incidents are not alone sufficient. This is not a general civility code for the workplace.

Spencer Press's argument is that this instruction was flawed because it did not include a statement that the conduct must be "extreme." This argument is premised on the Supreme Court's statement in *Faragher* that "conduct must be *extreme* to amount to a change in the terms and conditions of employment." 524 U.S. at 788, 118 S.Ct. 2275 (emphasis added).

We review the district court's choice of language in instructing the jury for an abuse of discretion. *Gray v. Genlyte Group, Inc.,* 289 F.3d 128, 133 (1st Cir.2002). The district court did not abuse its discretion in omitting the word "extreme" from its instructions to the jury. It is the district court's prerogative to craft the "particular verbiage" that it will use in its jury instructions. *Febres v. Challenger Caribbean Corp.,* 214 F.3d 57, 62 (1st Cir.2000). So long as that language properly explains the controlling legal standards and is not unduly confusing or misleading, it will not be second-guessed on appeal. *See id.; Brown v. Trustees of Boston Univ.,* 891 F.2d 337, 353 (1st Cir.1989); *see also Webster's Third New International Dictionary* 807 (1993) (one definition of "extreme" is "marked by great severity"). There is no requirement that the word "extreme" be used in instructing the jury on a harassment claim.

III. Johnson's Cross–Appeal Regarding Damages

Johnson cross-appeals the district court's summary judgment and post-trial determinations that, as a matter of law, he is not entitled to any back pay or front pay for any period beyond December 8, 2000. Spencer Press raises no questions about Johnson's preservation of these issues for appeal.

The availability of back pay and front pay is not affected by the cap on compensatory and punitive damages. Both federal and Maine law clearly exclude awards of back pay from the statutory cap on the sum of compensatory and punitive damages. *See* 42 U.S.C. § 1981a(b)(2); Me.Rev.Stat. Ann. tit. 5, § 4613(2)(B)(8)(d). And the Supreme ***379** Court has recently clarified that the same rule applies to awards of front pay. *Pollard v. E.I. du Pont de Nemours & Co.,* 532 U.S. 843, 848, 121 S.Ct. 1946, 150 L.Ed.2d 62 (2001).

An award of back pay compensates plaintiffs for lost wages and benefits between the time of the discharge and the trial court judgment. *See* Lindemann & Grossman, *Employment Discrimination Law* 635–37 (Cane, Jr. et al. eds., 3d ed.1996). Front pay, by contrast, is "money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." *Pollard,* 532 U.S. at 846, 121 S.Ct. 1946; *see* Lindemann & Grossman, at 639–42. Front pay thus compensates plaintiffs for lost wages that may accrue after the conclusion of the trial. Both back pay and front pay are authorized by 42 U.S.C. § 2000e–5(g)(1), which provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may ... order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

During the back pay period, individuals have an obligation to exercise "reasonable diligence" in finding alternative suitable employment. *See* 42 U.S.C. § 2000e–5(g)(1); *Ford Motor Co. v. EEOC,* 458 U.S. 219, 231–32, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982) (an "unemployed or underemployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in" 42 U.S.C. § 2000e–5(g)(1)); *Carey v. Mt. Desert Island Hosp.,* 156 F.3d 31, 41 (1st Cir.1998). Thus, awards of back pay are offset by any wages that could have been earned with reasonable diligence after the illegal discharge, regardless of whether they were actually earned. *See* § 2000e–5(g)(1); *Quinones Candelario v. Postmaster Gen. of United States,* 906 F.2d 798, 799–802 (1st Cir.1990). Failures to mitigate damages can take a variety of forms, including not looking for new employment, *see, e.g., Hansard v. Pepsi–Cola Metro. Bottling Co.,* 865 F.2d 1461, 1468 (5th Cir.1989), finding

new employment but voluntarily quitting, *see, e.g., EEOC v. Delight Wholesale Co.,* 973 F.2d 664, 670 (8th Cir.1992), or, as in this case, finding new employment and getting discharged for misconduct, *see, e.g., Brady v. Thurston Motor Lines, Inc.,* 753 F.2d 1269, 1277 (4th Cir.1985).

The Supreme Court laid out the basic standards for awarding back pay in *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). That opinion clarified that in cases of unlawful discrimination, "back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* at 421, 95 S.Ct. 2362. Despite its equitable nature, back pay is therefore "a presumptive entitlement of a plaintiff who successfully prosecutes an employment discrimination case." *Thurman v. Yellow Freight Systs., Inc.,* 90 F.3d 1160, 1171 (6th Cir.1996). In ***380** this circuit, juries are generally entrusted with decisions on back pay when the jurors are already resolving issues of liability and compensatory damages. [7] *See Santiago–Negron v. Castro–Davila,* 865 F.2d 431, 441 (1st Cir.1989).

Awards of front pay, by contrast, are generally entrusted to the district judge's discretion [8] and are available in a more limited set of circumstances than back pay. *See Lussier v. Runyon,* 50 F.3d 1103, 1108–09 (1st Cir.1995). Front pay should not be awarded unless reinstatement is impracticable or impossible. *Wildman v. Lerner Stores Corp.,* 771 F.2d 605, 616 (1st Cir.1985). Even then, awards of front pay are discretionary, in part because they necessarily involve predictions of events yet to come. *See id.; Lussier,* 50 F.3d at 1109. For these reasons, district court decisions as to front pay are generally afforded more deference than decisions as to back pay.

The district court ruled that Johnson stopped mitigating his damages about seven months after he left Spencer Press, when he was fired on December 8, 2000 from his subsequent job at Hannaford Brothers, a major supermarket chain in Maine. Johnson had started that job only a few days after leaving Spencer Press. Johnson was found eating food for which he had not paid, in violation of Hannaford company rules. This failure to mitigate damages, held the district court, eliminated the availability of either back pay or front pay for any time period after December 8. [9] Moreover, the district court found that there was insufficient evidence that the mistreatment Johnson endured at Spencer Press was causally responsible for his being fired from Hannaford. The court concluded that Johnson's own lay testimony to this effect did not create an issue of fact and that Johnson's expert was not "specific enough" on the link between Johnson's disability and his misbehavior at Hannaford. [10]

Johnson's cross-appeal does not dispute the conclusion that Spencer Press was not responsible for his termination from Hannaford. Instead, Johnson's basic argument is that the district court misunderstood the implications of his being fired from Hannaford for the availability of both front and back pay. Johnson argues that his termination from Hannaford only tolled the availability of back pay until he was able to find another job, and that the district court erroneously held that the availability of ***381** back pay was permanently cut off at that point. Johnson makes a similar argument as to front pay, claiming that the district court still had discretion to award front pay even after he was fired from Hannaford. Furthermore, Johnson says that he was unable to find a job after he was fired from Hannaford because he was psychologically completely disabled and Spencer Press is responsible for this disability. As a result, Johnson argues, Spencer Press is liable for back pay after he was fired from Hannaford because it was responsible for his inability to end the tolling period. Similarly, Johnson says that the district court could also have awarded front pay on this rationale. The analytical issues as to back pay and front pay are similar.

A. *Back pay*

Review of the legal principles used by the district court in determining the availability of back pay is de novo. *Reich v. Cambridgeport Air Sys.,* 26 F.3d 1187, 1190 (1st Cir.1994). Johnson's appeal raises a number of difficult issues. As Johnson notes, the district court's final holding was that once Johnson was fired from Hannaford, he was no longer eligible for any back pay. [11]

The district court was correct that once Johnson was fired from Hannaford for misconduct, he was no longer mitigating his damages, as was required. But that did not mean that the possibility of back pay was permanently cut off. Although the district court did not explicitly endorse, or even give reasons for, such a rule, its holding necessarily relied on this supposition of law. [12] We hold that this was error.

In fact, at least two circuit courts have found that back pay awards can accrue for periods after an employee is terminated from an "employer B" when the job at "employer B" was serving to mitigate damages arising from discriminatory conduct by "employer A." *See Delight Wholesale,* 973 F.2d at 670 (back pay period was temporarily tolled after plaintiff voluntarily quit for personal reasons and began to run once she found a new job); *Brady,* 753 F.2d at 1278–80 (back pay is temporarily tolled after an employee is fired for misconduct in the course of mitigating damages from a previous illegal discharge and begins again once the employee finds another job). These holdings stem, at least in part, from the NLRB's rule on the issue, first articulated in *Knickerbocker Plastic Co.,* 132 N.L.R.B. 1209, 1215, 1961 WL 15694 (1961):

> We further find that, as a result of such quitting, each of these claimants shall be ***382** deemed to have earned for the remainder of the period for which each is awarded back pay the hourly wage being earned at the time such quitting occurred. Therefore, an offset computed on the appropriate rate per hour will be deducted as interim earnings from the gross back pay of each of these claimants. *This offset shall be made applicable from the date of the unjustified quitting throughout the remainder of the back pay period for each particular claimant.*

(emphasis added). Because Title VII's back pay language was " 'expressly modeled' on the analogous remedial provision of the National Labor Relations Act (NLRA)" the "principles developed under the NLRA generally guide, but do not bind, courts in tailoring remedies under Title VII." *Ford Motor Co.,* 458 U.S. at 226 n. 8, 102 S.Ct. 3057 (internal citations omitted).

We hold that back pay is not permanently terminated when an employee is fired for misconduct or voluntarily quits interim employment. [13] This view comports with the purpose of the back pay remedy as articulated in *Albemarle. Albemarle* taught that back pay is a presumptive entitlement of a victim of discrimination and that the discriminating employer is responsible for all wage losses that result from its unlawful discrimination, at least until the time of judgment. [14] 422 U.S. at 419–21, 95 S.Ct. 2362. Had there been no discrimination at employer A, the employee would never have come to work (or have been fired) from employer B. [15] The discriminating employer (employer A) should not benefit from the windfall of not paying the salary differential when the employee is re-employed by employer C. [16] ***383** Further, the use of per se rules is contrary to the general principle that the necessary balancing of the equities requires a case-by-case approach. *Rosario–Torres v. Hernandez–Colon,* 889 F.2d 314, 321 (1st Cir.1989) (en banc) ("[T]he hallmark of equity is the ability to assess all relevant facts and circumstances and tailor appropriate relief on a case by case basis."); *Medlock v. Ortho Biotech, Inc.,* 164 F.3d 545, 555 (10th Cir.), *cert. denied,* 528 U.S. 813, 120 S.Ct. 48, 145 L.Ed.2d 42 (1999).

Ultimately, we need not craft general principles for how back pay should be calculated when an employee who has been discriminated against is fired from intervening employment. But our holding does require us to reach a second issue. Here, once Johnson was fired from Hannaford, he never sought out employment before trial in a further attempt to mitigate damages. Johnson explains that he did not seek further employment because he was unable to work as he suffered from a total psychological disability; indeed, Johnson received a 100 percent non-service connected disability rating from the Veteran's Administration. Some courts have adopted a rule that if a plaintiff is unable to mitigate damages due to a disability not caused by the discriminatory employer, that disability cuts off back pay liability. [17] *Lathem v. Dep't of Children & Youth Servs.,* 172 F.3d 786, 794 (11th Cir.1999) ("[C]ourts exclude periods where a plaintiff is unavailable to work, such as periods of disability, from the back pay award."); *Starceski v. Westinghouse Elec. Corp.,* 54 F.3d 1089, 1101 (3rd Cir.1995) ("[A]s a general rule ...

an employer who has discriminated need not reimburse the plaintiffs for salary loss attributable to the plaintiffs and unrelated to the employment discrimination." (internal quotation marks omitted)). Here, Johnson does not argue that a disability arising independently of the discriminatory employer does not cut off back pay, so we do not rule on the issue. Johnson does, however, argue that there was evidence that his disability was caused by the harassment he endured at Spencer Press. If it was, he says, then both back pay and front pay should have been available even after he was fired from Hannaford for misconduct.

Johnson is correct that several courts have held that an employee who is unable to work due to a disability is not precluded from receiving back pay when the employer "caused" the disability. This ***384** court has, applying Massachusetts law, endorsed that rule. *See Blockel v. J.C. Penney Co.,* 337 F.3d 17, 27–28 (1st Cir.2003). We now extend that holding to Title VII; an employee who cannot mitigate damages because of the unlawful actions of the employer can still receive back pay. *See Lathem,* 172 F.3d at 794 ("[A] Title VII claimant is entitled to an award of back pay where the defendant's discriminatory conduct caused the disability."); *Durham Life Ins. Co. v. Evans,* 166 F.3d 139, 157 (3d Cir.1999) ("Because [the employer's] conduct affirmatively impaired [the employee's] ability to mitigate her damages, it would be inequitable to reduce her back pay award in this case."). This rule is merely a logical corollary of the principle that the victims of discrimination should be restored, "so far as possible ... to a position where they would have been were it not for the unlawful discrimination." *Albemarle,* 422 U.S. at 421, 95 S.Ct. 2362. If the employer's unlawful conduct caused the employee's inability to mitigate damages, then the employer should be liable for the resulting consequences.

Nonetheless, the evidence provided by Johnson does not allow him to take advantage of this rule. That evidence does no more than create an issue regarding whether the harassment at Spencer Press was one among numerous other independent and significant contributing factors to Johnson's psychological disability. Besides his own testimony, the only evidence that Johnson offered was the testimony of one expert, Dr. Ananis. Dr. Ananis stated in a deposition that Johnson

> had been able to maintain a certain degree of functioning and employment until the events which took place during his employment at Spencer Press, including the harassment he stated he received while he worked there. I am aware that Mr. Johnson had other issues in his life, including family deaths, divorce, and problems with his sons, and I did not make a determination as to what event or events, if any, caused his depression and panic and anxiety disorders. Nevertheless, it is clear to me that the events at Spencer Press relating to the harassment he stated he received from his supervisor exacerbated his depression and panic and anxiety disorders.

Although this testimony may have created a genuine question of fact about whether there was *some* relationship between the harassment at Spencer Press and Johnson's disability, it was not sufficient for Johnson to escape summary judgment on the issue. Given that Johnson was able to find a new job at Hannaford immediately after leaving Spencer Press and then to keep the job for the next seven months and given that Johnson has had numerous other significant problems in his life that may have been causally related to his disability, the evidence was insufficient.

Johnson's own testimony does not bridge the gap. Johnson confirmed that he had suffered from depression and anxiety since 1993, and that he had family problems as well as the problems he suffered at Spencer Press. But he did not, and could not (owing to his lack of expertise), testify that his inability to get a job after Hannaford was caused by the harassment at Spencer Press.

B. *Front Pay*

For the same reasons that we affirm the denial of back pay after December 8, 2000, we conclude that there was no abuse of discretion in the district court's refusal to grant front pay.

IV.

The district court's judgment is ***affirmed.***

***385** CYR, Senior Circuit Judge, concurring.

Although I agree that the grant of summary judgment must be upheld, I write separately because the discussion in the majority opinion regarding whether the district court improperly predicated its decision on the legal principle that Johnson's termination by Hannaford permanently severed his entitlement to back pay is an academic exercise wholly unnecessary to the disposition of the appeal. Even if it were to be assumed that this principle constituted an implicit rationale upon which the district court relied—which I seriously doubt—its adoption plainly did not constitute outcome-determinative error. Rather, just as the Rule 56 proffer made by Johnson (*viz.,* the Ananis deposition) was not sufficient to prove that SPM caused the misconduct that led to his termination by Hannaford, so too it logically could not constitute evidence that SPM caused Johnson's full disability. Thus, as Johnson was required to bear the burden of proof on causation, SPM was entitled to summary judgment under either legal theory.

All Citations

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Footnotes

1 Johnson also sued Spencer Press, Inc., the parent corporation of Spencer Press of Maine, Inc. The district court granted summary judgment to Spencer Press, Inc., and Johnson has not appealed that decision. All references in this opinion to Spencer Press refer to Spencer Press of Maine.

2 Johnson also alleged that he had been the victim of unlawful discrimination on the basis of a disability and that he had been unlawfully retaliated against for invoking his rights. The district court granted summary judgment to Spencer Press on the disability discrimination claim, and Johnson does not appeal that determination. The district court did not grant summary judgment to Spencer Press on the retaliation claim, but, based on the jury's verdict, judgment was entered against Johnson on this claim and Johnson also does not appeal this determination.

3 The parties have not argued that there are material differences between Title VII and the Maine statute.

4 Spencer Press argues in its opening brief that it is also appealing the district court's refusal to grant judgment as a matter of law, and that this holding should be reviewed de novo. But after the jury reached its verdict, Spencer Press filed only a motion for a new trial under Rule 59, and not for a judgment as a matter of law under Rule 50(b). Accordingly, Spencer Press has waived its earlier motion for judgment as a matter of law and is not entitled to appellate review on the issue. *See Cambridge Plating Co. v. Napco, Inc.,* 85 F.3d 752, 759 (1st Cir.1996); *Pinkham v. Burgess,* 933 F.2d 1066, 1070 (1st Cir.1991). Even so, we observe that an objectively reasonable jury could easily have reached the result here.

5 *Rivera* upheld an award of summary judgment to the employer on de novo review. 331 F.3d at 185. Had Spencer Press moved for judgment as a matter of law under Rule 50, the same standard of review would apply. *See Reeves v. Sanderson Plumbing Prods. Inc.,* 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Here, by contrast, the denial of Spencer Press's motion for a new trial under Rule 59 must meet the more difficult standard of abuse of discretion. *See supra.*

6 This amount did not include the district court's additional award to Johnson of $1,227.94 in back pay.

7 However, "[w]here only reinstatement and back pay are requested or if they are the only issues, in addition to liability, remaining in the case then both reinstatement and back pay shall be for the court." *Santiago–Negron,* 865 F.2d at 441.

8 There is some dispute, which need not concern us, as to whether a jury should make calculations, if disputed, for purposes of the award. *See* Lindemann & Grossman, at 640–41.

9 The district court's initial ruling on this issue was that "the value of the Hannaford wages and benefits, whatever it is, can be treated as an ongoing offset to Johnson's loss resulting from leaving [Spencer Press]." This holding would have entitled Johnson to receive the differential between his wages at Hannaford and Spencer Press not only for the period he was employed at Hannaford from May 2 to December 8, 2000 (the $1,227.94), but also for the period after December 8, 2000. After trial, the district court altered its decision, holding that back pay was only available "for the time during which the plaintiff was employed at Hannaford Bros."

10 The district court, in light of its ruling on the availability of front pay, granted Spencer Press's motion *in limine* to exclude an expert witness who would present a statistical model predicting Johnson's lost front pay. Because we ultimately conclude that Johnson was not entitled to front or back pay beyond December 8, 2000, we affirm the district court's refusal to consider the expert testimony offered to prove the economic consequences of Johnson's termination from Hannaford.

11 If this conclusion was incorrect—as we think it was—then a series of issues normally would arise about how to calculate back pay once an employee is fired from interim employment while attempting to mitigate damages stemming from unlawful discrimination. One such issue is whether back pay should be withheld for the period during which the employee is trying to find another job, or should remain at the level it was at prior to the firing. Although we note this question below, we leave it unresolved because of an intervening dispositive fact: Johnson was unable to find employment after being fired from Hannaford because he was totally disabled and he did not produce sufficient evidence that Spencer Press caused that disability.

12 The district court's failure to address Johnson's argument that Spencer Press was responsible for his total disability is attributable to the court's belief that the issue was irrelevant because Johnson's termination from Hannaford was dispositive of the issue. After all, Johnson filed a motion for reconsideration that specifically claimed that the district court had neglected Spencer Press's responsibility for his ultimate disability, and the district court denied it without comment. In the end, however, the reason for the district court's error is not relevant to the analysis; all that is pertinent is that the error was made.

13 We do not suggest that a jury is required to extend the period of back pay under the circumstances, but only that there is no rule of law precluding it from doing so.

14 This issue is different from the issue of cutting off back and front pay when there is after-acquired evidence of wrongdoing that would have resulted in the employee's discharge from employer A. In such cases, the Supreme Court has held that both front and back pay are indeed cut off at the time that the defendant discovers evidence that would have led it to fire the plaintiff on legitimate grounds. *McKennon v. Nashville Banner Publ'g Co.,* 513 U.S. 352, 361–62, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995). That result follows from the simple guiding principle that the employee should be restored to the position he or she would have been in absent the discrimination: the employee would have been fired regardless of the discrimination as a result of the misconduct at the defendant's place of employment. *See id.* at 362, 115 S.Ct. 879.

15 There is a sub-issue about whether back pay, offset by deemed wages from employer B, should continue while the employee diligently searches for post-employer-B employment. The view of the Fourth and Fifth Circuits is that back pay should equal zero during "periods of unemployment following justified discharge" because "[d]uring such a period the claimant has excluded himself from the employment market." *Brady,* 753 F.2d at 1280; *see Patterson v. P.H.P. Healthcare Corp.,* 90 F.3d 927, 935 (5th Cir.1996). Notably, though, this perspective is in opposition to the NLRB's rule in *Knickerbocker,* which would leave a back pay award unchanged after an employee had been fired from a job at which she was mitigating damages from a prior unlawful termination. *See Knickerbocker,* 132 N.L.R.B. at 1215. It also appears to be at odds with the rule in the Eighth Circuit. *See NLRB v. Hopcroft Art & Stained Glass Works, Inc.,* 692 F.2d 63, 65 (8th Cir.1982) ("[T]he amount the employee would have earned had he not quit is to be offset for the remainder of the back pay period."). Leaving the back pay award unchanged after the employee is fired from interim employment, the logic goes, would put the employee in the position that he would have been in had he exercised reasonable diligence in never being fired.

16 Yet another sub-issue that we note involves how to calculate the back pay award while the plaintiff is employed at employer C. This is particularly difficult when the salary at employer B was higher than the salary at employer C. The Brady court held that the greater of the two salaries should be used for calculating back pay while the employee is at employer C. *See Brady,* 753 F.2d at 1278–80. We do not reach this issue.

17 Why this should be so is not self-evident. If the plaintiff would have been entitled to some form of salary continuation or benefits for disability had he remained employed at the discriminatory employer, it is not clear why he would not be entitled to the equivalent if he became disabled from working post-employment and before trial. Indeed, at least one circuit has held that back pay awards should not be cut off due to a post-termination disability if the plaintiff would have been entitled to some form of salary continuation or disability benefits had he not been unlawfully terminated. *Thornley v. Penton Publ'g, Inc.,* 104 F.3d 26, 31 (2d Cir.1997). This reasoning is simply a logical outgrowth of the principle that back pay should put the plaintiff in the position he or she would have been in but for the unlawful discrimination. *Cf. Gutzwiller v. Fenik,* 860 F.2d 1317, 1333 (6th Cir.1988) (back pay "should include the salary, including any raises, which plaintiff would have received but for the discrimination, as well as sick leave, vacation pay, pension benefits and other fringe benefits she would have received but for discrimination").

Johnson does not raise this issue here because he presents no evidence and makes no claim that he would have been entitled to disability benefits at Spencer Press had he not been unlawfully terminated.

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865 F.2d 1461
United States Court of Appeals, Fifth Circuit.

Andrew W. HANSARD, Plaintiff–Appellee, Cross–Appellant,
v.
PEPSI–COLA METROPOLITAN BOTTLING CO., INC., d/b/
a Pepsi–Cola Bottling Group, Defendant–Appellant, Cross–Appellee.

No. 87–1717.
|
Feb. 21, 1989.

Synopsis

Former employee brought action against former employer alleging violation of Age Discrimination in Employment Act when employer discharged and refused to rehire employee. The United States District Court for the Northern District of Texas, Eldon B. Mahon, J., entered judgment in favor of employee. Employer appealed and employee cross-appealed. The Court of Appeals, Sneed, Circuit Judge, sitting by designation, held that: (1) evidence was sufficient to support jury's verdict that former employee was discriminated against because of his age; (2) employee was not entitled to back pay after March, 1984; and (3) employee was entitled to prejudgment interest.

Affirmed in part, reversed in part, and remanded.

Jerre S. Williams, Circuit Judge, concurred in part, dissented in part, and filed opinion.

Attorneys and Law Firms

***1463** Richard E. Lieberman, James M. Gecker, Ross & Hardies, Chicago, Ill., for defendant-appellant, cross-appellee.

Art Brender, Terry M. Casey, Law Offices of Art Brender, Ft. Worth, Tex., for plaintiff-appellee, cross-appellant.

Appeal from the United States District Court for the Northern District of Texas.

Before GEE, SNEED,[*] and WILLIAMS, Circuit Judges.

Opinion

SNEED, Circuit Judge:

Pepsi–Cola Bottling Co., Inc. (Pepsi) was held liable for violating the Age Discrimination in Employment Act (ADEA) by discharging and later refusing to rehire Andrew Hansard. Pepsi appeals the jury's verdict on liability and damages. We affirm the district court's judgment on the merits, but we reverse and remand the award of damages. Hansard cross-appeals the district court's refusal to award liquidated damages and prejudgment interest. We affirm the district court's refusal to award liquidated damages, but reverse its refusal to award prejudgment interest. The jurisdiction of the district court rested on 29 U.S.C. § 626 (1982) and 28 U.S.C. § 1331 (1982). This court has jurisdiction under 28 U.S.C. § 1291.

I.

FACTS AND PROCEEDINGS BELOW

Hansard was employed by Uncle Joe's Bottling Co. from 1974 until 1979 in Fort Worth, Texas. II Tr. 4, 12. In 1979, Pepsi acquired Uncle Joe's Bottling Co. and Hansard became a Pepsi employee. II Tr. 4, 15, 68–69. For most of his tenure, Hansard worked on a delivery route servicing vending machines. II Tr. 14. In early 1983, the number of stops on Hansard's route decreased, but instead of reducing his hours, Pepsi permitted Hansard to work in the warehouse after his delivery route was finished. II Tr. 22–25, 68–69.

In 1983, Pepsi reorganized its corporate structure, and responsibility for Hansard's job was transferred to a different department. II Tr. 126–27. On June 20, 1983, Hansard met with three members of Pepsi's management: Scott Barth, the regional sales manager; Ms. Michael Miller, the employee relations manager; and Mark Esselman, an employee relations trainee. II Tr. 30–31. Hansard was the only employee invited to such a meeting. II Tr. 166. Hansard testified that Ms. Miller said that Hansard's department was being reorganized and that Hansard would be delivering vending machines and syrup instead of stocking vending machines. Ms. Miller asked Hansard: "Do you think you can handle it [the job]?" II Tr. 32. Earlier Ms. Miller, in a discussion with Barth and Esselman, had questioned Hansard's ability to do the new job. II Tr. 141. Hansard testified that he responded to Ms. Miller: "Yes. I probably could handle it because I have done hard work all my life," but "I would rather not do it if I could get out of it." II Tr. 32. Ms. Miller's version was different. She testified that Hansard refused the job and that she told Hansard that the only alternative was unemployment. II Tr. 132. Hansard testified there was "no way" he ***1464** refused a job and that "[t]here is nobody in there that I would think that I left [with] the impression that I wouldn't do it, because I was willing to do it." II Tr. 33. Hansard, who was fifty-nine, was replaced by a twenty-five-year-old man. II Tr. 4, 104.

Actions after the meeting increase the confusion. Pepsi's personnel forms indicate Hansard "left work," not that he was either fired or quit. II Tr. 163. Pepsi did not oppose Hansard's application for unemployment benefits, which they were entitled to do if he had quit. II Tr. 172, 178. Finally, this incident occurred only seven months before Hansard's pension rights were to vest. II Tr. 40.

In August 1983, Phillip Garcia, the regional sales manager, sought to create a "checker" position at the Fort Worth Pepsi plant. IV Tr. 10, 12. He asked Charles Miller, the warehouse manager, to fill the position. III Tr. 10, 18–19. Miller contacted Hansard, who was interested in the position, and recommended that Hansard be hired. II Tr. 19–20. Pepsi's Employee Relations Department rejected this request, citing a company policy that forbade rehiring former employees. III Tr. 20–21; IV Tr. 15–16. Miller testified that he had never heard of such a policy. III Tr. 27. Miller further testified that he believed that Hansard was not rehired because of Pepsi's "youth movement." III Tr. 17. Pepsi was unable to produce any documentary evidence of the "no rehire" policy. Later, a twenty-three or twenty-four-year-old man was hired for this position. III Tr. 28.

A jury trial was held in July 1986. The jury returned a verdict in favor of Hansard. R. 531–37. Hansard was awarded $61,149.44 in back wages (wages from the date of termination to trial) and $45,496.40 as front pay (lost wages from the date of trial until Hansard's retirement). The jury also found that Pepsi's actions were willful. *See* R. 532, 535.

The trial court refused to grant Pepsi's motion for J.N.O.V. It declined to award Hansard liquidated damages, however, ruling that by carrying Pepsi's motion for a directed verdict, it could review the sufficiency of the evidence on this issue. R. 784. The court also denied Hansard's request for prejudgment interest on Hansard's back pay award. R. 629–30.

We shall address the following issues in the order and under the headings indicated:

II. DENIAL OF PEPSI'S J.N.O.V. MOTION

A. *Discharge*

B. *Age Discrimination*

II.

DENIAL OF PEPSI'S J.N.O.V. MOTION

A. *Discharge*

Pepsi first argues that the trial court erred in refusing to grant its motion for J.N.O.V. because there was insufficient evidence to support the jury's finding that Hansard was discharged. The proper standard for reviewing the trial court's refusal to grant a motion for J.N.O.V. was set out in *Boeing Co. v. Shipman:*

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting the motion[ ] is proper. On the other hand, if there is ... evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion[ ] should be denied....

411 F.2d 365, 374 (5th Cir.1969) (en banc).

The evidence in this case supported neither side overwhelmingly. It follows that there is sufficient evidence to support ***1465** the jury's determination that Hansard was discharged. The jury was free to believe Hansard when he testified that he did not refuse any job that was offered to him. II Tr. 32. The fact that Hansard was the only employee with whom such a meeting was held lends circumstantial support to his testimony, particularly in combination with the absence of any Pepsi records to indicate that Hansard quit and Pepsi's failure to contest Hansard's unemployment benefits.

Pepsi relies on *Elliott v. Group Medical & Surgical Serv.,* 714 F.2d 556 (5th Cir.1983), *cert. denied,* 467 U.S. 1215, 104 S.Ct. 2658, 81 L.Ed.2d 364 (1984), to argue that Hansard never rebutted its evidence that Hansard voluntarily quit. In *Elliott* this court reiterated that if an employer suggests "an adequate, nondiscriminatory" reason for the plaintiff's discharge, "the trier of fact is not free to disregard that explanation without countervailing evidence...." *Id.* at 566.

There was such evidence here. Aside from Hansard's testimony, there were the circumstances of Hansard's meeting, Pepsi's failure to contest payment of unemployment benefits, the ambiguity in Pepsi's own records as to the reason for Hansard's absence, and the inability of Ms. Miller to explain why Pepsi's records failed to indicate that Hansard quit, despite her conclusion that he had. *See* II Tr. 163. This case involved a factual dispute between the witnesses for each party and credibility determinations were made by the jury. *See Guthrie v. J.C. Penney Co.,* 803 F.2d 202, 207 (5th Cir.1986); *see also Bhaya v.*

Westinghouse Elec. Corp., 832 F.2d 258, 262 (3d Cir.1987) ("Evaluation of witness credibility is the exclusive function of the jury, and where the only evidence of intent is oral testimony, a jury could always choose to discredit it."), *cert. denied,* ——U.S. ——, 109 S.Ct. 782, 102 L.Ed.2d 774 (1988). This is as it should be. Pepsi is not entitled to a J.N.O.V. on the issue whether Hansard quit his employment.

B. *Age Discrimination*

Next, Pepsi argues that there was no evidence that Hansard was terminated because of his age. Under the ADEA, the plaintiff must prove that age was a "determinative factor" in his discharge. *Bohrer v. Hanes Corp.,* 715 F.2d 213, 218 (5th Cir.1983), *cert. denied,* 465 U.S. 1026, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984); *see Reeves v. General Foods Corp.,* 682 F.2d 515, 523 n. 12 (1982). To repeat, our test is to determine whether "reasonable men" could find sufficient evidence that age was such a factor. *Boeing,* 411 F.2d at 374.

Hansard relied on the testimony of Charles Miller who testified that he believed Hansard was terminated as part of Pepsi's "youth movement." III Tr. 14–17. The challenge to the admissibility of this evidence is discussed in Part III *infra.* Although Charles Miller had no first-hand knowledge of the circumstances leading to Hansard's termination, his opinion rested on his experience at Pepsi, as well as the events surrounding Pepsi's refusal to rehire Hansard. III Tr. 17, 21–23. This court has held that testimony of this sort in some circumstances is probative of age discrimination. *See Reeves,* 682 F.2d at 525. Miller's familiarity with Pepsi's hiring policy and its general corporate youth movement was sufficient basis for his opinion. Further, Miller's opinion about Pepsi's refusal to rehire Hansard clearly had sufficient foundation by reason of his proximity to these events.

Two circuits in similar cases have found the mere opinion of another employee, who had no connection with the plaintiff's termination, not to be sufficient by itself to prove age discrimination. *Mauter v. Hardy Corp.,* 825 F.2d 1554, 1558 (11th Cir.1987); *Gray v. New Engl. Tel. & Tel. Co.,* 792 F.2d 251, 254–55 (1st Cir.1986). We need not address that issue because other evidence also supported an inference of age discrimination. Hansard also relied on a statement by Mark Esselman, who was present at the June 20th meeting. Hansard testified that as the meeting was ending, he remarked "I have done heavy lifting all my life. I am not quite as young as I used to be." Esselman responded, "Yes, it's kind of risky at your age." II Tr. ***1466** 32–33. Hansard also testified that he believed Ms. Miller's question—asking if he could handle the new position—was an indirect reference to his age. II Tr. 73. Indirect references to an employee's age can support an inference of age discrimination. *Cf. Bienkowski v. American Airlines,* 851 F.2d 1503, 1507 (5th Cir.1988) (upholding a district court's refusal to grant summary judgment, stating "we are unwilling to assume that indirect comments about [plaintiff's] age and adaptability are not possibly probative of unlawful discriminatory intent").

Hansard's termination only seven months before his pension benefits were to vest also supports his claim of age discrimination. II Tr. 42–43. Pepsi responds that its employees present at the June 20th meeting were unaware of the pension issue and that the timing of the meeting was attributable to Pepsi's reorganization. The timing of a termination can raise an inference of discrimination. *See Reeves,* 682 F.2d at 525. The jury was entitled to disbelieve Pepsi's explanation.

Finally, Hansard testified that he believed he was discriminated against because of his age. *See* II Tr. 40. While this testimony alone cannot support an inference of age discrimination, *see Sherrod v. Sears, Roebuck & Co.,* 785 F.2d 1312, 1316 (5th Cir.1986); *Hornsby v. Conoco, Inc.,* 777 F.2d 243, 247 (5th Cir.1985), it does draw strength from the very ambiguity of the June 20th meeting. [1]

Hansard's case is not as strong as it might be, but based on this accumulation of circumstantial evidence, "reasonable men could differ" about the presence of age discrimination. We must respect the jury's determination.

C. *Refusal To Rehire*

Pepsi next argues that reasonable men could not believe that its refusal to rehire Hansard was discriminatory. Pepsi contends that its policy of refusing to rehire ex-employees fully explains its decision not to rehire Hansard for the checker position. This

explanation, as pointed out earlier, was directly contradicted by Charles Miller's testimony that he believed Hansard was not rehired because of his age. III Tr. 21, 23. Charles Miller also testified that he was unaware of a no-rehire policy that would preclude Hansard's return to Pepsi. III Tr. 27. Perhaps even more probative of Hansard's position is that Pepsi failed to produce any documentary evidence supporting the existence of its alleged policy. Once more we are unwilling to disturb the jury's findings.

III.

ADMISSION OF CHARLES MILLER'S OPINION

To destroy a major support of the verdict, Pepsi asserts that the trial court's admission of Charles Miller's testimony was error. There is no indication that Miller had any first-hand knowledge of the events surrounding Hansard's termination. III Tr. 14–17. Nonetheless, the trial court's admission of lay opinion testimony will be reversed only for an abuse of discretion. *Scheib v. Williams–McWilliams Co.,* 628 F.2d 509, 511 (5th Cir.1980). Fed.R.Evid. 701 requires only that opinions by lay witnesses be "rationally based on the perception of the witness and ... helpful to ... the determination of a fact in issue."

Courts often have permitted lay witnesses to express opinions about the motivation or intent of a particular person if the witness has an adequate opportunity to observe the underlying circumstances. In *Torres v. County of Oakland,* 758 F.2d 147, 149–50 (6th Cir.1985), a witness who ***1467** had participated in the process of filling a supervisor role was permitted to testify that she believed the plaintiff had been discriminated against because of her national origin. In *John Hancock Mut. Life Ins. Co. v. Dutton,* 585 F.2d 1289 (5th Cir.1978), a husband died during an altercation with his wife; John Hancock contended that the death was not accidental. The plaintiff's daughter, who observed the altercation, was permitted to testify that she did not believe that her stepfather thought her mother would shoot him. *Id.* at 1293–94. Similarly, in *Samples v. City of Atlanta,* 846 F.2d 1328, 1334 (11th Cir.1988), a "long time" Atlanta police officer was allowed to testify that there was an unwritten policy encouraging police brutality in the department. The Seventh Circuit, moreover, permitted a witness who had observed an arrest to testify that she believed the arrest was motivated by racial prejudice. *Bohannon v. Pegelow,* 652 F.2d 729, 732 (7th Cir.1981). *See also United States v. Smith,* 550 F.2d 277, 281 (5th Cir.) (coworker permitted to testify that defendant understood CETA regulations he was charged with violating), *cert. denied,* 434 U.S. 841, 98 S.Ct. 138, 54 L.Ed.2d 105 (1977); *cf. United States v. Hoffner,* 777 F.2d 1423, 1425 (10th Cir.1985) ("[C]ourts have been very liberal in admitting witnesses' testimony as to another's state of mind if the witness has had a sufficient opportunity to observe the accused so as to draw a rational conclusion about the intent of the accused.").

Admittedly, Miller's testimony is not strongly supported; Pepsi asserts, accordingly, that, under *Mitroff v. Xomox Corp.,* 797 F.2d 271, 275–76 (6th Cir.1986), Miller's testimony should have been excluded. The Sixth Circuit in *Mitroff* held that the admission of one employee's testimony concerning a statement by an assistant personnel manager that there was age discrimination in the corporation was error. The court held that Rule 701 could not be satisfied since there was no basis for the witness' testimony because the personnel manager denied making the statement and because no other basis for the opinion was disclosed. *Id.* at 276. But, in this case, Miller's testimony was based on his own experience in the corporation, not a hearsay statement by a third party. *Mitroff* is not controlling.

We conclude, with some hesitancy it must be admitted, that the trial court did not abuse its discretion in admitting this testimony. The decisive factor, we readily acknowledge, is that the district court is best suited to determine whether Fed.R.Evid. 701 has been satisfied.

> Basically, Rule 701 is a rule of discretion.... The trier of fact can normally be depended upon ... to pick up the non-verbal signals, which, although absent from the record, indicate fairly clearly when the witness is

> describing what he saw and when he is describing what he thinks happened; the trier of fact also should generally be depended upon to give whatever weight or credibility to the witness' opinion as may be due.

3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 701[02], at 701–31 to –32 (1988) (footnotes omitted).

IV.

PEPSI'S OBJECTIONS TO THE JURY INSTRUCTIONS

Pepsi also complains of the district court's refusal to include two jury instructions. The issue is whether the trial court abused its discretion in so refusing. *See Bryan v. Cargill, Inc.,* 723 F.2d 1202, 1204 (5th Cir.1984). Pepsi's first proposed instruction stated that Hansard must prove "that his leaving Pepsi–Cola's employment was the result of a decision by Pepsi–Cola to refuse to allow him to continue working, rather than a result of Plaintiff's failure or refusal to accept an offer of continuing employment." R. 400. The trial court rightfully considered this more favorable to Pepsi than was proper. Instead, the trial court drew upon terms in common every day use and instructed the jury that "discharged" meant "terminated" or "fired." The trial court's refusal was not an abuse of discretion.

***1468** Pepsi next insists that the trial court erred in submitting the "pretext" theory for Hansard's discharge. This theory was embodied in the charge to the jury that it could "consider whether the employer has engaged in a pattern of practice of discrimination against its older employees." IV Tr. 134. Charles Miller's testimony constitutes some evidence of a pattern or practice of discrimination. The trial court did not abuse its discretion in submitting this theory to the jury.

V.

THE PROPRIETY OF HANSARD'S MONETARY RECOVERY

A. *Back Pay*

We now confront the issues of damages. Pepsi argues that Hansard was not entitled to back pay after March 1984.

Hansard testified that after his discharge in 1980 that he attempted to find other work. He applied for a variety of positions with no success. II Tr. 46–47, 75, 175–76. In March 1984 Hansard abandoned his job search and began running a booth at flea markets. Hansard testified that he first sold various odds and ends from his home. II Tr. 39. Later, he bought some merchandise for resale. II Tr. 49–50. The flea market operated only on weekends. II Tr. 80. Hansard's flea market booth never turned a profit, and he abandoned it in December 1985. II Tr. 47–51. After December, he stopped looking for work altogether and began receiving Social Security early retirement benefits.

The ADEA requires a plaintiff to use reasonable efforts to obtain other employment after he is terminated. *See Fiedler v. Indianhead Truck Line, Inc.,* 670 F.2d 806, 809 (8th Cir.1982); *EEOC v. Sandia Corp.,* 639 F.2d 600, 627 (10th Cir.1980).

Hansard clearly is not entitled to back pay after December 1985 because, by his own admission, he stopped looking for work. A plaintiff may not simply abandon his job search and continue to recover back pay. *See, e.g., Blizzard v. Newport News Redev. & Hous. Auth.,* 635 F.Supp. 23, 26 (E.D.Va.1985); *Weatherspoon v. Andrews & Co.,* 32 Fair Empl.Prac.Cas. (BNA) 1226, 1229 (D.Colo.1983)[1983 WL 577].

Whether Hansard's back pay entitlement terminated after March, 1984, is a closer question. Nonetheless, we believe Pepsi is right. From the record we conclude that a rational trier of fact could not find that Hansard satisfied his statutory duty to mitigate damages by engaging in his flea market business. A plaintiff's decision to become self-employed, alone, does not indicate a lack of reasonable diligence. *See Carden v. Westinghouse Elec. Corp.,* 850 F.2d 996, 1005 (3d Cir.1988); *Nord v. United States Steel Corp.,* 758 F.2d 1462, 1471 (11th Cir.1985). That is not the case here. In this case Hansard's efforts were simply insufficient. The flea market business was never more than a part-time enterprise. Hansard was fully capable of continuing his job search during the week. Further, Hansard did not approach the flea market as a business, rather he primarily gathered odds and ends from his home and sold them.

This court's decision in *NLRB v. Armstrong Tire & Rubber Co.,* 263 F.2d 680 (5th Cir.1959), is dispositive. There we held that the plaintiff did not satisfy his statutory duty under the National Labor Relations Act to mitigate damages when he began working in his wife's business. *See id.* at 683–84 & n. 4. The court noted that the business never turned a profit and was ultimately sold for the price of its inventory and equipment. *Id.* at 684 n. 4. In addition, once Hansard found the business unsuccessful, his duty to mitigate damages required him to resume his search for other employment. *See Boyd v. SCM Allied Paper Co.,* 42 Fair Empl.Prac.Cas. (BNA) 1643, 1655 (N.D.Ind.1986) [1986 WL 15558].

We conclude that Hansard failed to use reasonable diligence to mitigate his damages after March, 1984, and remand the case for recalculation of back pay damages.

B. *Front Pay*

Pepsi also claims that the district court erred in awarding Hansard front pay. ***1469** Part of our difficulty in addressing this issue arises because Congress did not specify what remedies are available to aggrieved plaintiffs. Rather, Congress granted courts broad authority to fashion relief.

> In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter....

29 U.S.C. § 626(b) (1982). In fashioning remedies under the ADEA, we must remember that the purpose of Congress was to make the plaintiff whole. *See Davis v. Combustion Eng'g, Inc.,* 742 F.2d 916, 923 (6th Cir.1984); *Spagnuolo v. Whirlpool Corp.,* 717 F.2d 114, 118 (4th Cir.1983); *Coleman v. City of Omaha,* 714 F.2d 804, 808 (8th Cir.1983); *Gibson v. Mohawk Rubber Co.,* 695 F.2d 1093, 1097 (8th Cir.1982); *Rodriguez v. Taylor,* 569 F.2d 1231, 1238 (3d Cir.1977), *cert. denied,* 436 U.S. 913, 98 S.Ct. 2254, 56 L.Ed.2d 414 (1978). ADEA remedies are supposed to be compensatory, not punitive. *See* H.R.Rep. No. 950, 95th Cong. 2d Sess. 13, *reprinted in* 1978 U.S.Code Cong. & Ad.News 528, 535 ("The ADEA as amended by this act does not provide remedies of a punitive nature."). [2]

"Front pay" refers to future lost earnings. Courts have permitted ADEA plaintiffs to recover "front pay" in addition to the usual award of back pay. Hawks, *Future Damages in ADEA Cases,* 69 Marq.L.Rev. 357, 362 (1986); Marion, *Remedies Under the ADEA,* 45 Md.L.Rev. 298, 331 (1986). [3] This court has suggested that front pay may be an appropriate remedy in ADEA cases. *See Smith v. Office of Personnel Management,* 778 F.2d 258, 262 n. 2 (5th Cir.1985) ("[W]e note that ... where the plaintiff is unable as a result of discrimination to earn his livelihood, an award of front pay probably would be necessary to 'effectuate the purposes of the Act,' " *quoting* 29 U.S.C. § 626(b) (1982)), *cert. denied,* 476 U.S. 1105, 106 S.Ct. 1949, 90 L.Ed.2d 358 (1986). An award of "front pay" is not inherently punitive.

However, consistent with the Act's "make-whole" philosophy, front pay is available only in limited circumstances. The Courts have a decided preference for reinstatement instead of front pay. It has been held that front pay cannot be recovered unless the plaintiff shows that reinstatement is not feasible. *Blum v. Witco Chem. Corp.,* 829 F.2d 367,373 (3d Cir.1987); *Bruno v.*

Western Elec. Co., 829 F.2d 957, 966 (10th Cir.1987); *McNeil v. Economics Laboratory, Inc.,* 800 F.2d 111, 118 (7th Cir.1986), *cert. denied,* 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 823 (1987); *Wildman v. Lerner Stores Corp.,* 771 F.2d 605, 616 (1st Cir.1985); *Whittlesey v. Union Carbide Corp.,* 742 F.2d 724, 728 (2d Cir.1984); *see* Hawks, *supra,* at 365; Marion, *supra,* at 334–35. *See generally* Annotation, *Reinstatement as Remedy for Discriminatory Discharge or Demotion Under Age Discrimination in Employment Act (29 USCS §§ 621 et seq.),* 78 A.L.R.Fed. 575, §§ 3–4 (1986) [hereinafter Annotation, *Reinstatement*].

In this case, the district court did not consider whether reinstatement was feasible. It merely submitted the issue of front pay to the jury. *See* R. 534, 537. Thus, the district court's award of front ***1470** pay in this case was improper without a precedent finding that reinstatement was not feasible. *See generally* Annotation, *Reinstatement, supra* §§ 5–11 (collecting cases that discuss factors affecting the availability of reinstatement).

The trial court initially must determine whether a plaintiff is entitled to front pay. It may not submit this issue to a jury. If the trial court concludes that front pay is appropriate, then the jury should determine the amount of damages. *See Coston v. Plitt Theatres, Inc.,* 831 F.2d 1321, 1333 n. 4 (7th Cir.1987), *vacated on other grounds,* 486 U.S. 1020, 108 S.Ct. 1990, 100 L.Ed.2d 223 (1988); *Maxfield v. Sinclair Int'l,* 766 F.2d 788, 796 (3d Cir.1985), *cert. denied,* 474 U.S. 1057, 106 S.Ct. 796, 88 L.Ed.2d 773 (1986); *Eivins v. Adventist Health Sys./E. & Middle Am., Inc.,* 660 F.Supp. 1255, 1261 (D.Kan.1987). *Contra Dominic v. Consolidated Edison Co.,* 822 F.2d 1249, 1257–58 (2d Cir.1987); *Gibson,* 695 F.2d at 1100; *Miller v. Pabst Brewing Co.,* 670 F.Supp. 1420, 1421 (E.D.Wis.1987); *Ventura v. Federal Life Ins.,* 571 F.Supp. 48, 51 (N.D.Ill.1983).

Finally, for the benefit of the district court on remand, we note that other courts have held that a plaintiff's failure to mitigate his damages will usually reduce or perhaps eliminate his entitlement to front pay. *See Cassino v. Reichhold Chems., Inc.,* 817 F.2d 1338, 1347 (9th Cir.1987), *cert. denied,* 484 U.S. 1047, 108 S.Ct. 785, 98 L.Ed.2d 870 (1988); *McNeil,* 800 F.2d at 118; *Maxfield,* 766 F.2d at 796; *EEOC v. Prudential Fed. Sav. & Loan Ass'n,* 763 F.2d 1166, 1173 (10th Cir.), *cert. denied,* 474 U.S. 946, 106 S.Ct. 312, 88 L.Ed.2d 289 (1985); *Whittlesey,* 742 F.2d at 728–29. Indeed, the Second Circuit stated that the plaintiff's failure to mitigate his damages completely forecloses the availability of front pay. *See Dominic,* 822 F.2d at 1258. Thus, if the district court finds on remand that Hansard cannot be reinstated, the court must consider his failure to mitigate his damages in determining the extent to which, if at all, front pay is appropriate.

VI.

THE ISSUES RAISED BY HANSARD'S CROSS–APPEAL

Hansard's cross-appeal raises two issues. First, he argues that the district court erred in holding that the evidence was insufficient to support the jury's finding that Pepsi's discrimination was willful. R. 532, 536. This finding would have entitled Hansard to liquidated damages. *See Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 125, 105 S.Ct. 613, 623–24, 83 L.Ed.2d 523 (1985). However, the district court, on the basis of its insufficiency finding, refused to award liquidated damages. R. 784.

The Supreme Court has held that liquidated damages are a punitive sanction and should be reserved for the most egregious violations of the ADEA. *Trans World,* 469 U.S. at 125, 105 S.Ct. at 623–24. Liquidated damages should not be awarded unless the defendant acted knowingly or recklessly. *Powell v. Rockwell Int'l Corp.,* 788 F.2d 279, 287 (5th Cir.1986).

The evidence in this case was weak. There is simply no evidence that Pepsi's actions were so egregious as to justify finding a willful violation. *See Smith v. Consolidated Mut. Water Co.,* 787 F.2d 1441, 1443 (10th Cir.1986). Pepsi was entitled to judgment on this issue.

Hansard next complains of the trial court's failure to award prejudgment interest. This court has never addressed whether an ADEA plaintiff is entitled to prejudgment interest on his award of back pay. *See Olitsky v. Spencer Gifts, Inc.,* 842 F.2d 123, 126 n. 1 (5th Cir.), *cert. denied,* 488 U.S. 925, 109 S.Ct. 307, 102 L.Ed.2d 326 (1988).

All of the courts that have addressed the issue have concluded that prejudgment interest should be awarded to ADEA plaintiffs who are not awarded liquidated damages.[4] *Reichman v. Bonsignore, Brignati* ***1471** *& Mazzotta P.C.,* 818 F.2d 278, 281 (2d Cir.1987); *Lindsey v. American Cast Iron Pipe Co.,* 810 F.2d 1094, 1101 (11th Cir.1987); *Berndt v. Kaiser Aluminum & Chem. Sales, Inc.,* 789 F.2d 253, 259–60 (3d Cir.1986); *Blim v. Western Elec. Co.,* 731 F.2d 1473, 1479 (10th Cir.), *cert. denied,* 469 U.S. 874, 105 S.Ct. 233, 83 L.Ed.2d 161 (1984); *Gibson,* 695 F.2d at 1102 n. 9; *Cline v. Roadway Express, Inc.,* 689 F.2d 481, 489 (4th Cir.1982); *Syvock v. Milwaukee Boiler Mfg. Co.,* 665 F.2d 149, 162 (7th Cir.1981); *Kelly v. American Standard Inc.,* 640 F.2d 974, 982 (9th Cir.1981); *see* Marion, *supra,* at 338–39. The primary rationale for this conclusion is that unlawful discrimination deprives an employee of his salary as well as the *use* of that salary during the interim period. *Heiar v. Crawford County,* 746 F.2d 1190, 1201–03 (7th Cir.1984) *cert. denied,* 472 U.S. 1027, 105 S.Ct. 3500, 87 L.Ed.2d 631 (1985); *see also Reichman,* 818 F.2d at 281 ("[P]rejudgment interest is designed to compensate the plaintiff for the loss of the use of money wrongfully withheld through an unlawful discharge."). Thus, awarding prejudgment interest is consistent with the purpose of the ADEA, *i.e.,* making the plaintiff whole. *Cf. Rodgers v. United States,* 332 U.S. 371, 373, 68 S.Ct. 5, 6–7, 92 L.Ed. 3 (1947) (stating that in deciding whether interest is appropriate in a given case, the court should consider congressional intent).

Pepsi argues that prejudgment interest in not available under the ADEA. It points out, correctly, that the remedial provisions of the ADEA were modeled after those of the Fair Labor Standards Act (FLSA). *See* H.R.Rep. No. 805, 90th Cong. 1st Sess. (1967), *reprinted in* 1967 U.S.Code Cong. & Admin.News 2213, 2218; Marion, *supra,* at 301; Note, *Set–Offs Against Back Pay Awards under the Federal Age Discrimination in Employment Act,* 79 Mich.L.Rev. 1113, 1113 (1981). Because prejudgment interest generally is not recoverable under the FLSA, Pepsi argues, ADEA plaintiffs are also precluded from recovering prejudgment interest. This court's position on the availability of prejudgment interest under the FLSA, however, is not entirely consistent. *Compare Peters v. City of Shreveport,* 818 F.2d 1148, 1168–69 (5th Cir.1987) (refusing to award prejudgment interest under § 216 of the FLSA), *cert. dismd.,* 485 U.S. 930, 108 S.Ct. 1101–02, 99 L.Ed.2d 264 (1988) *and Hill v. J.C. Penney Co.,* 688 F.2d 370, 375 n. 4 (5th Cir.1982) (same) *and Foremost Dairies, Inc. v. Ivey,* 204 F.2d 186, 190 (5th Cir.1953) (same) *with Marshall v. Hope Garcia Lancarte,* 632 F.2d 1196, 1199 (5th Cir.1980) (permitting prejudgment interest award under § 217 of the FLSA) *and Brennan v. City Stores, Inc.,* 479 F.2d 235, 242 (5th Cir.1973) (same).

The fact that prejudgment interest is not recoverable under the FLSA, however, does not compel the conclusion that prejudgment interest is not recoverable under the ADEA. As the Supreme Court has noted, the remedial provisions of the two acts "are not identical." *Trans World,* 469 U.S. at 125, 105 S.Ct. at 623–24. The FLSA has no equivalent to 29 U.S.C. § 626(b) (1982) which grants courts broad authority to fashion equitable remedies. *Cf.* 29 U.S.C. § 216(b) (1982) (providing for an award of "unpaid minimum wages, or ... unpaid overtime compensation ... and an additional amount as liquidated damages"). Other courts have rejected similar arguments. *See, e.g., Lindsey,* 810 F.2d at 1101.

We conclude that the trial court erred in holding that prejudgment interest was not available under the ADEA. Accordingly, we remand the case for further ***1472** consideration. *See Heiar,* 746 F.2d at 1203.

VII.

CONCLUSION

In sum, we conclude that there was sufficient evidence to support the jury's verdict that Hansard was discriminated against because of his age. However, we reverse the district court's award of damages and remand the case for recalculation of damages. We conclude that Hansard was not entitled to liquidated damages. Finally, we reverse the district court's order denying prejudgment interest.

AFFIRMED IN PART AND REVERSED IN PART AND REMANDED.

JERRE S. WILLIAMS, Circuit Judge, concurring in part and dissenting in part.
I concur fully in Judge Sneed's opinion for the Court in all parts except the consideration of and holdings as to damage issues in part V.

The opinion of the Court is correct in holding that starting in December 1985, appellee was not entitled to back pay because he abandoned job hunting efforts and took early retirement under social security. I think it's regrettable that appellee was forced into this alternative because the need of income made it necessary for him to do so. But I agree that under the law he was not entitled to an award of back pay following that date.

But I dissent from the conclusion in the opinion of the Court that the jury verdict must be upset with respect to back pay for the period from March 1984 until December 1985. Until March 1984, appellee engaged in an intensive search for comparable work. The jury had the right to believe his testimony to this effect and also that it was corroborated by the Regional Director of the Texas Employment Commission who received reports of these job hunting efforts.

In March 1984, at the age of 61, he undertook the establishment of a "flea market" business. Admittedly it began as a small operation. He was not a capitalist, and he had been fired from his income source in violation of law by the appellant. The jury had the right to believe his testimony that he continued his search for a job, but not with the prior intensity and also his testimony that if he had obtained such a job he would have taken it immediately. He tried to build up this small part-time operation from scratch into a business which would yield him some income. He did not succeed, and a little over a year later he finally gave up. On the basis of this evidence the jury had the right to conclude that appellee was continuing to attempt to mitigate his losses from his wrongful discharge during the period he undertook to establish this business.

The majority takes the position that our decision in *NLRB v. Armstrong Tire & Rubber Co.,* 263 F.2d 680 (5th Cir.1959) "is dispositive" to the contrary. In that case an employee was wrongfully discharged under the National Labor Relations Act. He attempted unsuccessfully to justify mitigation of back pay damages by going to work in his wife's business, a small drive-in store, which had never made a profit. There are two distinctions between the *Armstrong Tire & Rubber* case and the case before us. The first is that the discharged employee was not undertaking to establish a business but was moving into a business already established without really expecting to get any substantial amount of income. The major distinction, significant and critical, is that the discharged employee never undertook to look for a job but simply immediately went to work in his wife's business.

What the majority opinion is saying in this case is that even though a wrongfully discharged employee fairly close to the age of retirement has intensively looked for work for a substantial period of time without success, he cannot then undertake the relatively slow and difficult process of trying to establish a business of his own on absolutely minimum capital as a means of earning income and mitigating damages. There is no law compelling this result. And there clearly is enough evidence in the ***1473** record to indicate that this is exactly what this wrongfully discharged employee was trying to do. There may be evidence to the contrary, but the question was one for the jury. We do not have the authority to upset that jury verdict.

On the issue of front pay the Court is properly returning the case to the district court for an evaluation of the award of front pay. Some limitations may need to be placed upon it. At least it can be argued that not all of the critical factors were considered. While I concur in returning the issue of front pay to the district court for re-examination, I do not join in all of the observations and implications in the majority opinion. It is quite true that front pay is a substitute for reinstatement. Appellee should have been reinstated by the company. But it is unrealistic to talk of reinstatement now, although the majority opinion does, when he is 65 years old and when he was almost 64 years old when the district court made its decision. The only practicable remedy to compensate this appellee for the wrongful act of the appellant is the awarding of front pay. If appellant had carried out its obligations under the statute, appellee would have been reinstated in 1983. He would have enjoyed the normal expectation, which he testified was his reasonable expectation, that he would work with the company until the age of 65 and then retire. This evidence, which must be accepted, creates a classic case for front pay. This is the only way that the plaintiff can be made whole

as a means of effectuating the purposes of the act. *Smith v. Office of Personnel Management,* 778 F.2d 258–62 (5th Cir.1985), *cert. denied,* 476 U.S. 1105, 106 S.Ct. 1949, 90 L.Ed.2d 358 (1986).

The majority opinion was extremely pedantic in concluding that the district court prior to awarding front pay was required in this case to have made its own verbalized finding that reinstatement was not feasible. It was obvious on its face that reinstatement of this man, almost 64 years old, was not feasible. The finding is clearly implied in this case in submitting the issue to the jury, although of course the court can make such a verbalized finding as a matter of form on the remand. My conclusion finds support in a wise dictum in *Davis v. Combustion Engineering, Inc.,* 742 F.2d 916, 923 (6th Cir.1984) in upholding a front pay award for an illegally discharged 59 year old employee. The court said that the failure to award front pay to a 63 year old victim of discriminatory discharge "might be an abuse of discretion." The court went on to say, "... [T]hat which makes people whole is a matter of discretion for the trial court under the facts and circumstances of the individual case."

Finally, I agree with the opinion for the Court that the issue of mitigation in awarding front pay is not clearly resolved by prior court opinion. What is critical in evaluating the role of mitigation is the recognization, as the opinion for the Court does recognize, that the basic thrust of the statute is to make the employee whole for his losses as a result of the improper discharge. The rules with respect to mitigation in the award of back pay are not controlling. Even though front pay is not punitive, it has the function of being awarded in addition to back pay in lieu of reinstatement for the purpose of trying to make the employee whole for the wrong done to him.

In my view, on remand, the issue of the amount of front pay should be determined following these established principles, but the clear implication in the majority opinion is that any award of front pay is questionable because of a lack of mitigation. I do not find this implication acceptable. If there is lack of mitigation, it is only one factor to be considered in awarding front pay in this case. Discharge only seven months before appellee's pension was to vest is certainly another. The later refusal to rehire appellee in another vacant job to which he obviously was suited is another. In sum, appellant was obligated by its violation of the law to reinstate appellee. It did not do so. The statutory policy requires that the judgment of the court came as close as possible to making the victim whole for this violation of the law. 29 U.S.C. § 626(b). Only a substantial front ***1474** pay award can approach the satisfaction of that objective.

All Citations

865 F.2d 1461, 49 Fair Empl.Prac.Cas. (BNA) 197, 49 Empl. Prac. Dec. P 38,764, 57 USLW 2535, 27 Fed. R. Evid. Serv. 644

Footnotes

* Circuit Judge of the Ninth Circuit, sitting by designation.

1 Hansard also argues that Pepsi's emphasis on youth in its advertising suggests that he was a victim of discrimination. Ms. Michael Miller, a former employee of Pepsi's personnel department, testified that this theme was emphasized in the company's college recruitment efforts. II Tr. 146–47. She denied, however, that the advertising theme had any influence on its hiring decisions. II Tr. 147. In *Williams v. General Motors Corp.,* we stated that "the bare fact that an employer encourages employment of recent college ... graduates does not constitute unlawful age discrimination." 656 F.2d 120, 130 n. 17 (5th Cir.1981), *cert. denied,* 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982). Thus, this evidence does not support Hansard's claim.

2 Consistent with this congressional mandate, courts have held that ADEA plaintiffs are not entitled to punitive damages or damages for pain and suffering. *See* 3A A. Larson & L. Larson, *Employment Discrimination* §§ 103.51, 103.53 (1988).

3 *See McNeil v. Economics Laboratory, Inc.,* 800 F.2d 111, 118 (7th Cir.1986), *cert. denied,* 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 823 (1987); *Wildman v. Lerner Stores Corp.,* 771 F.2d 605, 614–16 (1st Cir.1985); *Maxfield v. Sinclair Int'l,* 766 F.2d 788, 795–97 (3d Cir.1985), *cert. denied,* 474 U.S. 1057, 106 S.Ct. 796, 88 L.Ed.2d 773 (1986); *O'Donnell v. Georgia Osteopathic Hosp., Inc.,* 748 F.2d 1543, 1551 (11th Cir.1984); *Whittlesey v. Union Carbide Corp.,* 742 F.2d 724, 726 (2d Cir.1984); *Davis,* 742 F.2d at 922–23; *EEOC v. Prudential Fed. Sav. & Loan Ass'n,* 741 F.2d 1225, 1232 (10th Cir.1984), *vacated on other grounds,* 469 U.S. 1154, 105 S.Ct. 896, 83 L.Ed.2d 913 (1985); *Gibson,* 695 F.2d at 1100; *Cancellier v. Federated Dep't Stores,* 672 F.2d 1312, 1319 (9th Cir.), *cert. denied,* 459 U.S. 859, 103 S.Ct. 131, 74 L.Ed.2d 113 (1982).

The Fourth Circuit has not addressed the issue. *See generally* Annotation, *Award of "Front Pay" Under § 7 of Age Discrimination in Employment Act of 1967 (29 USCS § 626),* 74 A.L.R.Fed. 745, § 4 (1985).

4 Courts are split on the question of whether a plaintiff who recovers liquidated damages may also recover prejudgment interest. *Compare Reichman v. Bonsignore, Brignati & Mazzotta, P.C.,* 818 F.2d 278, 281 (2d Cir.1987) (permitting recovery of both) *and Lindsey v. American Cast Iron Pipe Co.,* 810 F.2d 1094, 1102 (11th Cir.1987) (same) *with Blim v. Western Elec. Co.,* 731 F.2d 1473, 1479–80 (10th Cir.), *cert. denied,* 469 U.S. 874, 105 S.Ct. 233, 83 L.Ed.2d 161 (1984) (holding that ADEA plaintiffs may not recover prejudgment interest if they recover liquidated damages) *and Rose v. National Cash Register Corp.,* 703 F.2d 225, 230 (6th Cir.) (same), *cert. denied,* 464 U.S. 939, 104 S.Ct. 352, 78 L.Ed.2d 317 (1983) *and Gibson,* 695 F.2d at 1101–03 (same) *and Kolb v. Goldring, Inc.,* 694 F.2d 869, 875 (1st Cir.1982) (same); *and Spagnuolo v. Whirlpool Corp.,* 641 F.2d 1109, 1114 (4th Cir.) (same), *cert. denied,* 454 U.S. 860, 102 S.Ct. 316, 70 L.Ed.2d 158 (1981).

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Labor Arbitration Decision, BUILDERS PLUMBING SUPPLY, 89K/23639 (supplemental opinion), 95 BNA LA 351

Pagination

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Arbitration

In re BUILDERS PLUMBING SUPPLY [New Berlin, Wis.] and TEAMSTERS GENERAL LOCAL 200

FMCS Case No. 89K/23639 (supplemental opinion)

June 25, 1990

[*352]

See also 95 LA 344 .

Appearances: For the company: Thomas Y. Mandler (Schwartz & Freeman), attorney. For the union: Scott D. Soldon (Previant, et al.), attorney.
Steven Briggs

Decision of Arbitrator

BACK PAY

Background

On April 19, 1990, the undersigned issued the following Award in this case:

> After careful study of the record in its entirety, including all of the evidence and argument presented by both parties, the Arbitrator has concluded that the Company did violate the Agreement when it terminated bargaining unit employees and subcontracted out the work formerly done by them. The parties are directed to attempt to negotiate an appropriate remedy. Should they reach such agreement by May 10, 1990, the Arbitrator's jurisdiction in this matter is terminated; if the parties do not reach agreement on a remedy by May 10, 1990, each party may submit to the Arbitrator a short position paper (three pages, maximum) on what the remedy should be. To be considered timely, these position papers must be postmarked by May 15, 1990. Thereafter, the Arbitrator will fashion an appropriate remedy.

After receiving the above Award the parties were unable to negotiate a remedy. Both filed timely position statements and the Arbitrator now exercises jurisdiction to fashion a remedy pursuant to the authority jointly granted by the parties during the original hearing on December 11, 1989.

Position of the Parties

Union Position: The Union believes the Company should be directed to resume unit operations and that affected employees should be reinstated and made whole in all respects for losses sustained. It seeks back wages with interest (including all overtime), health and welfare contributions, IRA contributions, a reinstatement of members' unemployment compensation accounts, and a cease and desist order. The Union also suggests the Arbitrator retain jurisdiction for a period of 60 days from issuance of the remedy to conduct any necessary hearing or resolve any disputes over the liquidation (not a relitigation) of the remedy ordered.

Company Position: The Company believes the remedy should be limited to a determination of the appropriate amount of backpay due affected employees. It asserts that backpay should be equivalent to what the employees would have earned, less all amounts earned by them during the period in question, including amounts received from the Company at the time of their termination (vacation, severance, etc.), as well as compensation from subsequent employment and from unemployment compensation. The Company also believes that affected employees had an affirmative duty to mitigate their losses by seeking employment, and to the extent that some of them might not have done so, the backpay liability should be reduced. Finally, the Company asserts that had it not subcontracted its operations, layoffs would have occurred; accordingly, the backpay of the junior employees who would have been laid off should not be calculated from any time after the dates those layoffs would have taken place.

Discussion

Since the Company violated the Labor Agreement by terminating the employees in question, it is wholly appropriate that it reinstate those employees with back pay and benefits from the effective date of their improper termination to the date they are reinstated. The backpay amount should not reflect any "profit" for the employees, nor should it reflect a loss. Rather, it should closely approximate what they would have earned had their employment not been wrongfully **[*353]** terminated. The following are more specific comments on various aspects of the backpay remedy:

Backpay With Interest? I am not convinced from the record in the case that the Company maliciously and intentionally violated the Labor Agreement. It is more likely that through the unavoidable lens of self-interest the Company simply interpreted the Labor Agreement incorrectly. Accordingly, and consistent with the overwhelming majority of backpay awards, interest will not be awarded.

Overtime: As stated, affected employees should not suffer loss as a result of the Company's violation of the labor agreement. Therefore, the total number of overtime hours worked by contract employees during the period in question should be considered in the backpay equation.1

Unemployment Compensation: Unemployment compensation is intended to finance the job search. It is approved or denied by state agency, and a myriad of rules and regulations apply. Presumably, each state also has administrative rules which apply when a successful claimant is reinstated with backpay to his/her former job. In my view it is not appropriate for arbitrators to interfere in that process.

Interim Earnings: Money earned during interim employment could not have been earned were it not for the Company's violation of the Labor Agreement. If such earnings were not deducted from backpay, affected employees would be placed in a better position than if there had been no contract violation. Therefore, as a general principle in this case the Company's backpay liability should be reduced by amounts equivalent to each employee's interim earnings.

Duty to Mitigate Losses: If an improperly discharged employee remains idle during the period prior to reinstatement, the former employer should not be liable for backpay totalling what that employee would have earned had the discharge not taken place. Such persons do indeed have a duty to avoid willfully incurred losses. That duty may differ somewhat across individuals, however. For example, the discharged employee in the prime of his/her worklife has a greater duty to mitigate economic losses than does the more mature employee who when improperly discharged may

have had but six months to work before retirement. Each case must therefore be considered on its own.

REMEDY

After careful consideration of the parties' arguments, the Arbitrator has fashioned the following remedy:

1. The Company is directed to resume its unit operations and to reinstate with backpay and benefits the employees it improperly terminated on July 31, 1989.

2. The Union's request for interest is not granted.

3. There shall be no deduction from backpay for any unemployment compensation which affected employees may have received.

4. Affected employees' interim earnings shall be deducted from the Company's backpay liability.

5. Backpay shall include any overtime earnings which might reasonably have been earned by affected employees, using the "representative employee" method.2

6. Affected employees' duty to mitigate their losses by attempting to generate interim earnings shall be considered in computing the Company's backpay liability.

7. The Company is directed to cease and desist its failure to maintain the full force and effect of the Labor Agreement dated August 1, 1987, through July 31, 1990.

8. The Arbitrator retains jurisdiction in this matter until August 31, 1990, to hear and subsequently decide any dispute which might arise between the parties as to calculation of backpay and benefits under this Remedy.

fn 1

See Hill & Sinicropi, Remedies in Arbitration (Washington, D.C.: Bureau of National Affairs, 1981), p. 65, for a more complete discussion of this "representative employee" concept.

fn 2

Hill and Sinicropi, Reference 1, p. 65.

State of New Hampshire
Public Employee Labor Relations Board
Case No. G-0103-12

IN THE MATTER OF ARBITRATION BETWEEN

MANCHESTER POLICE PATROLMAN'S ASSOCIATION

&

CITY OF MANCHESTER

Grievant: Aaron Brown

AWARD OF THE ARBITRATOR

The Undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered by the above named parties and having been duly sworn and having duly heard the proofs and allegations of the parties AWARDS as follows:

In this Supplemental Decision, I have set forth the parameters for the parties to determine the back pay to be provided to the grievant, Aaron Brown.

August 24, 2020
Boston, Massachusetts

Gary D. Altman

State of New Hampshire
Public Employee Labor Relations Board
Case No. G-0103-12

IN THE MATTER OF ARBITRATION BETWEEN

MANCHESTER POLICE PATROLMAN'S ASSOCIATION

&

CITY OF MANCHESTER

Grievant: Aaron Brown

ARBITRATION DECISION AND AWARD

Introduction

The City of Manchester ("City" or "Employer") and the Manchester Police Patrolman's Association ("Union") are parties to a Collective Bargaining Agreement ("Agreement"). Under the Agreement, grievances not resolved during the grievance procedure may be submitted to arbitration. The Union challenged the discharge of Manchester Police Officer Aaron Brown. The parties presented their case in Arbitration before Gary D. Altman, Esq., on August 21, 2019. The Union was represented by John S. Krupski, Esq., and the City was represented by Mark T. Broth, Esq.

In an Arbitration Decision dated December 18, 2019, the Arbitrator sustained the grievance, in part, concluding that the grievant would be suspended for thirty days without pay and then was to be reinstated to a position with the Department. On December 27, 2019, the City informed the Union that it would not reinstate the grievant to any position in the Manchester Police Department.

At this point in the proceeding the parties have a disagreement over the issue of the monetary relief due to Mr. Brown, and agreed to submit the issue of backpay to the Arbitrator. In doing so, they agreed to the following stipulations.

1. The City of Manchester ("City") is a public employer as that term is defined by RSA 273-A:I X. The principal place of business of the City of Manchester is located at 1 City Hall Plaza in Manchester, New Hampshire.

2. The Manchester Police Patrolman's Association ("MPPA") is the certified exclusive representative for certain members of the Manchester Police Department, including all regular full-time Police Officers.

3. The parties are signatories to a collective bargaining agreement which was in effect in 2018 until June 30, 2019 and was marked at the time of hearing as Joint Exhibit 1.

4. The parties are signatories to a successor collective bargaining agreement which is currently in effect for the time period of July 1, 2019 until June 30, 2022 and is attached as Attachment A.

5. MPPA filed a timely grievance on behalf of Aaron Brown and a one (1) day arbitration was held before Arbitrator Gary Altman, Esq. on August 21, 2019.

6. On December 18, 2019, Arbitrator Altman issued his Award, whereby granting Aaron's grievance:

> For the reasons set forth in the attached Decision, the discharge of the grievant shall be reduced to a thirty day disciplinary suspension. In addition the grievant shall not be awarded back pay for the period of this thirty day suspension. Under this award the grievant is to be made whole for lost compensation until he returns to work pursuant to this Award, minus thirty days' pay for the period of the suspension. In addition, his back pay shall be offset by any compensation that the grievant received during this time period. The

grievant will have no entitlement to his former position in the Special Enforcement Unit, and his reinstatement can be to a position determined to be appropriate by the Chief of the Department.

7. On or about December 27, 2019, counsel for MPPA received a letter from Attorney Mark T. Broth, counsel for the City, informing that the City would not reinstate Brown. Attachment B.

8. On or about March 11, 2020, the MPPA filed an unfair labor practice against the City for failure to abide by a "final and binding" decision of an arbitrator.

9. The amount of back pay due and owing remains in dispute.

10. Aaron Brown ("Aaron") was hired as a full-time police officer with the Manchester Police Department ("MPD") on July 16, 2007. Joint Exhibit 3.

11. Aaron was assigned to the Special Enforcement Division on October 28, 2013. Joint Exhibit 4.

12. The April 11, 2018 Letter of Disciplinary Intent (p. 1- 4); Charges and Specifications (p. 5 – 10) and the Disposition Sheet (p.11) is Joint Exhibit 5.

13. At the time of his termination on April 11, 2018 Brown was employed for forty (40) hours per week at a rate of $35.95 an hour.

14. Pursuant to the decision of Arbitrator Altman, Brown was to serve a thirty (30) day suspension without pay.

15. The members of the MPPA are entitled to a non-discretionary payment of $50 a week pursuant to Article 28 of the respective collective bargaining agreements.

16. Effective July 1, 2018, the hourly rates for employees were increased by a cost of living adjustment of 3%, increasing Brown's hourly rate to $37.03 Joint Exhibit 1 Article 13.

17. Effective July 1, 2019, Brown's hourly rate was $37.77.

18. Effective July 1, 2020, the hourly rate for employees were increased by a cost of living adjustment of 2%, increasing Brown's hourly rate to $38.53.

19. Employees who opt out of health insurance coverage are entitled to a payment of $4000 paid in two installments of $2000 in January/February and July/August pursuant to the respective contracts Article 20.1 (A).

20. Employees are paid for 12 holidays at the rate of 1/5 of a week's salary paid in the first pay period of June and the second pay period of December for the Holidays occurring during the respective periods. See Article 10 of the respective agreements.

21. Effective May 1, 2020, the City received a grant from the State of New Hampshire which provided each police officer a payment in the amount of $2485.71.

22. By letter dated March 20, 2020, the City, by counsel, requested information regarding Brown's efforts to mitigate his wage loss following his termination from employment. Attachment C. The Union responded to the City's request on June 6, 2020. Attachment D.

With respect to Stipulation 22, on the issue of mitigation, the City wrote to the Union on March 20, 2020 stating in part:

> During the arbitration hearing, the parties, as is the usual practice, did not present evidence as to lost wages, efforts to seek alternate interim employment or interim earnings. Instead, the parties agreed to have the Arbitrator retain jurisdiction to resolve issues regarding determination of the back pay amount. While the period of retained jurisdiction has lapsed, the City has no objection to requesting Arbitrator Altman's assistance in resolving any dispute that exists regarding back pay calculations.

In order to determine whether Mr. Brown made a good faith effort to seek alternate interim employment during the period following his termination, and to determine the offset to which the City is entitled, the City requests the following information:

1. The address(es) at which Mr. Brown resided during the period following his termination.

2. The name, contact information, and date of application (if known) for each and every potential employer to whom Mr. Brown submitted a completed job application, whether for full-time, part-time, or temporary employment.

3. The name and contact information for each and every job placement agency, if any, whose services Mr. Brown engaged to assist in his search for alternate, interim employment.

4. The name, contact information and dates of attendance for each and every educational or training programs or courses in which Mr. Brown participated, whether as student or instructor, during the period following his termination.

5. The name, contact information, dates of employment, and hours worked for any employer other than the City of Manchester during the 12 month period preceding Mr. Brown's termination.

6. Whether, during the period following his termination or any part thereof, Mr. Brown collected any unemployment benefits, disability benefits, workers' compensation or other insurance benefits from any government agency or insurance provider.

7. Whether, during the period following his termination or any part thereof, there were any periods of time in which Mr. Brown was unable to work, whether full or part time, as the result of any physical or emotional health issues; if so, the dates on which he was unable to work.

8. Whether, during the period following his termination, Mr. Brown was hospitalized for any period

of time; if so, the dates during which he was hospitalized.

9. Whether, during the period following his termination or any part thereof; Mr. Brown served as the primary caretaker for any persons, whether on a paid or unpaid basis, including, but not limited to members of his immediate family; if so, the dates on which he served as the primary care giver and the names and ages of the persons who he served as primary caregiver.

10. Whether Mr. Brown was married during all or part of the period following his termination; if so, whether his spouse worked and the days of week on which she worked, together with the names and ages of any other persons residing in Mr. Brown's household.

11. Whether, during the period following his termination or any part thereof, Mr. Brown was employed; if so, the name and contact information for each such employer.

12. For each employer identified in response to inquiry No. 11 above, the dates of employment, position, held, rate of pay, hours worked each week and total compensation earned.

13. For each employer identified in response to inquiry No. 11 above, a copy of any and all W-2 and/or 1099 forms issued by the employer(s) to Mr. Brown for work performed during the period following his termination or any part thereof. If the employer did not issue a W-2 or 1099, please identify Mr. Brown's weekly earnings, whether in cash, exchange or other form, received from any identified employer.

14. If Mr. Brown was self-employed during the period following his termination or any part thereof, the name of his business entity, the nature of the business, and a statement as to his earnings and expenses resulting from his self-employment.

Upon receipt of this information, the City will promptly determine whether it is satisfied that Mr. Brown has made reasonable efforts at mitigation and will determine what it believes he would have earned

> as a Manchester police officer during the period following his termination (less the 30 day suspension period) and the offset that the City believes it is entitled to. The City will provide you with these calculations in order to see if we can reach agreement on a back pay amount. In the event that the City determines that Mr. Brown did not make reasonable efforts to mitigate his lost earnings, the City would be pleased to submit that issue to Arbitrator Altman (or another arbitrator selected by the parties) for resolution.

With respect to the City's inquiry, Mr. Brown responded that he did not seek any interim employment, or any assistance from an employment agency. Mr. Brown indicated that, "no unemployment benefits, no disability benefits, no workers compensation benefits, no insurance benefits or any other type of benefit related to termination/unemployment collected." Mr. Brown further indicated that he took over the role as primary caregiver (unpaid) for [his two sons]. "My wife adjusted her work hours and schedule following termination, no longer being able to serve as primary caregiver for them", and that his wife now "works as a nurse practitioner and adjunct professor of nursing. Those employment responsibilities combined, having been adjusted post termination, have her now working 7 days a week."

Positions of the Parties

Summary of the Union's Arguments

The Union maintains that the back-pay amount due to Mr. Brown is easily calculated, by considering the length of time Mr. Brown has remained out of work after his discharge, subtracting thirty days for the period of his disciplinary suspension, and then computing the contractual

salary rate, and other monetary benefits set forth in the parties' Collective Bargaining Agreement.

The Union further contends that the grievant is also entitled to receive creditable service for purposes of retirement for the time period after his suspension until he is reinstated by the Department. The Union maintains that participation is required for all full-time New Hampshire Police Officers, and that both the City and employee contribute to the system, based on requirements of the New Hampshire Retirement System. The Union states that if the City does not contribute its share into the Retirement System for Mr. Brown, then he will not receive serviceable credit for purposes of his retirement benefits. The Union states that this is particularly important because the grievant does not contribute into Federal Social Security, and thus, his NH public pension is the only retirement benefit that he will receive. The Union contends that the City's contribution into the New Hampshire's Retirement System must be considering even before the City's arguments for offsetting the grievant's back-pay amount.

The Union further argues that there should be no offset from the back-pay amount owed by the City to Mr. Brown. The Union maintains that there is no dispute that Mr. Brown did not have any interim earnings during the period after the thirty-day suspension. For a variety of reasons, the Union states that Mr. Brown was unable to earn any income during the time period he was discharged by the City until the issuance of the Arbitration Decision.

The Union contends that the fact that Mr. Brown could not obtain work as a police officer was caused by the Department's decision to place him on the "Laurie List",

("Exculpatory Evidence Schedule") which is a list of police officers whose have had issues of dishonesty in their careers, and which must be provided to defense counsel in criminal cases in which the Officer is involved. The Union states that because the Department placed Mr. Brown's name on this list, no police department would even consider offering Mr. Brown a law enforcement position. [redacted] The Union argues that the City even went so far as to attempt to have the New Hampshire Police Standards and Training Council strip Mr. Brown's police certification, which they have refused to do.

Further, the Union states that the City, when it discharged Mr. Brown, announced that a criminal investigation would be initiated against Mr. Brown. The Union states that a municipal police department cannot hire a police officer who, at the time, has pending criminal charges. The Union states that it took a considerable period of time before the County Attorney decided not to pursue any criminal charges, and it was not feasible for Mr. Brown to obtain work in law enforcement during this time period. Accordingly, the Union argues that Mr. Brown should not be penalized for not looking for work in his current profession as such circumstances were not due to Mr. Brown's misconduct, but due to the City's intentional

action in preventing Mr. Brown from obtaining work in the field of law enforcement.

The Union also contends that prior to his discharge Mr. Brown's wife was the primary caregiver for their two minor children. The Union states that after Mr. Brown's termination Mr. Brown became the primary caregiver, and his wife became the primary wage earner. The Union states that this fact should further excuse Mr. Brown from having to find some menial job simply to mitigate his lost wages.

The Union states that should there be any offset for wages, it should only be for the time period after the County Attorney decided not to pursue criminal charges until the date of the Arbitration decision. The Union states that there is no legitimate reason to provide for any offset after the Arbitration Decision was issued, as the City at that point was required to reinstate Mr. Brown to his position with the Department, and pay for all lost wages, and benefits.

Summary of the City's Arguments

The City maintains that under New Hampshire law an employee who is terminated, even if it is later found that the termination violated the terms of a collective bargaining agreement, must make reasonable effort to mitigate his or her loss of income, by seeking substantially equivalent employment. The City contends that not only is this duty to mitigate recognized by New Hampshire Law, it is also well accepted by labor arbitrators, when assessing the amount of back pay to be awarded to employees who are reinstated to their positions.

The City contends that in the present case Mr. Brown made absolutely no effort to find alternate employment. The City contends that at the time of his discharge New

Hampshire had one of the lowest unemployment rates in the Country. The City states that this is not a case in which the grievant was medically or physically unable to work; he did not apply for any positions. The City states that the grievant's decision to stay at home and be the primary caregiver for his children does not excuse him from not seeking alternate employment. The City maintains that if Mr. Brown made a personal decision to remove himself from the work force and not seek gainful employment, he should not receive back pay from the City after his discharge from the City.

The City further contends that the grievant's contention that his obligation to seek alternate employment ended after the Arbitration Decision was issued, is also without merit. The City maintains that the grievant's duty to mitigate his damages, and seek alternate employment, continued even after the Arbitration Award was issued. The City states that Mr. Brown was informed that the City would not reinstate him to a position after the issuance of the Arbitration Award, and accordingly, Mr. Brown was still obligated to mitigate his losses. Specifically, the City states that Mr. Brown continued to be obligated to make reasonable efforts to seek alternate employment throughout the entire time period, and this continued even after he learned that the City would not reinstate him to his position.

The City asserts that as a result of Mr. Brown's failure to make any effort to find alternate employment, and his decision to totally remove himself from the workforce, the City has no obligation to provide any monetary relief to Mr. Brown.

Discussion

In calculating a back pay award, the monetary compensation awarded should correspond to the specific monetary losses suffered by the grievant, with the purpose of making the employee "whole". To make an employee whole is to put the wrongfully discharged employee in the position he or she would have been in had the employee not been improperly dismissed.

It is also the well-accepted principle that an employee must make reasonable efforts to find new employment that is substantially equivalent to the position lost and is suitable to a person of his or her background and experience. Phelps Dodge v NLRB, 313 U.S. 177, 197-200 (1941). A wrongfully discharged employee is not held to the highest standard of diligence. The employee need only make a good faith effort to find suitable alternative employment in a substantially equivalent position. It has been held that a discharged employee is not entitled to back pay to the extent that he or she fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason.

There is no dispute that in the present case the grievant, Aaron Brown, made no effort to seek alternative employment or to mitigate his loss of pay that he suffered as result of his discharge from the Manchester Police Department. The City maintains that the grievant forfeited his right to back pay because he failed to make any efforts to mitigate damages by seeking suitable employment.

In reviewing an employee's obligation to mitigate his or her damages the National Labor Relations Board evaluates

the reasonableness of the discharged employee efforts under the totality of the circumstances including factors such as the economic climate, the relevant labor market, the employee's skills, qualifications, and personal circumstances. "Reasonableness is gauged by the unique factual circumstances," including individual characteristics of the claimant and the job market. Satisfying the Duty to Mitigate in Employment Cases: A Survey and Guide, Richard J. Gonzalez, 69 Miss. L.J. 749, 755-57, (1999).

Reviewing Mr. Brown's obligation to mitigate any damages can be broken down into three distinct time periods; (1) the time period for which he was under criminal investigation for the conduct that led to his discharge from the Manchester Police Department; (2) the time period after it was evident that no criminal charges would be brought against Mr. Brown; (3) the time period after the Arbitration Decision was issued that required that Mr. Brown be reinstated to a position in the Manchester Police Department, and made whole, minus thirty days for the period of the disciplinary suspension.

1. After Discharge while under criminal investigation by the Strafford County Attorney.

A discharged police officer attempting to find a suitable position in law enforcement during the pendency of a criminal investigation would have been a total exercise in futility. It is evident that municipal police departments or other law enforcement agencies would not have hired an individual, such as the grievant, who was dismissed as a Manchester Police Officer, and was being investigated as to whether his conduct leading to the discharge was a violation of the criminal laws of New

Hampshire. Moreover, it must be remembered that the Manchester Police Department was the entity that sought this criminal investigation against Mr. Brown. The City, by its effort in seeking the County Attorney to pursue criminal charges, seriously limited Mr. Brown's ability to find new employment in a substantially equivalent position that was suitable to his background and experience as a municipal police officer.

It is also important to remember that the County Attorney did not pursue criminal charges against Mr. Brown. Obviously, if the County Attorney decided to bring criminal charges against Mr. Brown, the arbitration proceedings could have been different. The County Attorney stated:

 [1]

Considering the totality of circumstances, including the position held by the grievant, and the fact that he was under criminal investigation, Mr. Brown was not required to have sought employment during the time period he was under criminal investigation. In other words, it was reasonable for Mr. Brown to have waited until the criminal

[1] The City in its brief claims that the Arbitrator erred by allowing the County Attorney's email into evidence in the original proceeding. Suffice it to say that there is no dispute that the City was the one that sought to have Officer Brown investigated for criminal wrongdoing, and there is no dispute that criminal charges were not brought against Mr. Brown. No doubt if criminal charges were filed against Mr. Brown, the City would have introduced such an event.

investigation was concluded for him to make any attempt to look for substantially similar employment.[2]

Accordingly for the period of time, in which Mr. Brown was under criminal investigation it was reasonable that he not be required to pursue employment, and Mr. Brown should be paid full-back pay for this period. Unless there is official document that the County Attorney concluded that criminal charges would not be pursued, the date of the email that was introduced in the first hearing shall serve as the date by which Mr. Brown was excused from seeking alternate employment.

2. Time period after decision made not to pursue criminal charges.

Circumstances changed after it was clear that the County Attorney decided not to pursue criminal charges. Undoubtedly, it would have been difficult for Mr. Brown to find work in the field of law enforcement after his discharge, but the difficulty of finding such position does not excuse him from making at least some effort, to look for work. It is the general rule in back pay cases that an employee must make at least reasonable efforts to find new employment, which is substantially equivalent to the position lost and is suitable to a person of his or her background and experience.

It is not as if Mr. Brown had to actually find employment but he must, at least, have made an effort to search for employment. It would be inappropriate to allow an employee to collect back pay during a period when the employee made no effort to mitigate damages by seeking

[2] The obligation to seek employment is not for any and all positions. Rather, an employee's obligation is to seek employment in a position suitable to his background and experience, and one that provides comparable pay and benefits.

employment and essentially dropped out of the labor market. The fact that Mr. Brown stayed home with his minor children while his wife worked additional hours does not satisfy the duty to mitigate. By this decision, Mr. Brown totally removed himself from the workforce. I know of no cases in which a discharged employee is excused from attempting to search for work because he decides to stay home with his children.

Thus, Mr. Brown should not receive any back pay from the period after the County Attorney's decision not to pursue criminal charges, and until the date of the Arbitration Decision.

3. Period after Arbitration Award.

My Arbitration Decision and Award was issued on December 18, 2019, in which I ruled, in part:

> Under this award the grievant is to be made whole for lost compensation until he returns to work pursuant to this Award, minus thirty days' pay for the period of the suspension. In addition, his back pay shall be offset by any compensation that the grievant received during this time period.

The City, in its brief, contends that Mr. Brown's obligation to mitigate continued even after the Arbitration Award directing reinstatement was issued. The Department decided not to reinstate Officer Brown, and now contends that he should, nonetheless, have continued to seek suitable employment even after the Decision was issued reinstating him to a position in the Police Department, and the City decided to ignore the Award set forth in the Decision.

This dispute now raises the issue of the arbitrator's authority after the Arbitration Decision was issued. As a

general matter, an arbitrator's authority ends at the time the arbitrator issued his or her decision. It is accurate that the parties agreed that the Arbitrator would retain jurisdiction on questions of back pay. Any such dispute, however, was limited by the terms of the Award for the time period from the date of Mr. Brown's discharge until the Decision was issued requiring that he be reinstated. It is within that time period that the Arbitrator agreed to resolve any disputes over back pay, and not rule on issues that occurred after the Award was issued, including the City's decision to refuse to follow the terms of the Award.

The City has the right to challenge the Arbitrator's Decision directing the reinstatement of Mr. Brown, as it deems appropriate. If the City complied with the Award, however, Mr. Brown would have been reinstated and would have begun to be paid the wages and benefits due to him under the parties' Collective Bargaining Agreement. I know of no cases in which an employee's obligation to mitigate continues after an award of reinstatement.

In the Award I stated:

> Under this award the grievant is to be made whole for lost compensation until he returns to work pursuant to this Award, minus thirty days' pay for the period of the suspension.

As far as the Arbitrator is concerned, these terms are clear and unambiguous; the City agreed to binding arbitration and was therefore contractually obligated, as of December 18, 2019 to reinstate the grievant and pay him his wages and benefits "until he returns to work pursuant

to this Award". This Arbitrator is not going to excuse the City from this express requirement.[3]

Conclusion

The above sets forth the parameters for the parties to determine the back pay to be paid to the grievant, Aaron Brown. The parties have stipulated the contractual wages and benefits that were in effect during the pendency of this proceeding, and they should be provided to the grievant under the parameters set forth above.

August 24, 2020
Brookline, Massachusetts

Gary D. Altman

[3] The Arbitrator's responsibility was to conclude whether there was just cause for Mr. Brown's termination, and will not opine on the validity of the City's actions after the issuance of the Award.