

FEDERAL MEDIATION AND CONCILIATION SERVICE
Case No. 15-56993-3

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In the Matter of Arbitration : RBJ Case No. 15-183

-between- :

FRATERNAL ORDER OF POLICE, :
LODGE NO. 8, and MICHAEL MULEY :

Grievants, : OPINION AND AWARD

and :

CITY OF MIAMI BEACH, :

Employer. :
-----X

Appearances:

CITY OF MIAMI BEACH, by:
David Miller, Esq. and Michael Elkins, Esq.
Of Bryant Miller

Also present for the City:
Sergeant Thomas Payne
Lieutenant Richard Weissman

FOP Local 8, by:

Eugene Gibbons, Esq.

Also present for the Union:
Michael Muley, Grievant
Bobbie Jenkins

Before:

Roger B. Jacobs, Impartial Arbitrator

O P I N I O N

This proceeding arose as a result of a grievance filed by FOP Local 8 (the "Union" or "FOP") regarding the discharge of Michael Muley (the "Grievant").

The parties, having been unable to resolve their dispute, have submitted this matter to arbitration pursuant to the collective bargaining agreement. The undersigned was designated as the Arbitrator.

Hearings were held on June 6, 7, and 8, 2016 in Miami Beach, Florida. At such hearings, the Union and the Company were present; the parties were represented as shown above by the appearances and were afforded a full opportunity to present evidence both oral and written, examine and cross-examine witnesses under oath and otherwise to present in full their respective positions, arguments and proofs. The parties also submitted post-hearing memoranda setting forth their arguments as well as supplemental submissions responsive to questions I posed.¹

This Opinion and its accompanying Award are based upon the record as thus constituted.

THE ISSUE

The parties agreed upon the following issue and remedy.

Was there just cause for the termination of Michael Muley?
If not, what shall the remedy be?

¹At the conclusion of the hearings, the parties agreed that briefs would be submitted by July 21, 2016, directly to the Arbitrator. The date was extended to August 1, 2015. Briefs shall be referenced as follows:

City of Miami Beach Brief - "MB at ____"

FOP Brief - "FOP at ____"

The supplemental submissions shall be referenced as follows:

City of Miami Beach Supplemental Brief - "MB Supp. Br. at ____"

FOP Supplemental Brief - "FOP Supp. Br. at ____."

BACKGROUND

The Collective Bargaining Agreement ("CBA") was submitted as JT-2 and I will rely upon it for the scope of my authority and to define matters at issue. Excerpts of the CBA are attached as Appendix A.

This case primarily involved Sgt. Muley being intoxicated while handling an off duty assignment at Mango's Bar in Miami Beach, Florida, on July 14, 2014. Sgt. Muley admitted that he was intoxicated at that time and also pulled his Smith & Wesson Revolver M&P 40 MM partially from his holster. His behavior was corroborated by video evidence as well as testimony.² As a result, the City of Miami Beach brought seventeen charges against Sgt. Muley. Ex. 3A.

POSITIONS OF THE PARTIES

City of Miami Beach

Based upon the totality of the circumstances, termination of Michael Muley was justified. The facts met the City's burden of proof to establish just cause for dismissal. The City case "is simple" and Muley's intentional misconduct cannot be justified under any circumstances. MB at 1. Muley created a spectacle that damaged public confidence. Id. The City denied it acted improperly and said "ultimately that does not matter." MB at 2. The City said that what matters is Muley's "15 year history of extreme uncontrolled binge drinking."³

Despite Grievant's long record of service, his behavior on July 14, 2014 was so egregious and in violation of Miami Beach protocols for police, that he should be terminated. His misconduct occurred while he was on duty. Thus, returning him

²The testimony was transcribed by a court reporter, Marla Schreiber. References to transcripts shall be as follows: "Tr. at ____."

³The only evidence presented was drinking on July 14, 2014. On cross-examination, Muley admitted he had an episodic drinking issue but no other specific events were presented before me.

to service would undermine the confidence of the Department and public. There was a "rock bottom line for Chief Oates: [T]here is no place for consuming alcohol on duty." MB at 10.

Muley's level of intoxication was extreme. MB at 4. (Blood alcohol level of 0.287 percent.) In addition, Grievant had a history of uncontrolled behavior even if there were no prior instances of aberrant conduct working as an officer in the City of Miami Beach. There was no basis for mitigation. The issues that caused Muley's problems still existed. "He is writing a check he cannot cash. No addict can make that guarantee. Neither can he." MB at 22-23.

The City contends it is simply too dangerous to return the Grievant back to work. "The result of his extreme intoxication was not only predictable, but was intended." MB at 4. As the Chief said, he (the Chief) needed to manage risk and the risk in this case to the public outweighed the potential harm to Michael Muley.

Muley had been a fine officer prior to this incident. However, he crossed the line on July 14, 2014. An officer cannot be drunk on duty. "[S]ympathy cannot excuse the inexcusable, cannot absolve the intentional misconduct he committed, and cannot justify putting the public at renewed risk." MB at 1. It is that simple. Returning Muley to duty sends a bad message both to the police force and to the citizens of Miami Beach.

The City urged that the "sole issue before the Arbitrator is whether the degree of discipline - discharge - was warranted in this case." MB at 6. The City said whatever standard of just cause is applied, discharge was appropriate. MB at 7. Relying upon another Miami Beach case, the City quoted that "[a]llowing this officer a second chance in this case would be

unjustified." MB at 7, citing Gutierrez and City of Miami Beach.⁴

The Union

The penalty in this case was too harsh based upon the service record of Muley; his lack of prior discipline; and the mitigation factors that should be taken into account. In addition, the acts and conduct of the City in this case following Muley's hospitalization were simply outrageous.⁵ The City also failed to follow applicable CBA provisions for the treatment of alcohol and drug issues. FOP at 5. The City failed to send Muley for evaluation and did not offer treatment to Muley as required by its own regulations.⁶ "Chief Oates did not need another test; Muley had already provided his urine sample." FOP at 6.

The City also violated Muley's constitutional and statutory rights by invading his hospital room after he was off duty from work. The FOP argued that "[a]ny compelling interest that the public employer may have had to obtain a blood sample had been satisfied by way of the agreed to urine sample." Id. At 6. While Muley was hospitalized, someone from the City filed a Workers Compensation claim in his name in an effort to evade the privacy laws and to obtain Muley's blood test results. The City

⁴In Gutierrez, the arbitrator concluded use of urinalysis was appropriate for alcohol testing. A urine sample was given by Muley. It was never addressed on the record. In addition, in Gutierrez the arbitrator stated that the City came to the arbitration "with unclean hands." The testimony of former Chief Raymond Martinez was that it was "not unusual for officers to be photographed with tourists." P. 19. He also discussed the "culture" issue which was not before me in this case.

⁵"[T]he City is also not without sin and has in fact acted in bad faith...." FOP Supp. Br. at 3.

⁶The City and the Union bargained to reach a "reasonable suspension drug testing process ... in Article 15." FOP at 4. This protocol requires officers to be subject to urinalysis. Id.

breached Muley's rights to privacy.⁷ The order to draw blood was illegal and unnecessary since Muley had already provided a urine sample. FOP at 7. Thus, "Chief Oates' order was not in keeping with the plain language of the CBA." Id.

Consideration of Muley's service record justified a penalty less than termination. The FOP reviewed the charges against Muley in detail. The primary focus was on Muley's refusal to agree to a blood test and that test was wrong based upon the CBA. FOP at 9.

The Union urged that "p[ro]per evaluation and assessment of Muley's personal issues including his battles with alcohol abuse, medical, financial and family problems taken in conjunction with the previous Barret Robbins shooting, and the every day job related stressors that go hand in glove with police work cannot be simply ignored or brushed off..." FOP at 12. Muley's condition was general and common knowledge in the MBPD and that knowledge should be imputed to the City. The City had treated others differently and sought to make an example out of Muley instead of helping him. Thus, termination under the circumstances was not justified and a lesser penalty should be imposed.

The FOP also said "the real reason Chief Oates could not save Muley's career is because City politics not true leadership got in the way of doing the right thing in this case." FOP at 14.

FINDINGS OF FACT

There is little disagreement on the basic facts in this dispute. Michael Muley (hereinafter Muley or Grievant) had been employed by the City of Miami Beach Police Department (MBPD)

⁷"[T]he City was hell bent on obtaining Muley's blood alcohol results." FOP Supp. Brief at p. 3.

from 2000 until his termination on March 13, 2015. He had attained the rank of sergeant and was a highly decorated and dedicated officer. Ex. UN1.

MULEY BACKGROUND

Muley had prior service as a police officer in the City of Tallahassee for about eight years. He had grown up in the northern Florida area and received an athletic scholarship to Eastern Kentucky University where he was a varsity athlete for five years. He is married to Lycette and has three teenage sons. He has also adopted his niece.

Muley was a highly decorated officer. He received the Medal of Valor at least twice and was officer of the year on several occasions. Prior to the incident leading up to his dismissal, he was considered an outstanding cop.

Muley described the impact of a shooting incident in 2005 with Barrett Robbins, a former NFL player. Muley said he was hospitalized and had psychological trauma that continued for years due to the events as well as protracted litigation that followed. He said the Robbins' matter "just wouldn't stop and took a toll on his family." Tr. at 481. He said he was deposed fifteen times.⁸

No other issue of discipline was discussed on the record before me.

Personal Issues. Muley said he began to drink in 2002 when his dad died. He said that for eight months, he drove from Miami to Tallahassee, and back to Miami, each weekend. After his dad died, his mother also had financial difficulties. He continued to care for her and provide her with financial assistance. He said he had a compulsive drinking problem --

⁸He met with Michael A. Rosen for treatment. Muley discussed the stresses with Rosen including the stress of dealing with his mom. Muley met with Rosen on February 25, 2011, March 4, 2011, March 18, 2011 and April 2, 2011.

because "I pushed myself to the limit." Tr. at 528. The problem continued but he never missed work.

Muley said he sought treatment in 2011 under the City Employee Assistance Program (EAP). It was a confidential program.

Muley said "when things piled up I overdrank." From 2011 to the incident (on July 14, 2014) he had no alcohol. He regularly attended meetings and worked midnights. He attended meetings at the St. David's Church in Davie, Florida and also took other officers to the program.

Marital Issues. His wife was very demanding, had a hot temper, and was aggressive and "in your face." She objected to Mike sending money to his mother, they "battled" over issues and there were tough times. He said frequently he slept elsewhere to avoid problems with her.

EVENTS OF JULY 13-14, 2014

July 13, 2014:

Muley had driven with his wife and family to Cooperstown, New York, to participate in a baseball tournament. He was the coach of his son's team, the Pembroke Lake Bulldogs. Muley slept in the barracks with the team. Tr. at 492. He testified credibly that after an argument with his wife, she drove him to the Albany airport on July 13, 2014. She told him to exit the car and that she had already purchased an air ticket for his return to Miami. She also told him she would be seeking a divorce upon her return. Tr. at 495.

Muley was met upon arrival in Florida by his friend and fellow police colleague Oscar Placencia. Oscar offered no comments about the incident. However, Lt. Eugene Rodriguez of the MBPD, and a friend, testified it was "freaking humiliating to have your wife put you on a flight and send you home. It was simply outrageous." Tr. at 402-403.

July 14, 2014:

Muley was asked by Officer Schultz to cover for Schultz that night at Mango's, an off duty location about two blocks from the police headquarters. Tr. at 493. Muley had been there many times before.

Muley arrived late, at about 11:00 p.m. He admitted that he was late during his testimony.⁹ Muley spent about one hour at the location and then went to the station to do paper work. Tr. at 499. He returned to Mango's a few hours later. Shortly thereafter, he began to consume shots of vodka with cranberry juice. His drinking was captured on video and was not contradicted. Muley admitted to having several drinks while on duty at Mango's and becoming intoxicated. Tr. at 505. The video evidence showed drinking at least at 3:21 a.m., 3:36 a.m. and also at Fat Tuesdays. Ex. 1.

Significantly, Muley can also be seen pulling his revolver partially from the holster - he said to demonstrate the new holster. Tr. at 508. The sequence took about four seconds on the video. Police regulations are clear -- the weapon is not to be removed unless it is in use. He was in violation of the regulation. The weapon was loaded when being worn by an officer. Tr. at 216. There was no safety on the weapon. Tr. at 212.

Muley also admitted having pizza from Mango's and putting some in his police vehicle. He admitted that he ate food and did not pay for it.¹⁰

At about 4:12 a.m., Muley was escorted to the Waldorf Hotel by Wayne Smith, a bouncer at Mango's. Muley can be seen on the

⁹No payment record was submitted in evidence for that off duty assignment.

¹⁰However, other officers testified that it was a routine and consistent practice for officers on off duty assignments to have food provided to them.

video walking to the hotel and then leaving very soon thereafter. He walked unsteadily on Ocean Court Alley. He held on to a post at one point for balance.

Muley did not dispute any of these facts.

Sometime after 4:00 a.m., the City had received an anonymous call stating that an officer was drunk walking on the street. Sgt. Thomas Payne of Internal Affairs (IA) was assigned to coordinate the investigation. He contacted Lt. Michael George who went to the scene. Lt. George testified that he found Muley and he asked Muley if he was alright. Muley said he was not. Muley said he did not feel well and had personal issues. Muley admitted to George that he had been drinking. Tr. at 179.

Muley got into the police vehicle driven by George and was taken to the side of the station by the cannon. Several other officers were called to the scene, both for the Internal IA investigation and from the FOP. Sgt. Bello, President of the FOP, spoke to Muley. Bello requested medical assistance which was provided by Fire Rescue. Muley was taken in that vehicle to Mt. Sinai Hospital where he went in to a room in the ER and was admitted to the Hospital. Muley remained at the hospital for several days and had extensive surgery. He was given morphine for pain.

Muley had been relieved of duty at the station and his holster and weapon were removed at that time. He was not on duty at the hospital and had not submitted time for payment for his work at Mango's.

MT. SINAI HOSPITAL

Muley tried without success to perform a breathalyzer test administered by the outside vendor designated in the CBA. He had abdominal issues that made a sustained breath impossible for him. Tr. at 517. Muley provided a urine sample whose contents

and analysis were not presented on the record. The urine sample was drawn about 7:20 a.m. and known to the officers on the scene.

Captain Mildred Pfrogner, in charge of IA, also came to the hospital to oversee the investigation. She had been in touch with Chief Daniel Oates who had directed her to obtain a blood draw from the Grievant. Muley refused three times. On the video in evidence Muley said he understood the order, that he had been given medicine, and that he would not consent on advice of counsel. Tr. at 518-519.

Multiple charges against Muley were related to this refusal and for "insubordination" for refusing this order. Muley did not deny this refusal.

Several officers were present in Muley's room at the hospital on July 14, 2014. At some point, hospital staff asked MBPD personnel to leave Muley's room. Tr. at 225.

BLOOD TESTING

A related issue arose with regard to obtaining his blood alcohol level. After Muley refused to provide a blood sample, MBPD obtained that information from a workers' compensation report filed by the city without Muley's permission. Chief Oates admitted that he only became aware of Muley having a .287 ethanol reading from Muley's workers' compensation report which the City utilized. Thus, to the extent the City raised a question about lack of knowledge regarding his medical condition, at least as of July 2014, that argument is simply not credible.

WORKERS' COMPENSATION FILING

Muley had not requested, consented to, nor filed a workers' compensation claim. Tr. at 541. Lt. George filed one on behalf of Muley that was withdrawn the following day by the City. It was withdrawn once the City received the information it wanted.

At no time did Muley authorize the claim to be filed and was not aware it had been done. The report - which is in evidence - was made available to Miami Beach approximately the same day or next day and had a full discussion of his medical conditions, although individual prior hospitalizations were not enumerated. Ex. C4.

The report was transmitted on July 15, 2014. The exact date it was received by the City of Miami Beach was unclear. No testimony explained how it was filed and by whom. However, the City argued that it was a business record maintained by the City. Counsel stated "It is part of the internal affairs report." Tr. 557. It was attached to the final action to terminate. Tr. 587. The report referenced Muley's prior medical history - without dates - including several abdominal issues and surgeries. It stated treatment in July, 2011 in some detail.

Moreover, it also stated "Patient does not want medical information shared with anyone - this includes family and members of the police force." Ex. C4 (emphasis added). His request was not honored. The City, apparently, had its contents during the entire pendency of this investigation!¹¹

Muley did not return to service as a police officer after July 14, 2014. He was suspended with pay until his discharge on March 13, 2015.

¹¹The FOP said "the City has strenuously argued ... they were never made aware of the fact that Muley was suffering with personal medical issues, nor did they have any proof of it. The contents of the City's own documents clearly refute the City's baseless assertion in this regard. FOP Supp. Br. at 2.

CHIEF OATES' DECISION

Daniel Oates, the Chief of Police in Miami Beach, ultimately concluded that he could not tolerate the risk of retaining Muley on the force. He testified credibly about his twenty years of prior experience in the NYPD.¹²

Chief Oates had been instrumental in setting up alcohol treatment programs in Aurora, Colorado and Ann Arbor, Michigan where he had also been Chief, prior to coming to Miami Beach. In Miami Beach, he stated that he had an "informal arrangement" with the City Manager but not a formal program. At least two current officers were assisted in residential programs. However, Chief Oates testified that neither was intoxicated on duty, unlike Muley. Being drunk on duty, however, was unacceptable under any circumstances.

TESTING, DRUG TESTING, REASONABLE BELIEF TESTING

There are several applicable provisions regarding testing. Article 14 of the CBA provided that the Chief may direct an employee to "submit to a urinalysis..." Article 14.b also provided for a last chance agreement for positive test for alcohol or drugs at the sole discretion of the City Manager. However, no such agreement was placed before me on this record so I did not focus on that provision.

The City of Miami Beach also had policies governing drug and alcohol misuse prevention which provided as follows:

3. Refusal to take the required tests or lack of cooperation with the testing procedures will be considered a "test positive" and will be handled accordingly.

7. All employees who test positive to a drug or alcohol test must be evaluated and released to duty by

¹²A seminal event for Oates occurred on St. Patrick's Day, in the early 1980's, regarding misuse of alcohol by officers. He was concerned about alcohol abuse by officers.

the Substance Abuse Professional (SAP) before returning to work. Ex. 4(a) (emphasis added.)

Reasonable suspicion testing was discussed on page four. The provision applicable to Muley provided as follows:

2. RESULTS OF POSITIVE TESTS

° Safety-sensitive employees, with an alcohol test of 0.04 or greater must be removed from their job duties, including safety-sensitive functions and cannot return until the employee undergoes evaluation and rehabilitation as determined by the SAP. The employee must undergo a breathalyzer test with a result of less than 0.02 before he/she can return to duty. Other employees will be subject to the same standard.

(emphasis added.)

° A safety-sensitive employee, with positive results of drug tests will not be permitted to return to safety-sensitive functions or other job duties until: the employee undergoes evaluation and rehabilitation as determined by the SAP. The employee must undergo a return to duty test with a negative result. Other employees will be subject to a similar standard depending on the nature of their functions. (emphasis added.)

° Safety-sensitive employees with positive test results will also be subject to a minimum of 6 unannounced tests over a 12 month period and may be tested for up to 5 years. All other employees may be similarly evaluated as deemed appropriate by the SAP.

It is undisputed that these protocols were not followed. Chief Oates admitted that he did not send Muley for evaluation or rehabilitation at any time. Tr. at 338. The only comment regarding compliance by the City was that - "None of that matters. The City denies it acted improperly, but it ultimately does not matter." MB at 2.

The MBPD also had guidelines regarding reasonable suspicion/drug testing - Ex. 4F; SOP 135. The SOP defined a

protocol to be used for "any employee for whom there is a reasonable suspicion...." The City did not follow this procedure with Muley.

There is also a drug testing protocol for police codified in SOP #135. The SOP required immediate evaluation of the employee. The SOP stated:

If reasonable suspicion exists, the employee shall be taken immediately for evaluation in accordance with Federal Statute 49 CFR Part 391.00(c), City Policy, and any bargaining unit contract that may apply.

The SOP also specifically dealt with reasonable suspicion drug testing, where and how it was to be conducted. It stated in pertinent part, II.6, that "[a]ll reasonable suspicion tests will get both the drug test and an alcohol breathalyzer test."¹³

ANALYSIS

There was no question on this record that Muley was intoxicated on duty and he withdrew his weapon at Mango's while drunk. Most of the other charges – by the Chief's own admission – were cumulative and not determinative in his decision-making.

MITIGATING FACTORS

Several officers testified that Muley was the most highly decorated officer on the force. His heroism was demonstrated through much testimony.¹⁴ Muley also testified credibly that he lived through the Robbins' attack and incident for many years. He said he was provided with only thirty minutes of counseling to deal with that situation even though he was sued personally after the individual was released from prison.

¹³The Memorandum of Understanding between the parties dated June 10, 1991 also provided that for reasonable suspicion testing "blood will normally be used for blood alcohol test and when a urine sample is impractical." Ex. 4G. It does not, however, address a conflict between different testing modalities or when there is a refusal for one test because another has already occurred. In this case, urine was provided and blood testing refused. The protocol provided that a refusal was considered a "positive" test result.

¹⁴See Ex. UN1 for his numerous commendations.

Muley's level of stress from the job and personal matters seemed extreme as presented at this hearing. He testified about long standing marital issues as typified by his forced return from Albany the day before the July 14 incident.

Another complicating factor was the timing of a new Chief of Police for MBPD. Chief Oates joined the Miami Beach on June 9. This incident arose on July 14. Thus, a "perfect storm" was set in place.

A new chief cannot be expected to be fully familiar with Muley or any of the other 390 or so officers on the force. However, lack of familiarity does not excuse the City from compliance with the terms of its CBA as well as other obligations to City employees.

LEVEL OF INTOXICATION

Muley was asked three times to submit to a blood test. He refused. He admitted to drinking and never denied that fact.

It was not clear why his level of intoxication, if that is the correct term, was relevant after his admission. The reasonable suspicion guidelines stated that for reasonable suspicion alcohol use on the job the employee "will be required to go for an evaluation..." This provision was ignored by the City.

Further, it provided that "all employees who test positive to ... alcohol test must be evaluated and released to duty by the Substance Abuse Professional (SAP)."

Muley was not sent for evaluation and rehabilitation and was not seen by a SAP. The Chief admitted non-compliance.

Muley was relieved of duty on July 14, 2014 but not separated from service until March 13, 2015 with full pay and benefits during his suspension. He could have been sent for evaluation and possible rehabilitation during those intervening nine months.

Significantly, Chief Oates testified that obtaining the blood test was not particularly important, in hindsight, since there was overwhelming evidence of Muley's behavior. Tr. at 357.

MBPD RECORDS

The City introduced documents as business records showing Lt. George filed a workers' compensation claim on behalf of Muley. It was submitted into evidence as a record of the City. The city exhibit was obviously in its possession including its words and contents. No witness explained how the document came to be initiated by the City although its purpose was transparent.

The City made an end around to obtain Muley's medical information, including ethanol level. Muley testified – without contradiction – that he did not file nor authorize anyone to file a workers' compensation claim on his behalf. The form had five substantive pages and a brief factual history on the top of the second page. It had personal medical information regarding his prior treatment including surgeries.

Testimony from the City that it lacked knowledge regarding Muley's prior medical condition is not credible. While the Chief was new on July 14, 2014, this document was dated that same day and was obviously obtained by the city at or around that date. In addition, various officers testified, without contradiction, that they were aware, at various degrees, of medical issues suffered by Muley. It was generally known by the Miami Beach PD that Muley had prior and serious medical conditions.

FIRST REPORT OF ILLNESS OR INJURY (EX. 3K) REPORT

This report was signed by Lt. George on July 14, 2014. For employee, it stated "unable to sign" meaning Muley. There was no indication that Muley was ever even made aware of this filing

by Lt. George or asked to sign. The report noted that Muley did not lose time from work and checked "other" for cause of accident. The only factual notation was "Mike Muley advised he was experiencing abdominal pain." No evidence was presented by Lt. George regarding this report or filing. Since Muley was not asked about the workers' compensation or First Report in the hospital he could not sign it.

For the purposes of this grievance, I need not decide what violations of standards and laws, if any, occurred by the filing and transmittal of a workers' compensation claim on behalf of Muley without his permission and authorization. His comments on the report are, however, noted and troubling.¹⁵ He specifically wanted his privacy maintained and it was not.

DISCIPLINARY STEPS BY MIAMI BEACH

Muley was relieved of duty on July 14, 2014. His holster and weapon were taken. He never returned to service. IA began its investigation right at the hospital. IA personnel were "asked to leave the hospital room by the hospital compliance officer" according to the IA report (at page 50).

At 12:50 a.m. "Relieved of duty" paper work was signed by attorney Bushel. It noted that Muley needed to follow the workers' compensation procedures upon release from the hospital and call IA. However, the workers' compensation claim was withdrawn by the City before Muley even left the hospital.

The Internal Affairs report was submitted by Sgt. Thomas Payne on November 3, 2014 and signed by Captain Pfrogner the same day. The report was fifty-five pages and was submitted in evidence at the hearing in this matter.

¹⁵The FOP said "[w]hy the City executed the initial claim of work related injury document is a mystery to Muley and how the City obtained certain private medical information is highly questionable." FOP Supp. Br. at 2.

On December 1, 2014 a Disposition Panel issued its report to the Chief of Police with its recommendation for Muley's termination. The panel found violations of all of the provisions charged. It also found Muley's intoxication became an incident which "several local news broadcast networks aired...some repeatedly. The story was also printed by the Miami Herald" and created negative media attention which adversely impacted the Miami Beach PD.

The Internal Affairs report was approved by Chief Oates on December 4, 2014.

Muley was notified of a pre-determination hearing on January 9, 2015 and an identical list of charges was provided. Ex. 3A. The document was entitled "Intent to terminate."

A pre-determination hearing was held on February 4, 2015.

A request for approval of termination was sent from Angela Menendez, Sr. Human Resources Specialist to Jimmy Morales, City Manager on March 13, 2015. It was signed by both Chief Oates and Manager Morales.

Muley's grievance was dated March 29, 2015 regarding his termination.

The findings on behalf of the City Manager were signed July 1, 2015 by Lee Kraftchick sustaining the termination of Muley. The report noted that the FOP raised the issue of workplace and personal stress. The decision found discharge appropriate due to the severity of the misconduct while admitting Muley had been an excellent officer and was suffering from significant stress on the date of the misconduct.

COMPLIANCE WITH CBA AND OTHER APPLICABLE REGULATIONS

The City failed to follow its protocol for reasonable suspicion. Article 14 of the Agreement provided for urinalysis based upon a reasonable belief. Muley provided a urine sample. The results were never put on the record before me. The City of

Miami Beach had a contractual obligation, according to its CBA, regarding drug testing. The City did not follow this protocol.

City of Miami Beach policies also provided that "[a]ll employees who test positive to a drug or alcohol test must be evaluated and released to duty by the Substance Abuse Professional (SAP) before returning to work." If there was a positive test, according to this policy, for safety sensitive employees they must be removed from their job duties and cannot return until "the employee undergoes evaluation and rehabilitation as determined by the SAP."

The City of Miami Beach Police Department also did not follow the City's policy for safety-sensitive employees. The policy provided for employees to undergo evaluation and rehabilitation as determined by the substance abuse professional. No such testing was ever ordered for Muley nor was he seen by an SAP. Thus, I do not agree with the City's comment that even if it acted improperly "it ultimately does not matter." It does matter.

The just cause analysis must involve a balance of Muley's acts which clearly were in violation of his duties as a police officer with his prior service as well as the specific nature of his misconduct. Muley was charged with seventeen infractions based upon his conduct on July 14, 2014. During his testimony, Chief Oates testified that by far the most significant facts were Muley's high level of intoxication and the partial withdrawal of his weapon from the holster while intoxicated on July 14, 2014. Chief Oates also stated that the media attention made Muley's conduct even more problematic.

Muley's policy violations are relatively straightforward, clear, and generally admitted. They are very significant and troubling.

However, the conduct and policy violations by the Miami Beach Police Department are also significant and must impact my analysis of the "reasonableness" of the discipline in this case.¹⁶

The City did not follow its own protocols and never sent Muley for evaluation as required.

Since the City urged that I rely upon the workers' compensation filing and accept it as a business record, I do. A review of the workers' compensation report has a detailed and lengthy recitation of Muley's medical history. This document was known to City personnel on or about July 14, 2014. Thus, its arguments to the contrary regarding medical issues for Muley are unfounded.

Additionally, in the workers' compensation report, it specifically stated that the patient did not want anyone, including his family or the police department, to be made aware of his condition. His request was ignored.

Muley provided a urine sample which appeared to satisfy the reasonable suspicion obligation.¹⁷

Muley refused to provide a blood sample but that evidence was obtained by the City anyway.¹⁸ In that regard, Chief Oates admitted that, in hindsight, the test was unnecessary since Muley both admitted being intoxicated and clearly was intoxicated on the video evidence.

¹⁶See Riley Stokes Corp., 7 LA 764 (1947), cited by the City, where the majority of the Arbitration Board ruled it was "their right and duty to examine into the reasonableness of the penalty..." I must do the same.

¹⁷The City argued that Muley's blood alcohol level was more than three times the legal standard to drive. Yet, no evidence supported the conclusion that he was going to drive. MB Supp. Br. at 2.

¹⁸Also see, McCartney's, 84 LA 799 (1985), finding that failure to "afford the grievant an essential element of due process guaranteed by the just cause provision" of the Agreement was a serious deficiency. I agree. Id. at 806.

ANALYSIS AND AWARD

Based upon the entire record before me, I find Michael Muley was intoxicated on duty and partially raised his weapon from his holster on July 14, 2014, in violation of police regulations and rules of conduct.

He had pizza provided by the establishment, which was also a violation of the rules. Credible testimony, however, established that it was a routine practice for officers on off duty assignments at food establishments to eat without cost on those assignments.

Chief Oates testified that many of the charges against Muley were cumulative. His main focus was on the drunkenness while in uniform; the display of Muley's weapon; and the potential for further harm and disgrace to the police force. The Chief also commented that the public knowledge about the incident brought dishonor to the department and an overall problem for the City.

No scientific evidence was presented on the nature of alcoholism as a disease nor was such a diagnosis presented on the record. However, during cross-examination, Muley accepted the characterization of himself as an alcoholic. Contrary to the MBPD argument, he did not offer the "disease" as a justification for his behavior at any time. Rather, he simply asked for another chance, primarily based upon his record of service.

I also rely, in part, on a comment by counsel for the City of Miami Beach who stated as follows: "There is [sic] multiple SOP's, multiple regulations and a collective bargaining agreement all that needs to be read together." Tr. at 127. I agree and have applied all of those to conclude that the City

did not follow its obligations under the regulations as well as the collective bargaining agreement with the FOP.

The City has established just cause for discipline against Michael Muley. However, the City was required to follow its own requirements before terminating Muley's employment.

In balancing the obligations of the City of Miami Beach to its citizenry and its Collective Bargaining Agreement with the FOP, I make the following award:

(1) Muley shall be permitted to undergo evaluation regarding his alcohol issues and possible rehabilitation in accordance with the agreements referenced in my Award;

(2) Should Muley be deemed able to undergo rehabilitation, he may elect to be placed in a residential treatment program for a period of several months consistent with Chief Oates' informal policy;

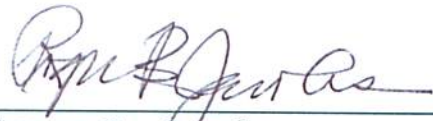
(3) If Muley successfully completes that rehabilitation, he will be subject to a fitness for duty evaluation prior to any reinstatement;

(4) In the event Muley is deemed fit for duty, he shall be reinstated at that time with no loss of rank or seniority; and

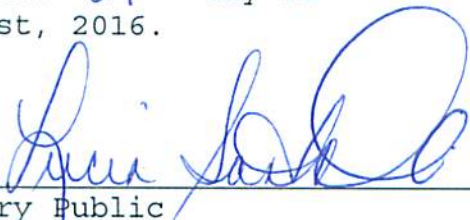
(5) If Muley is not found fit for duty at that time, he will not be reinstated to the MBPD.

I shall retain jurisdiction over the remedy in this matter.

The Grievance filed by Fraternal Order of Police, Lodge No. 8 regarding the termination of Michael Muley is sustained in part and denied in part.

By: 
Roger B. Jacobs

Sworn to and subscribed before
me this 24th day of
August, 2016.


Notary Public

LUCIA SANTULLI
NOTARY PUBLIC
NEW JERSEY
MY COMMISSION EXPIRES 10-23-16

NOTARY PUBLIC IN THE STATE OF NEW JERSEY

My commission expires on 10-31-19

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