IN THE MATTER OF ARBITRATION BETWEEN

FRATERNAL ORDER OF POLICE LODGE #8 Lt. Alexander Carulo, Grievant	**OPINION AND AWARD**
and	Termination Grievance of Lt. Alexander Carulo, Grievant
CITY OF MIAMI BEACH FLORIDA Employer/City/Department	Award Dated: February 9, 2017

Date and Place of Hearing: September 27-29, 2016 continuing on October 27-28, 2016
Offices of the Employer
Miami Beach, Florida

Date of Receipt of Post Hearing Briefs: January 17, 2017

APPEARANCES

For the Grievant: Eugene G. Gibbons, Esq.
Buschel Gibbons P.A.
100 S.E. Third Avenue, Suite 1300
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For the Employer: Michael L. Elkins, Esq.
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Miami, FL 33131

ISSUE

Whether or not the City had just cause to terminate the employment of Lieutenant Alexander Carulo, and if not what shall the remedy be?

WITNESSES TESTIFYING

Called by the City	Called by the Union/Grievant
Lt. Paul Ozaeta, Patrol Division Formerly Internal Affairs Investigator Miami Beach Police Department	Lt. Paul Ozaeta, Patrol Division Formerly Internal Affairs Investigator Miami Beach Police Department
Sergeant Osvaldo Ramos, Internal Affairs Investigator Miami Beach Police Department [Direct and Rebuttal Witness]	Robert (Bobby) Jenkins, President Fraternal Order of Police Lodge # 8 Florida Fraternal Order of Police
Captain Mildred Pfrogner, Middle District MBPD Formerly Commander Internal Affairs Unit Miami Beach Police Department	Brian Sliman, Deputy Chief of Police Doral, FL Formerly Major Miami Beach Police Department
Captain David De la Espriella, Patrol Division Formerly Commander Internal Affairs Unit Miami Beach Police Department	Sergeant Steven Feldman, Technical Services Unit Miami Beach Police Department
Chief Daniel Oates, Chief of Police Miami Beach Police Department [Direct and Rebuttal Witness]	John Buhrmaster, Formerly Deputy Commander Internal Affairs Unit Formerly Deputy Chief of Police Miami Beach Police Department
Sergeant Colin Pfrogner, Motorcycle Patrol Unit Miami Beach Police Department	Lieutenant Charles London, Patrol Division Formerly Captain Formerly Lieutenant Training Division Miami Beach Police Department
	Sergeant Robert Hernandez, Training Department Formerly Public Information Officer Miami Beach Police Department

WITNESSES TESTIFYING CONTINUED

Called by the City	Called by the Union/Grievant
No additional witnesses were called	Richard Gullage, Retired Lieutenant Formerly Captain Miami Beach Police Department
	Angel Vazquez, Retired Major Miami Beach Police Department
	Alexander Carulo, Grievant Formerly Captain Formerly Lieutenant [Discharged] Miami Beach Police Department

OTHERS PRESENT

On Behalf of the City	On Behalf of the Union/Grievant
Angela Menendez, Human Resources Senior Specialist	Kevin Millan Vice President Fraternal Order of Police
Ruben Robert, NAACP Representative Observer	Rico Olivera, Second Vice President Fraternal Order of Police
Michael W. Smith Human Resources Director City of Miami Beach	
Richard Weissman, Internal Affairs Miami Beach Police Department	

JURISDICTION

The issue in grievance was submitted to James L. Reynolds as a sole arbitrator pursuant to the provisions of the Collective Bargaining Agreement [Joint Exhibit 1] between the parties. The parties stipulated at the hearing that the grievance was properly before the Arbitrator for a decision and that he was properly called. At the hearing the parties were given full and complete opportunity to examine and cross-examine witnesses and present their proofs. Final argument was provided through post hearing briefs submitted to the Arbitrator by each party. The briefs were received by the agreed upon deadline as amended. The briefs of the parties were exchanged to opposing counsel through the Arbitrator. With the receipt of the post hearing briefs by the Arbitrator, the record in this matter was closed. The issue is now ready for determination.

STATEMENT OF THE ISSUE

The issue to be resolved here is whether or not the employment of Lieutenant Alexander Carulo with the Miami Beach Police Department was terminated for just cause as provided for in Article 5 of the Collective Bargaining Agreement between the parties, and if not what shall the remedy be?

RELEVANT PROVISIONS OF THE COLLLECTIVE BARGAINING AGREEMENT

ARTICLE 5 - MANAGEMENT RIGHTS

> It is recognized that except as stated herein, the City shall retain all rights and authority necessary for it to operate and direct the affairs of the City and the Police Department in all of its various aspects, including, but not limited to, the right to direct the work force; to plan, direct, and control all the operations and services of the Police Department; to determine the methods, means, organizations, and personnel by which such operations and services are to be conducted; to assign and transfer employees; to schedule the working hours; to hire and promote; to demote, suspend,

discipline or discharge for just cause, or relieve employees due to lack of work or for other legitimate reasons; to make and enforce reasonable rules and regulations; to change or eliminate existing methods, equipment, or facilities; provided, however, that the exercise of any of the above rights shall not conflict with any of the expressed written provisions of this Agreement and that a grievance may be filed alleging such a conflict.

ARTICLE 3 GRIEVANCE PROCEDURE

Section 3.1 - Definition of Grievance and Time Limit for Filing

A grievance is a dispute involving the interpretation or application of the express terms of this Agreement, excluding matters not covered by this Agreement; or where Personnel Board rules and regulations are involved; provided that disciplinary actions, including discharges, may be grieved under this Article, as provided herein. See Section 3.7 (Election of Remedies) for procedures to be utilized in particular circumstances. …..

* * * *

Section 3.4 - Authority of Arbitrator

The arbitrator shall have no right to amend, modify, ignore, add to, or subtract from the provisions of this Agreement. He shall consider and decide only the specific issue submitted to him in writing by the City and the FOP, and shall have no authority to make a decision on any other issue not so submitted to him. The arbitrator shall submit in writing his decision within thirty (30) days following the close of the hearing or the submission of briefs by the parties, whichever is later, provided that the parties may mutually agree in writing to extend said limitation. The decision shall be based solely upon his interpretation of the meaning or application of the express terms of this Agreement to the facts of the grievance presented. If the arbitrator acts in accordance with this Section, the decision of the arbitrator shall be final and binding.

ARTICLE 11 – GENERAL PROVISIONS

Section 11.12 - Incorporation of Personnel Rules

Any personnel rules agreed upon by the parties for incorporation in this collective bargaining agreement shall be set forth in an addendum to this Agreement.

In addition to the above cited contract provisions the City has promulgated certain Personnel Rules for the Classified Service [City Exhibit L]; Police Department Standard Operating Procedures [City Exhibit M; Union Exhibit 2] and Police Department Rules [City Exhibit N] which bear on this case. They were carefully reviewed and considered by this Arbitrator. The specific violations that were sustained in the Disposition Panel Decision of April 20, 2015 [City Exhibit G] pertained to the following:

> **SOP #80 VI, B**
> **Computers and E-Mail**
>
> Email is to be used for official use only. It will not be used frivolously or to harass an employee or the system, i.e., no offensive material, racial or ethnic slurs, off-taste comments, or anything illegal, defamatory, obscene, or otherwise inappropriate.
>
> **SOP #142 1. C. 1**
> **Mobile Data Computers/Handheld Data Communication Devices:**
>
> The wireless notebook computer or handheld data communications device may be used to access information from the Florida and National Criminal Information Center and other related databases. Access is regulated by State and Federal law. The following conditions apply: 1. Use of information is solely limited to criminal justice purposes. Dissemination of information to non-law enforcement is unauthorized and is unlawful.
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> **Information Technology Policy 21.01**
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> * * * *
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> **4.** Any improper use of e-mail, including, but not limited to the following, is strictly prohibited:
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> * Sending any material in violation of Federal, State or County laws and/or City policies.
> * Sending any e-mail that discriminates against persons by virtue of any protected classification including, but not limited to, race, gender, nationality, religion, age, sexual orientation and so forth.
> * Sending inappropriate comments or jokes, cartoons or other communications that may be considered derogatory, obscene or

offensive.

* Viewing pornography or sending photographs, videos, jokes or stories of a pornographic nature via e-mail.

* Sending or receiving "spam," chain letters or other types of communications that have the potential to interfere with the proper operation of the system.

* Sending personal identification information (including but not limited to name, address, e-mail address, telephone number, social security number, date of birth, mother's maiden name, driver's license identification number, Florida Identification Card number, alien registration number, passport number, employer or taxpayer identification number, Medicaid or food stamp account number, bank account number, credit or debit card number, credit or debit card expiration date, personal identification number or code assigned to the holder of a debit card by the issuer to permit electronic use of such card, other number or information that can be used to access a person's financial resources, (or medical records) for fraudulent purpose, pecuniary benefit or harassment.

Department Rules and Regulations (DRR)
3.2 Knowledge and Conformity to DRR, SOPs or General Orders

3.2.1 Employees shall thoroughly familiarize themselves with, conform to and abide by, the Department Rules and Regulations, SOPs, General Orders, City Work Rules, City Personnel Rules, and all union contracts. Employees must have a working knowledge of all laws and ordinances in force. In the event of improper action or breach of discipline, it will be presumed that the employee involved was familiar with the law and / or order in question. Upon return from any extended absence, they shall familiarize themselves with all changes that may have occurred during such absence.

6.3 Personal Conduct

6.3.3 All officers shall perform all duties impartially, without favor, affection, or ill will and without regard to status, sex, race, national origin, religion, political belief, or station in life. All citizens will be treated equally with courtesy, consideration, and dignity. Officers will never allow personal feelings, animosities, or friendship to influence official conduct. Laws will be enforced appropriately and courteously and, in carrying out their responsibilities, officers will strive to obtain maximum cooperation from the public. Officers will conduct themselves in appearance and deportment in such a manner as to inspire confidence and respect for the position of public trust they hold.

6.10 Confidentiality

6.10.1 Employees shall not knowingly violate any departmental restrictions for the release or dissemination of information, except in the course of official duties or as required by law, or publicly disclose information likely to endanger or embarrass victims, witnesses or complainants.

6.18 Harassment Policy

Employees will not make derogatory remarks concerning race, sex, religion, age, sexual orientation or national origin of any person.

6.28 Conduct Unbecoming

6.28.1 Conduct unbecoming an employee of the Department is defined as any conduct or act, which has an adverse impact upon the operation of the Department, and destroys public respect and confidence in the Department and its employees.

Such conduct may include, but is not limited to, participation in any immoral, indecent or disorderly conduct, or conduct that causes substantial doubts concerning an employee's honesty, fairness, or respect for the rights of others, or the laws of the State or Nation, regardless of whether such act or conduct constitutes a crime.

6.39 Supervisor Responsibility

6.39.1 Supervisors are charged with the responsibility of providing guidance and assistance to their subordinates and instilling positive work ethics. Supervisors will be cognizant that such responsibility includes maintaining a working knowledge of the goals and objectives of the Department, and continuously working toward these goals and objectives. Supervisors must exemplify leadership qualities consistent with the Department's Mission Statement.

In addition to the above the Union points to SOP #010 as controlling in this case. It reads in relevant part as follows:

SOP #010 INTERNAL AFFAIRS INVESTIGTIONS, COUNSELING AND THE

DISCIPLINE PROCESS
* * * *

PROCEDURE

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V. INVESTIGATIVE PROCESS

C. IA Investigations and GIs

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2. . . . .

a. The burden of proof regarding the disposition of IA investigations and GIs is a "preponderance of evidence".

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VIII. CASE DISPOSITIONS

A. The following dispositions shall be utilized for all IA investigations and SLIs:

1. Substantiated – the allegation is supported by sufficient evidence to conclude that the employee committed one or more of the violations or the investigation substantiated other violations the subject employee;

2. Unsubstantiated – there is insufficient evidence to either prove or disprove the complaint;

3. Unfounded – the complainant admits to making a false allegation, the charge is not factual or the accused employee was not involved in the incident.

4. Exonerated – the incident occurred, however, the employee's action were justified, lawful and proper;

5. Closed – the complainant does not cooperate with the investigation and there are no further leads or the complainant changes his mind about the allegation

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X. Records Retention and Confidentiality

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E. All records of disciplinary action shall be maintained in the IA Unit

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XII. Discipline

A. General

1. The degree of disciplinary action shall be based on the totality of all circumstances associated with each incident and/or subsequent complaint.

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XIII. Administration of Discipline

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B. Documentation by supervisors of incident, acts or behavior.

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4. Verbal conferences directed to employees by supervisors shall be documented in the employee's Unit Notebook.

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D. Disciplinary Actions

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a. Step 1 – Informal Counseling

Informal Counseling stimulates interaction between the concerned supervisor and the employee regarding a matter which could lead to further progressive disciplinary action.

a) The supervisor shall document the counseling session in a

memorandum and a copy shall be placed in the employee's Unit Notebook.

b. Step 2 – Verbal Conference

A Verbal conference allows the supervisor to bring to the employee's attention the need to improve his performance, work habits, behavior or a breach of rules and regulations and serve as a warning against further repetition of the unsatisfactory conduct. The supervisor shall utilize the occasion to identify the area needing improvement and assist the employee in identifying ways to prevent the problem from recurring with a warning of penalty if the misconduct continues.

a) A "Verbal Conference" shall be documented on an "Administrative Action Form".

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Step 7 – Demotion

A demotion means reclassifying an employee to a position having a lesser degree of responsibility, lower salary and salary range.

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F. Limitations period for disciplinary actions (180 Day Rule)

1. Pursuant to FS 112.532, no disciplinary action, demotion or dismissal shall be undertaken by an agency against a law enforcement officer or correctional officer for any act, omission or other allegation of misconduct if the investigation of such allegation is not completed within 180 calendar days, after the date the agency receives notice of the allegation by a person authorized by the agency to initiate an investigation of the misconduct. In the event that the agency determines that disciplinary action is appropriate, it shall complete its investigation and give notice in writing to the law enforcement officer or correctional officer of its intent to proceed with disciplinary action, along with a proposal of the action sought. Such notice to the officer shall be provided within 180 calendar days, after the date the agency received notice of the alleged misconduct, except as follows:

a. The 180 day limitation period may be tolled for a period specified in a written waiver of the limitation by the law enforcement officer or correctional officer;

b. The 180 day limitation period shall be tolled during the period that any

criminal investigation or prosecution is pending in connection with the act, omission or other allegation of misconduct;

c. If the investigation involves an officer who is incapacitated or otherwise unavailable, the 180 day limitation period shall be tolled during the period of incapacitation or unavailability;

d. In a multi-jurisdictional investigation, the 180 day limitation period may be extended for a period of time reasonably necessary to facilitate the coordination of the agencies involved;

e. The running of the 180 day limitation period may be tolled for emergencies or natural disasters during the time period wherein the Governor has declared a state of emergency within the jurisdictional boundaries of the concerned agency.

2. An investigation against a law enforcement officer or correctional officer may be reopened, notwithstanding the 180 day limitation period for commencing disciplinary action, demotion or dismissal, if:

a. Significant new evidence has been discovered that is likely to affect the outcome of the investigation;

b. The evidence could not have reasonably been discovered in the normal course of investigation or the evidence resulted from the pre-disciplinary response of the officer;

c. Any disciplinary action resulting from an investigation that is reopened pursuant to this paragraph must be completed with ninety (90) calendar days after the date the investigation is reopened.

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FACTUAL BACKGROUND

The Employer is a municipal corporation chartered under the laws of the State of Florida. Among its other functions it provides police services to the residents and visitors to the City of Miami Beach. The Union is the exclusive bargaining representative for

employees of the City in the classifications of Trainee, Police Officer, Sergeant of Police, Lieutenant of Police, and Detention Officer. There are approximately 350 sworn officers in the City's Police Department. The parties have maintained a collective bargaining relationship for many years. The controlling Collective Bargaining Agreement became effective on October 1, 2012 and continued in full force and effect through September 30, 2015. Although the labor agreement indicates that it had expired at the time of the hearing in this matter, neither party stated during this proceeding that it had changed in any way relevant to this case. Except for the period that the Grievant held the position of Captain of Police, he was covered by its provisions.

The Grievant was hired as a police officer by the City on May 16, 1994. He was terminated effective May 14, 2015. At the time of the termination of his employment he was a Lieutenant in the Patrol Division of the Department. There was no evidence of any prior discipline of the Grievant introduced into the record of this proceeding.

Prior to being assigned as a Lieutenant in the Patrol Division, the Grievant held an unclassified non-bargaining unit position as a Captain of Police on the command staff of then Chief of Police Ray Martinez. He reported at that time to Major Angel Vazquez.

In September 2011 an internal complaint was lodged by Sergeant Steven Cosner against Major Vazquez accusing him of attempting to influence the testimony of Sergeant Cosner in a criminal trial. That charge was investigated, sustained and closed in June 2012. A

second complaint by Sergeant Cosner against Major Vazquez was made in March 2013. The second complaint alleged that Major Vazquez lied in the course of the earlier investigation. That complaint was assigned to Internal Affairs Lt. Paul Ozaeta for investigation, and was subsequently found to be unsubstantiated.

In the course of the Internal Affairs investigation of the second complaint against Major Vazquez an examination of his emails during the period of March, 2010 through October, 2010 was undertaken. That examination produced some emails containing pornographic material. Upon discovery of these emails the investigation into his emails was expanded to the then present time of July 2013. Examination of Major Vazquez's emails showed that Captain Carulo, Captain Gullage, and Chief Martinez were also receiving and sending inappropriate emails over the City's email system.

Lt. Ozaeta cataloged the Grievant's inappropriate emails as those sent using his City email address and those sent from his private email address to individuals whose email addresses were on the City's email system. They were labeled as "C" and "S" respectively in the record of this proceeding. Lt. Ozaeta reported at the time to Captain De la Espriella, who in turn reported to Deputy Chief of Police Overton. The existence of the inappropriate emails was reported by Deputy Chief Overton to Ray Martinez who was the Chief of Police at the time. He did not open a new Internal Affairs investigation into the emails, but directed that the IA Unit continue to investigate them.

A memorandum from Chief Martinez to Major Vazquez dated December 21, 2013 [City Exhibit A and City Exhibit H(5)] reports that on December 15, 2013 Chief Martinez verbally counseled Major Vazquez regarding the proper use of the City's email system. It further indicates that the Internal Affairs investigation into Major Vazquez's alleged perjury was closed on December 16, 2013 and that "no further action [was] necessary". The memo does not show that others were copied on it. Captain Carulo is not mentioned in the memo. The record also contains no evidence that the memo or other record of counseling was placed in Major Vazquez's Unit Notebook or in an IA file as prescribed in SOP #010. The memorandum refers to the emails as simply being non-work related. It did not describe the nature of the email messages contained therein.

The Internal Affairs Unit under the Command of Captain De la Espriella continued to investigate the inappropriate emails being sent and received by Captain Carulo, Captain Gullage, and Chief Martinez. On January 29, 2014 Captain De la Espriella was reassigned by Chief Martinez from Internal Affairs to the Patrol Division. He was succeeded by Captain Mildred Pfrogner. The IA investigation into the emails continued under Captain Pfrogner. During her transition into the Internal Affairs Unit Captain De la Espriella briefed Captain Pfrogner that Chief Martinez had advised IA to continue to investigate the emails but that no further action was necessary.

Chief Martinez resigned from the Department shortly after reassigning Captain De la Espriella to Patrol. Subsequently, on February 6, 2014, then Acting Chief Buhrmaster

confirmed to Captain Pfrogner and Lt. Ozaeta that Chief Martinez had opined that no further action on the email investigation was necessary. He produced from his desk, at that time, the above referenced December 21, 2013 memorandum [City Exhibit A] from Chief Martinez. That was the first time that either Captain Pfrogner or Lt. Ozaeta had seen it. Subsequently, Captain Pfrogner asked the Internal Affairs staff if they had seen it before, and no one had. The investigation into the emails continued.

On June 9, 2014 Chief Daniel Oates became the Chief of Police of the City. Shortly afterward, on July 2, 2014 Captain Pfrogner briefed him on Major Vazquez's case and the investigation into the emails. Chief Oates visited the IA Unit and viewed a sampling of the emails that had been produced during the investigation. He then ordered an expanded IA investigation into the emails. The investigation was extended to the then present time of July 2014, and included all members of the Command Staff.

On July 7, 2014 Chief Oates advised Major Vazquez that he was facing reduction in rank from Major to Lieutenant because of the emails and would be a subject of an Internal Affairs investigation. Alternatively, Chief Oates granted that Major Vazquez, who was then in the Deferred Retirement Option Program, could retire from the Department if he did so by the end of that week. Major Vazquez did so.

On July 9, 2014 Captain Carulo was demoted and reassigned from the Chief's Command Staff to a position of Lieutenant in the Operations Division of the Department. Chief

Oates testified that when he told Captain Carulo of his reassignment he stated that it was not for disciplinary purposes, but only that he had lost confidence in his ability to serve as a member of the Command Staff based on his role in the emails exchanged among other members of the Department.

It is not disputed that the ranks of Captain and Major on the Command Staff are appointed unclassified positions where the employees in those positions serve "at the pleasure of the Chief". Chief Oates also advised Captain Carulo that he would be a subject of an Internal Affairs investigation. On July 17, 2014 [City Exhibit E] then Lieutenant Carulo was notified that he was a subject of an Internal Affairs investigation. He was interviewed on December 9, 2014 in connection with the investigation at which time he admitted to sending the emails in question.

The expanded scope of the IA investigation required the entire IA staff to engage in the investigation. Approximately 1,000,000 emails were individually examined.

On January 12, 2015 Lt. Carulo was relieved of duty with pay pending a final disposition of his case. The Union filed a grievance protesting his being relieved of duty on January 15, 2015.

Responsibility of Lead Investigator on Lt. Carulo's case was transferred on February 17, 2015 to Sgt. Ramos after Lt. Ozaeta was promoted to the rank of Lieutenant and assigned

out of the Internal Affairs Unit. The final IA Investigative Report regarding Lt. Carulo was issued by Internal Affairs on March 17/18, 2015 and approved by Chief Oates on March 23, 2015 [City Exhibit H(7)].

The Investigative Synopsis of the IA report is as follows:

> INVESTIGATIVE SYNOPSIS:
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> "Lieutenant Carulo used his City of Miami Beach e-mail accounts to receive and distribute offensive and/or inappropriate materials to other members of the Miami Beach Police Department, and to several recipients outside of the miamibeach.govdomain. The scope of these materials overwhelmingly included hardcore pornography; however there were also instances of racially insensitive, homophobic and misogynistic material, in addition to confidential information being passed to unauthorized persons. Altogether, there are fifty nine (59) instances of such material being distributed by Lieutenant Carulo (Appendix 1) via their City e-mail accounts.
>
> Lieutenant Carulo also used a private e-mail address to introduce seventy-nine (79) significantly inappropriate text/graphic materials (Appendix 2) to the City e-mail accounts of various members of the police department including supervisors and to members who Lieutenant Carulo held supervisory authority over.
>
> The emails were categorized as either: Nudity (N), Inappropriate Sexual (S), Inappropriate Racial/Offensive (IRO), Inappropriate Comment (IC), Pornography (P), Misogynistic (M), Homophobic (H), Confidential Information (C), and Inappropriate for the workplace (IW). A review of all of Lieutenant Carulo's emails revealed:

- One (1) email containing confidential information.
- Two (2) emails containing homophobia.
- Four (4) emails misogynistic emails.
- Four (4) emails containing inappropriate comments (foul or derogatory language).
- Twelve (12) emails containing inappropriate sexual images or commentary.
- Twelve (12) emails containing racial or offensive commentary.
- Fourteen (14) inappropriate emails for the workplace.
- Forty four (44) emails containing pornography.

- Fifty (50) emails containing nudity."

The Internal Affairs Unit prepared a chart showing the extent of the email activity in question of the 28 employees whose email records were reviewed as part of the investigation. It was entered as City Exhibit K. It shows that Lt. Carulo initiated or forwarded a significantly larger number of such emails than any other officer investigated.

On April 7, 2015 the IA investigation and findings of Lt. Carulo were referred to the Disposition Panel. After review the Panel published its Decision on May 20, 2015 [City Exhibit G]. It sustained violations of the following Standard Operating Procedures, Policies, and Departmental Rules and Regulations by Lt. Carulo. It recommended termination of his employment:

> SOP #080 VI. (B) Computers and E-Mail
> SOP #142 1. C.1 Mobile Data Computers / Handheld Data Communication Devices
> Information Technology Policy 21.01
> DRR 3.2 Knowledge and Conformity to DRR, SOPs or General Orders
> DRR 6.3 Personal Conduct
> DRR 6.10 Confidentiality
> DRR 6.18 Harassment
> DRR 6.28 Conduct Unbecoming
> DRR 6.39 Supervisory Responsibility

On May 14, 2015 the employment of Lt. Carulo with the Miami-Beach Police Department was terminated [Union Exhibit 3]. The Union filed a timely grievance on behalf of Lt. Carulo. It was heard in arbitration September 27-29 and October 27-28, 2016.

POSITION OF THE PARTIES

Position of the Employer

The City maintains that it had just cause to terminate the employment of Lt. Carulo and that the grievance should be denied. In support of that position it offers the following arguments:

> 1. The evidence overwhelmingly supports a finding that the City had just cause to terminate the Grievant. The "preponderance of the evidence" is the proper standard for the burden of proof to be applied. Where an employer has met its burden of proving that an employee is guilty of misconduct, an arbitrator has no authority to "second guess" the employer's decision regarding the appropriate penalty.
>
> 2. The material facts are not disputed. The Grievant admits he intentionally distributed all of the material addressed at the hearing. Therefore he admits to the conduct for which he was discharged. Accordingly, the sole issue before the arbitrator is whether the degree of discipline – discharge – was warranted in this case.
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> 3. A review of the material uncovered in the investigation compels the conclusion that the Grievant violated each of the rules charged. He used the City email system to view and distribute racist material, to view and distribute large volumes of pornographic material, he disseminated ethnically derogatory jokes and comments, he made derogatory remarks about Hispanics, he distributed material offensive to women and homosexuals, he registered for a pornographic website using the City's email, he introduced photographs of naked civilian women and a female police officer into the public record without their permission, and he released confidential driver information for non-law enforcement purposes. The City's rules clearly prohibit the Grievant's conduct.
>
> 4. The Grievant's emails contain several instances in which he used the racial slur "nigger", the homosexual slur "fag" and the female slurs "bitch" and "cunt". The "jokes" the Grievant disseminated are rife with offensive stereotypes, including references to Blacks as criminals and "Hos", Mexicans as gardeners, women as sex objects, who belong nowhere but the bedroom and the kitchen, and homosexuals as "worse than oil" on the City's beaches. These statements are offensive to any reasonable person. The Grievant offered no remorse at the hearing. In fact he was defiant. In the Grievant's world using the word "nigger" is okay. In his world, distribution of offensive stereotypes is okay. In his

world, the fact that he is a police officer means nothing. He does not view himself a having to be of high character and treat others with respect. He makes excuses, claiming that the racial propaganda comes from him as a person, not as a police officer.

5. It is far too late in the day for any public employee, let alone a police captain in an ethnically diverse urban tourist area, to pretend that is acceptable to use the words "bitch", "cunt" "fag" and "nigger" in the workplace, even in the context of a joke. The City's written rules prohibit the use of just such patently offensive and derogatory terms.

6. The Grievant sent, received and viewed numerous offensive and pornographic photographs, videos, and jokes. This was not an isolated occurrence, as the Grievant insists, but a regular practice among him and a handful of his colleagues. The Grievant by far and away distributed more such material than anyone else in the entire Police Department. The Grievant argued that it was "the culture". Culture or not, this conduct is beyond reprehensible and a police officer of any rank, let alone a Captain, should know better. To hide behind the defense of "everyone was doing it" is shameful, and a disgrace to all upstanding police officers.

7. Most importantly, a police officer is held to the highest of standards. A police officer who disseminates degrading material (in any amount) cannot and should not be allowed to continue to have the civil rights of individuals at his disposal. In short, there is no excuse for the Grievant's conduct.

8. The Grievant argued that the emails could not have been offensive to the public because he was careful to send them only to a select group of colleagues, and no one complained. The fact that he intended to limit his emails shows only that he knew that if they were ever discovered they would offend his follow officers and the public at large, and he therefore attempted to keep them concealed. The documents were in the City's email system, and like most such documents were bound to come to the public's attention sooner or later. When they finally did, no one could claim surprise that the public was offended at seeing its police officers spending their work time exchanging pornographic material and a high ranking officer making racial slurs.

9. The Grievant acknowledges that he gave confidential information from the D.A.V.I.D. data base to a civilian. Such conduct is unlawful and unauthorized.

10. The Grievant's claim of disparate treatment is not persuasive. His argument amounts to the familiar refrain that "everybody does it", and is not a defense to clearly prohibited misconduct. Moreover, no one engaged the same quality or quantity of misconduct as the Grievant. No one's emails were nearly as voluminous as the Grievant's and did not contain racial slurs or other blatantly discriminatory matters. Captain Gullage received a week suspension for his more limited misconduct and retired shortly thereafter. Major Vazquez resigned in lieu of termination.

11. The Grievant contends that his conduct was tolerated, if not formally approved, by former Chief Martinez. No public official has the authority to ignore clear government rules and thereby establish an independent, contradictory code of conduct for his or her subordinates. In view of the City's clear rules prohibiting the Grievant's conduct, any action by an individual official, including the former Police Chief, which could be construed to permit or condone such conduct would be "forbidden by law and contrary to public policy". Accordingly, the Grievant's defense fails.

12. The Union argues that the Internal Affairs investigation took so long the Grievant's due process rights were violated. While an inordinate delay in taking disciplinary action against an employee can in some circumstances violate due process, relief in the form of a prohibition or rescission of discipline is available only upon proof of actual prejudice. The delay in this case was not inordinate under the circumstances of the considerable time and resources required to compile, review and organize the voluminous documents the Grievant himself introduced into the City's email system. The Grievant has not offered any proof of actual prejudice. Accordingly, the length of the investigation does not prevent the Department from taking discipline. Moreover, the 180 day investigation period included in the Police Officers Bill of Rights, Fla. Stat., Dec. 112.532(6)(a), does not apply to complaints generated internally such as this one. *McQuade v. Fla. Dep't of Corr.,* 51 SO.3d 489 (Fla 1st DCA 2011).

13. The Grievant argues that he has been subjected to "double jeopardy" in the discipline issued to him in this case. He contends that the first discipline came in the form of verbal instruction he received from Major Vazquez to stop circulating pornographic emails. There is no written documentation of any formal verbal counseling by Major Vazquez to the Grievant for this issue. Such documentation is required under Department SOP #010. Further, an instruction to avoid engaging in future misconduct is not the same as discipline for engaging in past misconduct. More importantly, perhaps, Major Vazquez did not have the authority, and certainly was in no position, to foreclose the Department from taking discipline against his subordinates.

14. The Grievant also argues that his removal from the Command Staff was discipline. This is without merit. Members of the Command Staff are at will and serve at the pleasure the Chief of Police. The positions are unclassified. Accordingly, a member of the Command Staff can be removed from the Command Staff by the Chief for any reason. In this case, once the Chief learned that the Grievant had sent massive amount of graphic pornography, he exercised his right to remove him from the Command Staff. In doing so, the Chief explicitly stated that the Grievant was going to be investigated by Internal Affairs and may be subject to discipline, pending the results of the investigation. The removal from the Command Staff was not discipline.

15. There is no basis for mitigating the discipline. The offenses committed by the Grievant are so serious that summary discharge without prior warnings or attempts at corrective discipline is justified. Moreover, given the Grievant's complete failure to accept any responsibility and accept any wrong, there can be no likelihood of rehabilitation. The discipline imposed should not be disturbed. There is no basis to conclude that the City abused its discretion by terminating the Grievant. Mitigating an otherwise just discharge may only be rationalized if it is believed that the employee will remediate his conduct, that he has learned a lesson and will not repeat the misconduct. The Grievant has testified that he does not believe that he did anything wrong. Accordingly, there is no room for rehabilitation.

Position of the Union

It is the position of the Union that the City's decision to terminate the employment of Lt. Carulo should be overturned and his grievance upheld. It pleads that the Grievant should be reinstated to his rank of Lieutenant with the Miami Beach Police Department with back pay to include a reasonable amount of lost overtime, and all his benefits retroactively restored as if there was never an interruption in his employment. In support of that position the Union offers the following arguments:

1. At its most basic, *just cause,* for discipline means that the discipline is fair and appropriate under all the circumstances. Winnowed apart, the just cause standard actually has twelve different components, all of which are

separate inquiries:

1. Have the charges against the officer been factually proven?
2. Was the punishment imposed by the employer disproportionately severe under all the circumstances?
3. Did the employer conduct a thorough investigation into the incident?
4. Were other officers in engaged in conduct similar to that of the officer treated as harshly?
5. Was the officer's misconduct the product of action or inaction by the employer?
6. Did the employer take into consideration the officer's good or exemplary work history?
7. Did the employer take into consideration mitigating circumstances?
8. Was the officer subjected to progressive discipline?
9. Was the employer motivated by anti-union bias?
10. Are the employer's rules clear and understandable?
11. Is the officer likely to engage in similar misconduct in the future?
12. Was the officer accorded procedural due process in the disciplinary process?

Any one of the above components of just cause may be asserted, and if not overcome by the City, stands as a viable defense and compels an arbitrator to reverse or mitigate disciplinary actions meted out by a law enforcement agency. The Union believes there is sufficient credible evidence in the record to support overturning many of the charges levied against Lt. Carulo and more than sufficient mitigation evidence that when properly placed into perspective should reverse and/or considerably mitigate the disciplinary action imposed by the City.

2. It is apparent the City disproportionately punished Lt. Carulo and failed to consider and/or apply the fundamental principles of progressive disciplinary action. The City's decision to terminate Lt. Carulo was patently unfair and unjust and should be overturned and/or mitigated.

3. Lt. Carulo's discipline was untimely and in clear violation of SOP #010 – IA procedures. The Department initiated an Internal Affairs investigation into Lt. Carulo's conduct in July 2013. From this point, and pursuant to the Department's own SOP #010, Section XIII – Administration of Discipline, Subsection (F) the Department had 180 calendar days to complete its investigation and give notice in writing to Lt. Carulo of its intent to proceed with disciplinary action, along with a proposal of the action sought. The City and the FOP incorporated that requirement from the Law Enforcement Officers Bill of Rights (Fla. Stat.

112.523(6)) into its standard operating procedures. By doing so the City afforded its law enforcement officers the right that no disciplinary action would be undertaken by the Department for any act, omission or other allegation of misconduct if the investigation of such allegation is not completed within 180 calendar days. In the present case, the City clearly violated Lt. Carulo's procedural rights in this regard. He did not receive notice of the City's intent to terminate his employment until sometime between April 20, 2015 when the Disposition Panel issued their recommendation, and May 13, 2015. The City clearly violated its own 180 day rule as set forth and adopted in its own Standard Operating Procedure.

4. All Police Department SOP changes/amendments/deletions are provided to the FOP for review and input pursuant to the Collective Bargaining laws of the State of Florida. The Florida Public Employees Relations Commission has long held that discipline, including dismissals and discharge are mandatory subjects of bargaining. Moreover, rules that set the standard for disciplinary actions against police officers are terms and condition of employment because these rules regulate the working conditions under which the police officers operate. For this reason, Lt. Carulo should be reinstated because the City violated his procedural disciplinary due process rights by not completing the email IA investigation and providing him with notice of City's intended disciplinary action as promised in the City's own adopted 180 day rule policy. Clearly, the 180 day right/requirement of SOP #010 was a term and condition of Lt. Carulo's employment that was clearly violated by the City when it terminated his employment almost two years after attaining knowledge of the allegation of misconduct.

5. Lt. Carulo's emails were well known and addressed by Chief of Police Martinez. It cannot be reasonably disputed that the City of Miami Beach Police Department knew of the Carulo emails relatively shortly after Captain De la Espriella placed him under investigation. Whether the City desires to call it an "informal inquiry" or an "investigation" is a matter of semantics. The fact is there is direct evidence contained in the record that supports the fact that Chief of Police Raymond Martinez knew of the Carulo violations as well as those of others (Vazquez and Gullage) and that Chief Martinez decided to handle the situation personally with no further action to be taken by Internal Affairs.

6. Captain De la Espriella confirmed that he was told by Deputy Chief Overton that Chief Martinez wanted to conclude the perjury case against Major Vazquez and keep the email cases underneath that umbrella and that the Chief would personally deal with it at that time. Chief Martinez possessed the discretionary authority to discipline. The evidence shows

that Chief Martinez chose to issue a memorandum of counseling to Major Vazquez with instructions that he inform the rest of individuals involved, who were his subordinates, to "cease and desist" with any misuse of the City email system.

7. It should be noted that Lt. Carulo's last City email system violation occurred in October 2012. It is reasonable to conclude that Chief Martinez knew this from the emails compiled by IA and that this factor may have also been considered by him when he wrote the December 21, 2013 memorandum disciplining Major Vazquez. Lt. Carulo had not violated the policy in over a year. Whatever Chief Martinez's reasons were, the fact remains that he dealt with the email system violations and had Major Vazquez speak to Lt. Carulo about his misuse of the email system.

8. Chief Vazquez's actions were an informal counseling, which is a recognized form of disciplinary action. The City will likely argue that this never happened because there is no "documentation" of it happening. As required by SOP #010. Major Vazquez testified, however, that he did in fact document his counseling of Lt. Carulo by placing the appropriate document in Carulo's shift book as required. Sergeant Steve Feldman also testified that he too remembered receiving a verbal counseling from Major Vazquez on the same issue. Chief Martinez was fully aware of the situation and dealt with it in his own way. More importantly, how he dealt with it was not in violation or inconsistent with the Police Department's disciplinary policy and fully within his inherent power and authority as Chief of Police. He chose not to open an Internal Affairs investigation but handled it informally likely because he did not wish to expose the agency, his own command staff or himself to unnecessary public scrutiny, and felt he could address and handle the issue quietly.

9. Chief Martinez's decision is not a cover-up and it did not thwart any outside person from doing their own independent investigation into the matter. He could never stop that from happening but he did not have to order his investigators to do it for them.

10. The evidence is overwhelming that from December 2013 to June 9, 2014 the Department was well aware of Lt. Carulo's emails and that the IA inquiry into them was "shelved". No additional investigative work was done. When Captain De la Espriella was reassigned he briefed his replacement in Internal Affairs, Captain Pfrogner, on the case. Captain Pfrogner sought clarification on the status of the case from then Chief Buhrmaster. Chief Buhrmaster produced for Captain Pfrogner a copy of the December 21, 2013 memorandum from Chief Martinez to Major Vazquez. Captain Pfrogner acknowledged the memo in a note to file, but

no further investigation was done at that time. Captain Pfrogner testified that the case continued to be discussed in Internal Affairs. What she describes is not an internal investigation but is simply internal gossiping. Apparently, Captain Pfrogner and/or Captain De la Espriella had a plan to re-introduce the email evidence to a new Chief whenever that day came.

11. Shortly after Chief Oates arrived as Chief of Police he was briefed by Captain Pfrogner regarding the case. He viewed a sampling of the emails and ordered an Internal Affairs investigation into the entire Command Staff including Major Vazquez, Captain Carulo, and Captain Gullage. The investigative period was extended to the then present time. It is clear that this expansion did not uncover any additional violations of any kind related to Lt. Carulo or the others. All of the emails related to Lt. Carulo had long been in the possession of Internal Affairs.

12. On or about July 7, 2014 Captain Carulo was demoted to the rank of Lieutenant and removed from Chief Oates' Command Staff. Chief Oates stated that Carulo's demotion was directly related to the emails contained in the IA investigation and that caused Chief Oates to lose confidence in his ability to perform as a Captain. His demotion was without a doubt for disciplinary reasons and more importantly, untimely. Chief Oates demoted Captain Carulo after discussing the case with the Human Resources Department and the City Manager. If he wasn't disciplining Captain Carulo and was simply exercising his inherent managerial authority as Chief of Police, why did he need to review the case file, talk to investigators, consult H.R. and obtain the approval from the City Manager? That is because only the City Manager possesses the final authority regarding disciplinary actions of suspension, demotion or dismissal.

13. Chief Oates was only going to demote Captain Carulo and leave it at that. That is why there was no mention of an investigation. Something or somebody later caused him to change course.

14. There is no disputing that Chief Oates's demotion of Captain Carulo was disciplinary in nature. Chief Oates's terminating the employment of Lt. Carulo for the same misconduct as his demotion from the rank of Captain is patently unfair and unjust. It is an additional reason to overturn Lt. Carulo's termination and uphold his grievance.

15. Other employees engaged in similar misconduct were not terminated. While it is true that Lt. Carulo passed along the emails, he did so to willing consumers. Clearly there were many individuals with an appetite for the material. Yet, all the folks who received and presumably viewed the material were not in violation any department rule or regulation. This

supports the fact that it was Lt. Carulo's use of the email system alone that is at issue. Further, other employees sent "inappropriate" emails on the City email system but none were terminated from their employment. Of all the employees found to have violated the policy only Lt. Carulo was terminated from his employment. Lt. Carulo was not the only violator, but he was one of only a few formally placed under IA investigation and the only employee terminated for violating the City's email policy. There can be no doubt the City used Lt. Carulo as a scape goat for a problem/culture that was systemic throughout the Police Department.

16. Lt. Carulo deserves mitigation because of his exemplary service record and he is very unlikely to repeat the violation. Lt. Carulo is Hispanic and is not a racist person or an abusive person. The evidence is clear that Lt. Carulo adjusted his wrongful behavior related to the City's email system sometime in October 2012 as evidenced by Internal Affairs finding no additional email system violations after that date. Lt. Carulo has not and will not repeat this behavior. In short, the facts contained in the record support that Lt. Carulo's termination was excessive and overly severe given the totality of the circumstances. For all the above stated reasons and the reasons contained in the record, The City's decision to terminate Lt. Carulo should be overturned and his grievance upheld. He should be fully reinstated with all back pay to include a reasonable amount of lost overtime and all his benefits retroactively restored as if there was never an interruption in his employment.

ANALYSIS OF THE EVIDENCE

The controlling contract language is found in Article 5 of the Collective Bargaining Agreement. That Article provides that the City must show just cause for discipline imposed. The Collective Bargaining Agreement does not, however, provide a definition of "just cause". Accordingly, the usual and ordinary meaning of that term is applied. A commonly recognized definition of just cause is found in Just Cause, the Seven Tests, by Koven and Smith, 2nd Ed., 1992, BNA. These seven tests are attributed to the distinguished arbitrator Carroll R. Daugherty, and described in Enterprise Wire Co.

(46LA 363, 1966). They are 1) reasonable rules and orders, 2) notice, 3) investigation, 4) fairness of the investigation, 5) proof, 6) equal treatment, and 7) fairness of the penalty. The Union proffered twelve components of just cause found in The Rights of Law Enforcement Officers by Will Aitchison (5th Ed., 2004, Labor Relations Information Systems, pp89-91) as follows:

1. Have the charges against the officer been factually proven?
2. Was the punishment imposed by the employer disproportionately severe under all the circumstances?
3. Did the employer conduct a thorough investigation into the incident?
4. Were other officers in engaged in conduct similar to that of the officer treated as harshly?
5. Was the officer's misconduct the product of action or inaction by the employer?
6. Did the employer take into consideration the officer's good or exemplary work history?
7. Did the employer take into consideration mitigating circumstances?
8. Was the officer subjected to progressive discipline?
9. Was the employer motivated by anti-union bias?
10. Are the employer's rules clear and understandable?
11. Is the officer likely to engage in similar misconduct in the future?
12. Was the officer accorded procedural due process in the disciplinary process?

Both of these checklists for just cause cover substantially the same elements, and either would provide a useful structure for analysis of the facts and circumstances of this case.

Reasonableness of Rules and Notice

Lt. Carulo is charged with violating a number of Departmental SOPs and Rules and Regulations. A careful reading of those procedures and rules compels a finding that they are reasonable and fundamentally related to the City of Miami Beach Police Department in carrying out its mission of law enforcement. The Union does not contest the

reasonableness of any of them. It is not disputed that Lt. Carulo had prior notice of them, and there is no evidence that they were implemented without his knowledge. Accordingly, the procedures and rules that the Grievant is charged with violating are found to be reasonable and the Grievant had prior notice of them.

Investigation and Fairness of Investigation

Just cause requires that prior to imposing discipline the Employer conduct a thorough and fair investigation. That requirement is also found among the components of just cause espoused in The Rights of Law Enforcement Officers. The record in this case shows that the incident was thoroughly investigated by Internal Affairs, and was elevated to higher levels of management for review and approval before a final decision to terminate Lt. Carulo's employment was reached. There is no showing that the Department rushed to judgment and made a "snap decision" to discharge the Grievant. To the contrary, the record shows that the investigation into the Grievant's conduct took a protracted amount of time due to the volume of email messages that were examined. Because of the substantial length of time taken to review the email messages of the Command Staff over the period ordered by Chief Oates the Union contends that SOP #010 was violated resulting in a breach of Lt. Carulo's due process rights.

The Union points out that SOP #010 requires the City to provide notice to Lt. Carulo of its intent to proceed with disciplinary action within 180 days from the date the Department received notice of his alleged misconduct [Emphasis supplied]. The City

contends that the delay in this case was not inordinate under the circumstances of the considerable time and resources required to compile, review and organize the voluminous documents the Grievant himself introduced into the City's email system. Moreover, the City argues that the Union must show that the Grievant was actually prejudiced by the delay, and has failed to offer any proof of actual prejudice. Additionally, the City argues that the 180 day investigation period included in the Police Officers Bill of Rights, Fla. Stat., Dec. 112.532(6)(a), does not apply to complaints generated internally such as this one. It cites *McQuade v. Fla. Dep't of Corr.,* 51 SO.3d 489 (Fla 1st DCA 2011) as providing judicial guidance. In summary, the City argues that the length of the investigation did not prevent the Department from taking discipline.

What is disputed is when the City received notice of the Grievant's alleged misconduct. The City contends that the Department received that notice when Chief Oates met with Captain Pfrogner and reviewed a sampling of Captain Carulo's emails in early July 2014. On July 9, 2014 Chief Oates met with Captain Carulo. At that time he advised Captain Carulo that he was demoting him to the rank of Lieutenant and removing him from his Command Staff because he had lost confidence in his ability to serve on the Command Staff based of what he had seen in the emails. Chief Oates advised the Grievant at the time he was demoted to Lieutenant that he was not doing so as a disciplinary action. Chief Oates further notified Captain Carulo on July 9, 2014 that he was ordering that an Internal Affairs investigation be opened in which Captain Carulo was the subject. An Internal Affairs investigation was subsequently opened on July 17, 2014.

The Union argues that the Department received notice of Captain Carulo's alleged misconduct much earlier. It points to a memorandum from former Chief Martinez dated December 21, 2013 to Major Vazquez as evidence that the City had been notified of the Grievant's misconduct. That argument is compelling but not convincing. It must be noted that Captain Carulo is not mentioned in the memo at all, and its substance vaguely refers to only non-work related emails and attributes them only to Major Vazquez. The memo cannot reasonably be construed as a notice of alleged misconduct by the Grievant. Moreover it makes no mention of the City's intent to proceed with disciplinary action against Captain Carulo as of December 21, 2013.

There was also considerable testimony from Major Vazquez that he verbally counseled Captain Carulo after he was admonished by Chief Martinez in December 2013. That testimony is not supported by record evidence showing that Major Vazquez did so and documented that counseling as required by SOP #010. Accordingly, the record compels a finding that Captain Carulo was not notified on December 21, 2013 that the Department intended to proceed with disciplinary action against him. The City's position that it provided the required notice to Captain Carulo when Chief Oates met with him on July 9, 2014 is credited.

Starting the 180 day clock running on July 9, 2014 results in the City having until January 8, 2015 to notify Lt. Carulo of its intent to proceed with disciplinary action

against him. On January 12, 2015 Lt. Carulo was relieved of duty with pay pending final disposition of the investigation. The Internal Affairs investigation was completed on March 17, 2015 and approved by Chief Oates on March 23, 2015. The City served notice on the Grievant of its intent to terminate his employment on April 29, 2015. Accordingly, the City took an additional 111 days from the procedurally defined deadline of January 8, 2015 to the date of April 29, 2015 when the Grievant was notified of the City's intent to discipline him. The question then presented is whether the total of 291 days from when the City notified Captain Carulo on July 9, 2014 that he was the subject of an IA investigation to when he was notified of the City's intent to proceed with the disciplinary action of termination of his employment on April 29, 2015 constitutes an impairment of his due process rights as protected by SOP #010.

Careful consideration was given to all the facts and circumstances of the specifics of this case and controlling precedent. Consideration was given to the fact that SOP #010 is a Departmental policy that reflects language found in the Law Enforcement Officers Bill of Rights. There is no evidence introduced in this proceeding, however, that it was incorporated into the Collective Bargaining Agreement as potentially provided for in Section 11.12 of the Agreement. That said, this Arbitrator has authority to consider SOP #010 as a factor in determining if there was just cause for termination of the Grievant's employment.

The City argues that the 180 day limitation found in SOP #010 does not apply in

disciplinary cases, as here, where the complainant is internal to the Department. The policy makes no such distinction. Indeed, if 180 days is not limiting for an internally generated complaint then what, if anything is limiting in those cases. Can the Department bring a complaint that has as its basis an incident that occurred a year ago, five years ago, or ten years ago? Such a potentially boundless "limit" is troubling.

The City also argues that the Grievant failed to show any prejudice from the City exceeding the 180 day limitation in SOP #010. Indeed, there is no showing that any evidence or witnesses were unavailable because of the time taken to investigate the emails in question. It is noted that the Grievant was placed on paid administrative leave during the period of the investigation. Accordingly, he was compensated with his base salary during that period, but did not have the opportunity to earn overtime compensation during that period. Moreover, he was denied the opportunity to perform the work he was trained and experienced to do. These factors are not necessarily substantial violations of his due process rights, but must be considered along with all the other factors in deciding if those rights were violated when the investigation exceeded the 180 day limit.

Significantly, the record shows that by the deadline of January 8, 2015 the City actually had the incriminating emails sent by Lt. Carulo. Indeed the emails were known to Captain Pfrogner, who headed the Internal Affairs Unit at the time, and Chief Oates in early July 2014. It is not apparent why the City waited for further investigative work to be completed before charging the Grievant. Certainly the City must have been aware of

the 180 day deadline. When that deadline was approaching it already had what it eventually regarded as sufficient evidence to charge the Grievant. Why it waited for several months later to do so is not apparent or justified. Accordingly, while the investigation was thorough, it did not result in a timely notice of disciplinary action. That lack of timely notice was considered along with other findings in reaching a decision in this case, but is not regarded as a preemptive cause for rescission of the disciplinary penalty applied. It is also noted that while the notice of intent to discipline was not timely, there was no evidence presented to show that the Grievant was actually prejudiced in proceeding with his defense.

Proof

In this discipline case the City is burdened to show that it had just cause to impose the penalty of termination of Lt. Carulo's employment. The quantum of proof to meet that burden is not well settled in arbitration, however. Some arbitrators will apply the usual standard of "preponderance of the evidence" in all cases, including termination cases. Other arbitrators will, in cases involving discharge where a criminal act or moral turpitude is the basis of the discipline, apply a higher standard of "clear and convincing evidence". Still other arbitrators will render an award without stating what level of proof has been applied. In any event, an employer is burdened to present sufficient evidence to convince a reasonable person that the grieving employee is guilty of the charges against him.

Here the Grievant has admitted that he sent the emails at issue. By doing so, that evidence is accepted as being credible and damning. Many of the emails contained pornographic images that would be considered disgusting by any reasonable person. Additionally, other emails contained images that a reasonable person would find racist. Also troubling is an email where the Grievant supplied confidential information from the D.A.V.I.D. law enforcement data base to a civilian person without authorization and in violation policy and Florida law.

The Grievant testified that the emails that had racist, homophobic or misogynistic overtones were exchanged jokingly, and did not reflect his personal feelings toward minorities or women. Indeed, the Grievant is himself, Hispanic and he testified that his wife is Black/Hispanic and his daughter is openly gay. There is no basis in the record to dispute his testimony that he does not harbor personal contempt for minorities or women. There is a huge basis for concern however, as to how the public would regard a senior police officer who distributed or forwarded the offending emails using the City's email system.

Analysis of the emails and the entire record of this proceeding compel a finding that the Grievant did violate the Departmental SOPs and Rules and Regulations he stands accused of violating. The City has met its burden of proof.

Equal Treatment

The Union asserts that the Grievant was singled out for disparate treatment. It points to evidence that others were willing participants in the exchange of inappropriate emails, yet they were not terminated. It notes that Major Vazquez was not terminated, but was allowed to retire. It further notes that Captain Gullage was only suspended for a few days. That perspective misses the important point that Lt. Carulo distributed significantly more objectionable material than any other Command officer.

In order to find disparate treatment, the offenses of the comparators must be similar to what the Grievant committed both in frequency and degree. Here, the Grievant was significantly "ahead" of the others. Moreover, it is found that Major Vazquez retired under pressure. Clearly, he was not terminated, but the facts and circumstances of his departure show that he would have been demoted and subject to disciplinary action had he not done so. He wisely took the retirement option. Somewhat similarly, Captain Gullage was suspended and retired shortly thereafter.

Taken together the totality of the record does not sustain a finding that Lt. Carulo was subjected to disparate treatment. The City has met its requirement of showing equal treatment.

Fairness

The City was properly very concerned about the reaction from the community should the emails distributed by the Grievant and others become public. It is noted that all documents in the City's email system are subject to being made public. It is commonly acknowledged that police officers are held to a higher standard of conduct than other members of the public. They are empowered to enforce laws that can deprive individuals of their freedom. As such police officers must be beyond reproach. The nature of the email messages involved here casts a pall over Lt. Carulo's ability to be regarded with the respect a police officer, especially one in a supervisory or leadership position, must have in order to be effective in performing his or her duties.

The Union argues that Lt. Carulo has been subjected to "double jeopardy" by the discipline imposed. They contend that the Grievant was disciplined through a verbal counseling by Major Vazquez after Chief Martinez had verbally counseled Major Vazquez. There is, however, none of the required documentation of that counseling. Major Vazquez testified that he did counsel the Grievant, and placed a note in his Shift File. The evidence is simply not convincing that such counseling occurred. Moreover, it is not apparent that Major Vazquez did anything more than more than advise the Grievant that his inappropriate email messages had to stop. Such "counseling" does not rise to the level of discipline, especially when documentation of it does not appear to exist.

The Grievant contends that the exchange of the emails involved was condoned by Chief Martinez. Indeed Chief Martinez is seen to be a recipient of many of the emails, and

there is no record of him replying back to the Grievant to stop sending them. It is important to note, however, the even the Chief of Police does not have authority to permit activity that would be prohibited by law such as disclosing a D.A.V.I.D. record to an unauthorized civilian.

It is noted that the record shows that by the end of October 2012 there were no further offensive emails attributable to the Grievant. That suggests that something occurred that caused them to cease, but the reason the email exchanges stopped is not shown in the record of this proceeding. It is not disputed, however, that they did halt at that time.

The Union further argues that Lt. Carulo was also subjected to "double jeopardy" by being demoted from the at-will, non-bargaining unit position of Captain on the Chief's Command Staff to a position as a Lieutenant. It is noted that the Captain position is not one covered by the terms of the Collective Bargaining Agreement, whereas the Lieutenant position is. There was considerable testimony as to whether the reassignment of the Grievant from a position as a Captain to that of a Lieutenant was disciplinary. It is not disputed that Chief Oates used the word "demoted" in his July 9, 2014 announcement to the Department that described the reassignment of the Grievant. Chief Oates testified that he advised the Grievant at the time, however, that he was not disciplining him. Chief Oates further testified that he demoted the Grievant because he had lost confidence in his ability to serve on the Chief's Command Staff. The question thus presented is whether or not the demotion of the Grievant from Captain to Lieutenant was a disciplinary action.

It is not disputed that the position of Captain is an appointed position outside of the bargaining unit. As such the Chief of Police has complete discretion as to who is selected to fill such a position and who is to be removed from the position. No reason need be given for selecting or removing an officer from such an appointed position. Accordingly, removal of the Grievant from a Command Staff position of Captain is not regarded as a disciplinary action. Using the word "demoted" only describes the fact that the Grievant was being reassigned to a lower rank. It does not make the action disciplinary. For the above reasons the record compels a finding that the Grievant was not subject to "double jeopardy'

The fairness of a disciplinary action must also consider the likelihood that an employee will repeat the offenses with which he is charged. The City describes the Grievant as being unrepentant, and failing to acknowledge any responsibility for improper conduct. The Union, on the other hand, argues that the Grievant is unlikely to offend again and that he has learned his lesson. They point to his unblemished record of service to the City prior to the incidents that gave rise to his termination. It is also noted that the offensive emails involved herein stopped in October 2012 and there is no evidence of reoccurrence since that time. That is evidence supporting a finding that the Grievant is unlikely to repeat his misconduct.

The Grievant testified that he regarded the exhibits that the City characterized as racist as

simply joking. A reasonable person applying contemporary understandings of the terms involved would fail to find humor in them.

Arbitrators are not engaged by the parties to impose their own sense of appropriate discipline and they do not do so. They will not, however, hesitate to set aside discipline imposed by management when the record shows it is excessive. That is not the case here. The Grievant's actions as evidenced by his role in the emails in question are shameful and disgraceful. The troubling missed 180 day deadline by the City, the Grievant's otherwise clean record, and the fact that the emails stopped years ago could favor some mitigation of the penalty. Taken into the entirety of the record, however, they collectively do not rise to a level sufficient to reverse the City's decision to terminate his employment. On balance, the evidence compels a decision that termination of his employment be sustained.

IN THE MATTER OF ARBITRATION BETWEEN

FRATERNAL ORDER OF POLICE LODGE #8 Lt. Alexander Carulo, Grievant	**OPINION AND AWARD**
and	Termination Grievance of Lt. Alexander Carulo, Grievant
CITY OF MIAMI BEACH FLORIDA Employer/City/Department	

The termination of the employment of Lt. Alexander Carulo was for just cause and is sustained. The grievance and all remedies requested are denied.

February 9, 2017 *James L. Reynolds*

Dated:_____ _____

James L. Reynolds,
Arbitrator

Awd 1.17