In Re: CITY OF SAN ANTONIO, TEXAS and SAN ANTONIO POLICE OFFICERS' ASSOCIATION, *Case No. FC2015-104, Matthew Martin – Indefinite Suspension*

HEARING EXAMINER: DON B. HAYS – Selected by the parties

APPEARANCES:

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THE ISSUES

Responding to the mandates of the Texas Local Government Code, augmented by the parties' local bargaining agreement, the following issues appear from our record to have been sufficiently raised for arbitral resolution:[1]

[1] Throughout the award, citations will be recorded as follows: Reporter Record, Volume number, page, line to page: line or RR:V:#, P: Ln to P: Ln. During *six days of testimony* there were different court reporters;

Issue No. 1: Did the City of San Antonio, Texas, sufficiently prove the truth and correctness of any/all of the allegations of wrongdoing (rules violated) contained within San Antonio Police Department Acting Chief of Police Anthony Trevino's termination notice, issued to San Antonio Police Department Officer Mathew Martin on or about September 30, 2015?[2]

Issue No. 2: If the answer to Issue No. 1 is YES, did the City of San Antonio, Texas, then prove it had sufficient cause to issue an indefinite suspension to San Antonio Police Department Officer Matthew Martin, based only on such sufficiently proven charges? If not, what should be the appropriate disciplinary response?

We note parenthetically that both representatives agreed that under the provisions of the Texas Local Government Code Ann. (§143.001 – 143.363, hereinafter *TLGC*), as modified by the mandates of the parties' collective bargaining agreement, if we conclude from the *preponderance*[3] of the city's credible evidence that SAPD Acting Police Chief Trevino had sufficient (just) cause to initiate *some* disciplinary action against Police Officer Martin, but concurrently find that the totality of the city's supporting evidence does not convincingly establish the inherent reasonableness (justness) of permanently removing this officer from the employment rolls of the San Antonio Police Department, we are authorized to *reduce such*

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each reporter named his/her volume as Volume 1. Volume numbers corresponded to the sequential days of August 25, 26, 31, 2016, September 1, 2016, and October 6, 7, 2016.

[2] City of Austin, Texas v. Villegas, 603 S.W.2d 282 (Tex.Civ.App. 1980, writ ref'd n.r.e.).

[3] Joint Exhibit 2, pp. 75 -76 §10 (c).

sanction to what we consider to have been preponderantly proven to be an appropriate sanction which serves the recognized purposes of discipline.[4]

BACKGROUND

The City of San Antonio, Texas, has both recognized and essentially accepted the Texas Civil Service Act applicable to firemen and policemen [Tex. Rev. Civ. Stat. Ann., Article 1269 (Vernon Supp. 1985) and the Tex. Rev. Civ. Stat. Ann., Article 174 (Fire and Police Employee Relations Act)]. Chapter 174.023 of that Act grants to the members of the San Antonio Police Department (hereinafter *SAPD*) the right to select a certified representative to negotiate bargaining agreements with the city, within which many terms of employment governing all "covered" SAPD police officers are included. Exercising such legislative authority the SAPD officers historically selected and are currently represented by the San Antonio Police Officers' Association (hereinafter *SAPOA*, *association*). We note parenthetically that SAPOA also appears to be currently affiliated with the Combined Law Enforcement Associations of Texas (hereinafter *CLEAT*).[5]

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[4] Compare City of Waco v. Kelley, 197 S.W.3d 324 (Tex. 2006/Tex. Feb. 2010) and Collective Bargaining Agreement, Article 28, Section 9 (*infra*).

[5] ***During this portion of his disciplinary appeal Officer Martin elected to be represented by a privately contracted attorney (Sifuentes) rather than a designated CLEAT representative.***

Following initial certification of such association the principals (*city/SAPOA*) entered into a series of local labor agreements; their successor agreement appears to embrace the time period involved in this appeal and includes several Collective Bargaining Agreement excerpts which were directly/inferentially raised during our evidentiary hearing (*emphasis added*):

* * * *

ARTICLE 28
Disciplinary Actions

* * * *

Section 9.

The award of the Arbitrator shall state which particular *factual charges he finds to be true*, if any, and the particular rules he finds such conduct to have violated, if any. Where the charges are upheld, the award shall state whether the discipline imposed is upheld, or whether some lesser discipline is substituted. ***This agreement authorizes an arbitrator to reduce an indefinite suspension to a period greater than 45 days.***[6]

Section 10.

The following rules shall govern the conduct of arbitration hearings under this Section, and of certain preliminary matters.

A. Both parties shall provide, at least twelve (12) calendar days prior to the date of the hearing, the names and addresses of witnesses expected to be called at the hearing. In the absence of good or excusable cause, the arbitrator may exclude the testimony of a witness upon the failure of a party to disclose such a witness. The parties, in writing, may request discovery from each other concerning the case. Should the opposing party not agree to provide the requested information within seven (7) calendar days of the request, the request shall be deemed denied. The requesting party may then apply to the Arbitrator who shall order such discovery as is appropriate to the nature of the case, consistent with, but not bound by, the rules of discovery in Texas civil cases. In considering the

[6] See Footnote 4 and 5 *supra.*

application, the Arbitrator shall consider the burden and expense of producing the information, the need of the requesting party, the amount of time available prior to the hearing, and such other matters as he may deem material. In no event shall discovery be requested within seven (7) calendar days prior to the hearing.

* * * *

C. In all hearings under this Section, the City shall prove its case by a preponderance of the evidence.

* * * *

Section 11.

Unless otherwise provided in this Agreement, the Arbitrator shall have all those powers and only those powers vested in the Commission under Chapter 143 of the Local Government Code and the Commission Rules, with respect to suspensions, indefinite suspensions, and demotions, with the sole exception of the power to amend such rules.

* * * *

Matthew D. Martin (hereinafter *Martin/appellant*) is a comparatively young (DOB 10/25/77) heathy male, who represents himself to be currently single and the divorced father of two minor children.[7] Martin avowedly has accumulated a significant amount of formal education (Bachelor's Degree from Ohio State University in 2000) together with a substantial amount of relevant (formal/on-the-job) departmental instruction/training during his time in service with the SAPD. Appellant appears to this hearing examiner to be competent enough to read, understand and substantially comply with all of the SAPD departmental rules and responsibilities associated with his position and actions as a certified Texas police officer.

Prior to entering the SAPD Martin reportedly spent approximately four years honorably serving in the United States Marine Corp. After that service period he next loyally functioned as a highly trained member of a special section of the U.S. Department of Secret Service (presidential protective detail), for which he reportedly received multiple special commendations. Officer Martin appears to have no service related physical disabilities that could have compromised his ability to respond and proficiently perform all of his assigned SAPD responsibilities in a reasonable, responsible, safe and professionally proficient manner.

In February, 2007, Martin was accepted into the SAPD's Police Academy; he thereafter timely graduated, was awarded patrolman's status and officially went on active duty with the department in September, 2007. Since that date, ***but prior to this incident***, he appears to have performed essentially all of his SAPD assigned duties in a highly satisfactory manner, including those associated with his temporary assignment as a field training officer (FTO) for departmental (patrol) newcomers. In addition Martin has been the recipient of multiple SAPD performance awards and service commendations.

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[7] Tr. Vol. IV, p. 12 *et seq.*

THE EVIDENCE

While on patrol on April 7, 2015, near a San Antonio residential location believed to be a distribution site for illegal drug sales,[8] Officer Martin avowedly observed, through binoculars, several small suspicious packages being received by the driver (**Juan Martinez**) of a privately owned vehicle belonging to *passenger Miriam **Aquino***. SAPD Officers Martin and Fredrick Grataski (hereinafter ***Grataski***) then closely trailed the suspected vehicle to a location near Martin Luther King Drive/Brooksdale Drive, where avowedly a ***justifiable*** traffic stop was made.[9]

After completing the stop a ***vehicular and personal search of the driver was undertaken***, revealing what was subsequently determined to be ***two*** small bags containing an illegal substance. A ***third*** single bag of similar size and content was *ultimately* determined to be secreted in the bra of the female owner/passenger of the vehicle (Aquino).

Upon completing the arrest and filing charges against ***only the driver*** **(Martinez)** Officer Martin purposefully entered the following official report of the encounter (emphasis added):

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[8] TR August 31, 2016, p. 13, Ln. 5-14.

[9] Articulated reason for stopping vehicle was *expired registration* and *outstanding warrants* – Union Exh. 5 (COBAN recording).

> **ON THE ABOVE LISTED TIME AND DATE WHILE ASSIGNED TO DIRECT PATROL, A REGISTRATION SEARCH OF LISTED VEHICLE RETURNED AS EXPIRED FEB OF 2015, LISTED VEHICLE WAS STOPPED AND I CONTACTED DRIVER (AP1) AND PASSENGER 01. DRIVER APPEARED NERVOUS [.] A [typo omitted] WARRANTS SEARCH OF AP1 AND 01 WAS CONDUCTED. AP1 RETURNED WITH ABOVE LISTED ACTIVE VERIFIED WARRANTS. AP WAS PLACED UNDER ARREST [.] I ASKED IF HE HAD ANYTHING ON HIS PERSON AP STATED NO. I ASKED IF THERE WAS ANYTHING ILLEGAL IN LISTED CAR AND AP1 DID NOT ANSWER [.] I ASKED AGAIN AND AP STILL DID NOT ANSWER. *WHEN I LOOKED DOWN BETWEEN THE DRIVER SEAT AND DOOR I SAW IN PLAIN VIEW LISTED EVIDENCE. LISTED VEHICLE WAS RELEASED TO 01 THE LISTED OWNER. AP1 WAS TRANSPORTED TO 401 S. FRIO AND BOOKED ON LISTED CHARGE AND WARRANTS.* NO FURTHER ACTION WAS TAKEN. COBAN AVAILABLE.**[10]

This sequence of events, including some suspected arrest irregularities was first reportedly noted by members of the Bexar County District Attorney's office. Accordingly an alert was sent to SAPD indicating a possible need for further investigation.

Following a properly ordered *internal* review of the entire arrest sequence, including, *inter alia*, the audio and video (COBAN) evidence recorded at the arrest scene, Officer Martin was accused of being ***untruthful*** in his written report concerning ***(a) where the narcotics were discovered and (b) who actually had possession of the narcotics***.[11]

The SAPD alleges that during Officer Martin's and associate SAPD Officer Grataski's vehicular/personal search, appellant found marijuana *inside the passenger compartment of the vehicle*. They also later discovered that Ms. Aquino was untruthful about not having personal possession of any

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[10] Joint Exhibit 6, p. 10a.

[11] Joint Exhibit 5, p. 2; also compare to unspecified SAPD Rule 4.12 (report writing) and Discretional Procedure (Rule 502).

marijuana, based on their ultimate determination that she was hiding one bag of marijuana in her bra.

After allowing Ms. Aquino to remove the one bag of narcotics she was hiding, Officer Martin knowingly took possession and personally *comingled* it with the two other (unmarked) bags he had allegedly "found" during his search of her vehicle. *We acknowledge that at no point did either of the two investigating officers discover any illegal drugs on the person or in the clothing of Martinez (the driver of the vehicle).*

Notwithstanding the above described sequence of discoveries, Officer Martin subsequently carried out a unilateral decision to *singularly charge Driver Martinez with all of the narcotics recovered, including the one bag recovered from Ms. Aquino's bra. He (Martin) also decided to disregard a material part of his discovery and "unconditionally released" Ms. Aquino and her vehicle. Sometime thereafter Martin willfully elected to exclude that aspect (Aquino) of such encounter, including the actual location of each of the bags of illegal drugs, when he was preparing and submitting his official SAPD arrest and incident report.*[12]

Addressing the contested issue of Officer Martin's "state of mind" regarding the actual location and possession of the three bags of drugs, we

[12] 10/6/16, p. 120, L. 22—p.121, L.22.

note the following excerpts from the sworn testimony appellant offered during our evidentiary review, to-wit (emphasis added):

> Q. (BY MR. REYNA – counsel for the city) Okay. ***And you never found any marijuana on Juan, did you?***
> A. ***No, I did not.***
> Q. ***So you had two sources of marijuana –***
> A. Yes.
> Q. - in her car-
> A. Yes.
> Q. - and on her?
> A. Not two sources on her.
> Q. No. One – one source, *two bags you recovered from the car*?
> A. Yes, sir.
> Q. *And one bag that you recovered from Miriam?*
> A. *Yes, sir.*
> Q. *And somehow you decided that all the – all of those belonged to Juan?*
> A. *Yes. I explained that in my previous testimony.*[13]

Officer Martin's conscious decision to arrest and charge *only* Driver Martinez appears to have been initially verbalized at the arrest site, recorded in part by the SAPD COBAN system but then *avowedly forgotten* during our evidentiary hearing, to wit (emphasis added):

> Q. (BY MR. REYNA) So what's the difference of between him [Juan Martinez,] not answering the question and her just lying straight to his face – to your face?
> A. Well, I – I realized she was – she was lying to me. I felt she was lying to me from the get-go.
> Q. ***But you had already formed your opinion you were going to cut her loose and let her go?***
> ***A. I couldn't even tell you when – when I decided – at what point I decided to let her go.***[14]

[13] 10/6/16, p. 120, L. 22 – p. 121, L. 13.
[14] 10/6/16, p. 134, L. 20 – p. 135, L. 3.

* * * *

Q. So when ***you said, "We're going to say we found it all in the same spot," that's what you intended to report?***
A. No, that's not what I intended to report.
Q. You did report that though?
A. Yes.
Q. ***And it wasn't true, was it?***
MR. SIFUENTES: Object to vagueness.
Q. (BY MR. REYNA) Was it a true statement?
THE ARBITRATOR: Overruled. Go ahead.
Q. (BY MR. REYNA) *Was it a true statement that you found all of the marijuana in one spot?*
A. ***I wouldn't say that it was untrue. It – it was inaccurate.***
Q. And so what you filed in your report was inaccurate?
A. Yes.[15]

* * * *

Following the completion of an internal investigation conducted by seasoned SAPD Investigator Sergeant Michael Riggs, his personal evidentiary conclusions, together with those concurrently developed by the SARIC, investigators were sequentially reviewed by members of the SAPD chief's Advisory Committee and then by Acting Chief Trevino.[16]

However, we would note that the investigating information and conclusions separately developed by each of the two internal investigating entities is credibly alleged to have been pockarred by some incompleteness and/or material omissions/incorrect conclusions; any/all of which are

[15] 10/6/16, p. 135, L. 12 – p. 136, L. 3.

alleged to have *fatally flawed* the city's pivotal evidence profile and ultimately caused Acting Chief Trevino to *misinterpret and prejudicially* view much of the relevant and credible evidence reportedly involved in the sequence of events summarized hereinabove.

Notwithstanding such *alleged* investigatory and evidentiary (procedural/credibility) errors, the following departmental allegations and disciplinary notices were timely issued to Martin, with a copy to the San Antonio, Texas, Civil Service Commission by Acting Chief Trevino, to wit (*emphasis added or in original*):

* * * *

> It is contemplated that you will receive a contemplated indefinite suspension for violation of Rule XIII(C)(12) of the Civil Service Commission Rules and Rules 3.02 and 3.04(C) of the Rules and Regulations of the San Antonio Police Department. Alleged as the basis for this suspension are the following allegations:
>
> > On or about April 7, 2015, while conducting a traffic stop at Martin Luther King and Brooksdale and subsequently making a narcotics arrest, Officer Matthew Martin was untruthful in his written report concerning where the narcotics were discovered and who had possession of the narcotics. As a result of actions taken by Officer Martin and documented during the traffic stop and subsequent narcotics arrest, the District Attorney's Office forwarded information to the Chief of Police to be reviewed for possible administrative and criminal misconduct.
> >
> > Officer Martin had arrested and booked the driver of the stopped vehicle, Mr. Juan Martinez, for possession of narcotics (Marijuana) that were actually discovered in the possession of the passenger, Ms. Miriam Aquino. Officer Martin brought discredit and

[16] Loudermill personnel review with Officer Martin and Chief Trevino – see Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

reproach on himself and the San Antonio Police Department when he falsified the circumstances and evidence recovered in the arrest.

Additionally, on or about July 17, 2015, during a videotaped interview with detectives from SAPD's SARIC Unit at Police Headquarters located at 315 S. Santa Rosa, Officer Matthew Martin was untruthful when he falsely claimed that Mr. Juan Martinez was arrested and booked for possession of Narcotics (Marijuana) because he had stated that the narcotics were his. Neither Mr. Martinez nor his passenger, Ms. Miriam Aquino, the person who actually had the additional Marijuana in her possession, ever made the claim, as Officer Martin stated to the detectives, that all of the Marijuana found belonged solely to Mr. Martinez.

Additionally, there is no COBAN footage or justification in Officer Martin's written arrest report that support Officer Martin's claims of where the narcotics were discovered and who had possession of them.

Given the foregoing allegations, please be advised that (a) these charges may be rebutted to the Chief either orally or in writing within seven calendar days; and (b) officers suspended up to a maximum of forty-five working days may, at the chief's discretion, serve such suspension by forfeiting accumulated compensatory, vacation, bonus time, or holiday leave equal to the suspension.

Please acknowledge receipt of the origin of this report.

/s/ A. Trevino 9/16/15
ANTHONY L. TREVINO, JR., CHIEF OF POLICE DATE

ADDITIONAL NOTES BELOW:

/s/ Matthew Martin #1140 09/20/2015
OFFICER MATTHEW MARTIN, #1140 DATE

* * * *

MM - I acknowledge receipt of these documents. However I do not feel that this is a true nor accurate description of the events as they occurred.

OFFICIAL NOTICE OF INDEFINITE SUSPENSION (September 30, 2015)

Officer Matthew Martin, #1140

San Antonio Police Department
San Antonio, Texas

Fire Fighters' and Police Officers' Civil Service Commission
111 Soledad, Suite 123
San Antonio, Texas 78205

Commissioners and Officer Matthew Martin:

Under and by virtue of the authority vested in me by Title 5, Subtitle A, Chapter 143 of the Local Government Code, V.T.C.S. said chapter entitled "Municipal Civil Service". I do hereby suspend Officer Matthew Martin from paid duty with the San Antonio Police Department, indefinitely, without pay, from his position as an officer of the San Antonio Police Department, effective immediately.

Officer Martin has violated Subsection C of Rule XIII of the City of San Antonio Fire Fighters' and Police Officers' Civil Service Commission Rules, said rules having been adopted on February 23, 1998, and thereafter from time to time amended, by the Fire Fighters' and Police Officers' Civil Service Commission as the Civil Service Rules for the Fire and Police Departments of the City of San Antonio. The particular civil service rule violated by Officer Martin and ground for suspension is as follows:

> (12) Violation of an applicable fire or police department rule or special order.

The Rules and Regulations of the San Antonio Police Department which Officer Martin has violated are as follows:

> RULE 3.02 – TRUTHFULNESS OF MEMBERS: Members shall speak the truth at all times. Reports and written communications from any member shall also reflect the truth.
>
> RULE 3.04 – RESPONSIBILITY TO SERVE THE PUBLIC: Members shall serve the public through direction, counseling, assistance, and protection of life and property. Members shall also respect the rights of individuals and perform their services with honesty, sincerity, courage, and sound judgment. (C) CONDUCT AND BEHAVIOR: Members, on-or off-duty, shall be governed by the ordinary and reasonable rules of good conduct and behavior, and shall not commit any act tending to bring reproach or discredit on themselves or the department.

The factual basis for the instant disciplinary suspension is as follows:

On or about April 7, 2015, while conducting a traffic stop at Martin Luther King and Brooksdale and subsequently making a narcotics arrest, Officer Matthew Martin was untruthful in his written report concerning where the narcotics were discovered and who had possession of the narcotics. As a result of actions taken by Officer Martin and documented during the traffic stop and subsequent narcotics arrest, the District Attorney's Office forwarded information to the Chief of Police to be reviewed for possible administrative and criminal misconduct.

Officer Martin had arrested and booked the driver of the stopped vehicle, Mr. Juan Martinez, for possession of narcotics (Marijuana) that were actually discovered in the possession of the passenger, Ms. Miriam Aquino. Officer Martin brought discredit and reproach on himself and the San Antonio Police Department when he falsified the circumstances and evidence recovered in the arrest.

Additionally, on or about July 17, 2015, during a videotaped interview with detectives from SAPD's SARIC Unit at Police Headquarters located at 315 S. Santa Rosa, Officer Matthew Martin was untruthful when he falsely claimed that Mr. Juan Martinez was arrested and booked for possession of Narcotics (Marijuana) because he had stated that the narcotics were his. Neither Mr. Martinez nor his passenger, Ms. Miriam Aquino, the person who actually had the additional Marijuana in her possession, ever made the claim, as Officer Martin stated to the detectives, that all of the Marijuana found belonged solely to Mr. Martinez.

Additionally, there is no COBAN footage or justification in Officer Martin's written arrest report that support Officer Martin's claims of where the narcotics were discovered and who had possession of them.

A copy of the instant disciplinary suspension order is being filed with the Fire Fighters' and Police Officers' Civil Service Commission.

Following separation from the Department, the training requirements to maintain an officer's peace officer's license for the current training cycle and unit are that officer's responsibility. An officer should refer to the TCOLE website http://www.tcole.texas.gov/content/training-requirements for further information and to establish a TCOLE account to review current training records.

/s/A. Trevino _____ 9/30/15

ANTHONY L. TREVINO, JR., CHIEF OF POLICE DATE
SAN ANTONIO POLICE DEPARTMENT

On this 30 day of September, 2015, I hereby acknowledge receipt of the original of the foregoing indefinite suspension. I acknowledge having received notification that I have fifteen days from the date of receipt of this suspension during which to file a written appeal of this suspension with the Personnel Director of the City of San Antonio requesting either arbitration or the hearing of my appeal by the Fire Fighters' and Police Officers' Civil Service Commission. I acknowledge that I have been informed that if I appeal to a hearing examiner/arbitrator, I waive all rights to appeal to a district court except as provided by subsection 143.057(j) of the Texas Local Government Code. I also acknowledge that I have been informed that my right to appeal the decision of a hearing examiner/arbitrator to district court pursuant to section 143.057 of the Texas Local Government Code may have been modified by the provisions of Article 28 of the Collective Bargaining Agreement by and between the City of San Antonio and the San Antonio Police Officers' Association.

/s/ Matthew Martin	09/30, 2015	1050
OFFICER MATTHEW MARTIN, #1140	DATE	TIME
SAN ANTONIO POLICE DEPARTMENT		

* * * *

Thereafter a timely appeal was filed and we were selected by the parties as the officially designated hearing examiner/arbitrator. A series of evidentiary hearings was thereafter *initially* convened on August 25, 2016 (continued on August 26, 31, 2016, September 1, October 6 and 7, 2016). At the conclusion of such evidentiary hearings both parties (representatives) elected to file written factual summations and supporting arguments at a time to be thereafter mutually agreed upon. Furthermore, all parties and representatives agreed to *waive* any/all time limitations regarding a mandated date for publishing this decision.

CITY'S POSITION
(emphasis added or in original)

The city demonstrated by a preponderance of the evidence, presented at the arbitration hearing, that Officer Martin was in fact *untruthful* in his written report on or about April 7, 2015. His untruthfulness was reiterated at his videotaped interview with the San Antonio Regional Investigation Committee (hereinafter *SARIC*) investigators on July 17, 2015. His untruthful conduct at each of the described occurrences, *coupled with the arrest of Mr. Juan Martinez for narcotics found to be hidden on another person*, brought discredit to Officer Martin and the San Antonio Police Department. Chief Trevino was therefore justified in issuing the indefinite suspension on September 30, 2015.

GRIEVANT'S POSITION
(emphasis added or in original)

Officer Martin has asserted that the allegations are false. He arrested Juan Martinez based upon probable cause. Officer Martin's training and experience caused him to believe that narcotics were delivered to Juan Martinez. Officer Martin in fact found two of the three packages of marijuana, which were delivered to Juan Martinez, exactly where Officer Martin indicated in his report. The IA investigation and SARIC investigation were fraught with factual errors, namely: repeating the errors contained in Casey Reynolds' email, as discussed below.

Neither SARIC nor IA detected Casey Reynold's errors, which went unchallenged to the Advisory Action Board. *Chief Trevino adopted these errors which became the basis for his letter of indefinite suspension.* Consequently, despite the multi-step process, these errors were never detected, never corrected, and were finally adopted as gospel truth.

Chief Trevino believed that Officer Martin's conduct caused discredit and reproach with the District Attorney's Office; *however the District Attorney never asked that the matter be investigated as a criminal matter. Regardless, the District Attorney rejected SARIC's complaint of criminal misconduct against Officer Martin.*

Before Chief Trevino issued his indefinite suspension he never knew what position the District Attorney would take on prosecuting Officer

Martin, or if they placed him on the "Brady" list, or whether or not the DA's Office would use Officer Martin as a witness in the future. No such information was included in the IA case file, admitted for a limited purpose as Joint Exhibit, Tab 6.

Thus, any claim of discredit and reproach was based merely upon Chief Trevino's speculation; there was nothing in the IA package to support those assumptions. Chief Trevino erroneously believed the District Attorney would never call Officer Martin as a witness; however, such believe was refuted by Mr. Wheat's testimony.

The gist of the Chief Trevino's charges against Officer Martin was whether Juan Martinez had possession of all three bags of marijuana or only two of the bags. Based upon the undisputed evidence, Tex. Penal Code Section 6.01, and Tex. Penal Code Sections 7.01, 7.02, Juan Martinez did in fact have possession of all three bags.

Moreover, the totality of the circumstance known to Officer Martin established probable cause to arrest Juan Martinez for possession of all three bags of marijuana. This probable cause was based upon the following:

1. Officer Martin's surveillance of the Brighton Terrace Apartments;
2. Seeing what appeared to be a drug deal happening;
3. The finding of marijuana on the driver's side;
4. Miriam's admission that she and Juan bought marijuana at the apartments Officer Martin knew to be the Brighton Terrace Apartments; and
5. Juan's admissions in the back seat of the SUV when speaking with Grataski, and
6. Juan's admissions at the Magistrate's Office after the COBAN video were shut off.

After the evidence in arbitration proved the foregoing, the city essentially seemed to argue that Officer Martin violated the rules by not writing a complete report and abusing his discretion by not arresting Miriam as well. However, *Chief Trevino "did not allege" in his letter of suspension that Officer Martin violated Rule 4.12 [report writing] or Procedure 502 [involving discretion] by failing to write a detailed report or improperly exercising discretion by releasing Miriam Aquino.*

Given the state of the record, the city has failed to meet its burden of proof on any of the alleged violations by a preponderance of the evidence.

Notwithstanding the lack of proof, assuming *arguendo* a rule violation, the punishment was excessive given that Officer Grataski, who was *similarly situated*, received only a 30-day suspension. Additionally, in a case involving nearly identical facts, Chief Trevino issued a three-day suspension to Officers Phillip Wang and Rudy Garza.

ANALYSIS AND OPINION

CREDIBILITY/DISHONESTY IN REPORTING

As affirmed by the courts and repeatedly endorsed by this arbitrator, law enforcement is both a special and unique profession. It has often been described as demanding a state of perpetual readiness, sound judgment, strict personal discipline and a particularly large measure of *honesty, obedience to departmental rules and emotional control*. These are special personal demands and requirements not normally expected nor often found associated with most other vocations.[17]

Furthermore, we have learned through experience that *any form of job related deception or dishonesty*, preponderantly proven to emanate from a police officer, too often exposes a characteristic that many seasoned arbitrators have found to be ***essentially immutable***; irrespective of ***almost any proffered exculpating reason or mitigating circumstance***. Clearly the

persistent presence of such a "characteristic" we find to be totally *incompatible* with a successful career in law enforcement and the multitude of related responsibilities, particularly those involving, *inter alia*, public trust.[18]

Although appellant was not specifically charged with "*dishonesty*" (only untruthfulness) we are convinced by the nature and quantum of the credible evidence that on this occasion Officer Martin acted *deliberately* in selecting certain statements he gave to the departmental investigators, and, as indicated hereinabove in certain portions of his suspiciously ambiguous and/or unexplained evasive testimony he offered into evidence during this appeal hearing.

Furthermore, even if Officer Martin's opinions regarding "*possession*" and "*parties*"[19] appear to resourcefully track the verbiage and

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[17] Bolieu v. Fire and Police Civil Service Commission, 330 S.W.2d 234 (Tex.Civ.App. 1959).

[18] Michael Morton Act, Senate Bill 1611 (2013) – Act named after individual who was released after extended incarceration because district attorney failed to reveal inculpatory evidence which could have implicated the truth and veracity of a police officer who was or might have been a witness to the criminal event. See also Brady List.

[19] Texas Criminal Code Excerpts:

* * * *

Sec. 6.01. REQUIREMENT OF VOLUNTARY ACT OR OMISSION.

(a) A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession.

(b) Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.

reach of certain involved Texas criminal laws, that circumstance neither explains nor excuses his actions here being examined (*i.e.* material incompleteness of arrest report; significant silences regarding what did and did not happen, and the calculated diversionary effect caused by the words he "selectively utilized" when completing his "official" incident report).

In this era of "technological overexposure," two of the sentinels we perceive as guardians of positive public perception, particularly where law enforcement agencies are involved, are ***transparency in all official actions and deeds, and meticulously accurate and complete reporting of all related occurrences when required***. Although SAPD's reported but unpublished policy against "*over policing*" is defensively described as having afforded this individual patrol officer with a small window of discretion in certain arrest circumstances, we remain unpersuaded that this was one of those "qualifying" situations.

Even assuming *arguendo* that the unconditional release of Ms. Aquino and her vehicle did not rise to the level of actionable misconduct *per se*, there appears to have been reasonable reporting alternatives available. An alternative whereby Officer Martin could have officially

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(c) A person who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act.

identified Ms. Aquino's involvement in some reportable capacity; at least so that his incident report was facially complete, yet reserved to the district attorney's office the ultimate prosecutorial options

Even Martin's associate, Officer Grataski, who ultimately received a stringent disciplinary suspension for his onsite actions/inactions, acknowledged under oath that he was "surprised" at the statements (omissions) revealed in Martin's official incident report, given what that officer reportedly observed to have actually occurred at the arrest scene.[20] Although we recognize that philosophers have historically opined that "*what is truth*" is often a matter of personal perception,[21] from the perspective of law enforcement, drug interdiction and incident reporting, in our opinion there is no such thing as a "partial truth," nor even justifiable "truthful but incomplete-inaccurate reporting" (*i.e.* see Martin's testimony reproduced hereinabove).

As emphasized by counsel for the city, Martin "originally" reported that *he looked down between the driver's seat and saw, in plain view, the listed evidence (i.e. three bags)*. A deliberate misstatement included in his official report that, in our judgment, was not even "marginally" accurate, considering the exhaustive video, audio reports and intense witness

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[20] TR August 31, 2016, p. 28, *et seq.* Ln. 7-23.

examinations, all offered into evidence regarding Martin's vehicular search. Such a patently incorrect entry (omission) cannot be realistically excused, or even rationally camouflaged under the umbrella of *negligence*. *Ergo*, appellant's official misstatements regarding the issue of discovered drug "location" were preponderantly proven to all be untrue (not inadvertently inaccurate as inferred by Martin).

By his ill-conceived election to file a patently incomplete and inaccurate arrest report, by selectively utilizing the words he ultimately chose to "officially describe" the sequence of events, with no credible or lawful explanation [except the "innovative *afterthought*" of seeking refuge in the phrasing of certain criminal statutes (possession/parties)], Martin assumed the risk of the most severe *administrative disciplinary penalty*. To his further discredit Martin then appeared to exacerbate the potential consequence of his errors (commission and omission) by relying on evasive/ambiguous statements to very pointed questions propounded to him during our evidentiary review (see testimony excerpts hereinabove).

Neither the unique circumstances credibly proven to have actually been involved, nor the SAPD's emphasis on "not over policing," nor Martin's exemplary record of public service augmented by his positive

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[21] Citation omitted as superfluous.

professional accomplishments (performance evaluations/commendations) collectively qualify as ***dispositive mitigating circumstances***. Mitigating circumstances which his counsel argues should compel our reversing, or at a minimum substantially reducing[22] the indefinite suspension imposed by Acting Chief Trevino.

Our experience has been that no matter the degree of stress caused by the inherent dangerous nature of police work, nor the emotional "undressing" a suspected officer must sometime endure during a post-incident (internal) investigations, very few *truly dedicated and professional police officers* will attempt to completely avoid all responsibility for these types of allegations/actions (non-actions). However we do recognize that there is a common tendency for "every" accused person to *put his best foot forward* when he/she is answering tough interrogating questions, particularly those which challenge his onsite judgment during such an encounter in the field. It would serve no useful purpose and would only unduly lengthen this decision to more specifically detail each of Martin's proven unauthorized acts and/or untruthful answers; many of which appear to have been credibly identified either in Internal Investigator Riggs'

[22] The limiting effect on our remedial authority is not limited by the mandates of the Texas courts in the decision in City of Waco v. Kelley (*supra*). That discussion arguably *prohibits us from considering the rehabilitative benefits and career salvation that we believe could come from a* ***lengthy suspension without pay, if coupled with stringent reinstatement conditions***.

discoveries, and/or reflected in our official evidentiary record (trial's transcript).[23]

CONDUCT PREJUDICIAL TO GOOD ORDER

It is axiomatic that when hearing examiners/arbitrators are required to apply statutes, city codes or departmental orders they should follow accepted standards of interpretation, giving pivotal words their usual and ordinary meaning.[24] In determining whether appellant's conduct on this occasion violated the statutory and departmental code prohibiting conduct that was proven to be *"prejudicial to good order"*, it was the city that had the affirmative responsibility to identify and preponderantly prove each element of the chief's allegations. Therefore, when evaluating the city's proof offerings we must view the admitted credible testimony and documentary evidence in a light most favorable to the appellant in order to correctly determine whether he, or any reasonable trier of fact, could find preponderant evidence that such alleged violations had the actual adverse effect that was officially reported by the SAPD (internal investigator) and/or SARIC.

Notwithstanding the inconsistencies in appellant's testimony, the observations of collateral observers, including the opinions offered by a

[23] Collective Bargaining Agreement, Article 28, Section 9 *supra.*
[24] City of Tyler v. Razis *et al*, 12 Crt. of App./Tyler (May, 1996)

representative of the Bexar County District Attorney's office, we have concluded that any rational trier of fact could and presumably would infer, from the totality of the credible evidence, that Officer Martin purposefully ignored his SAPD reporting responsibilities both at and after this particular drug interdiction. Based on such conclusions in our opinion appellant can enjoy *no meaningful refuge* in the fact that the San Antonio district attorney's office elected not to take any "official" action regarding the fallout from Officer Martin's actions (inactions), or in the absence of any conclusive decision regarding this officer's "possible" future disqualification as a (non-credible) witness to be included on that department's "Brady List."[25]

Appellant's counsel repeatedly and resourcefully argued that both "factually" and "technically," at least under the terminology of the Texas Penal Code, appellant was not in error in reporting that the three drug packages were observed as being initially received by the driver (J. Martinez); and that such receipt qualified as having total possession of *all* the discovered drugs under the unchallenged circumstances observed.

Notwithstanding the merit in such defensive allegations, in the context of this *internal administrative disciplinary review* such arguments

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[25] See Footnote 18 *supra*.

are entitled to be viewed only as a resourcefully tactical diversion. An innovative attempt to have us deemphasize the material inaccuracies, incompleteness and deceptive effect of appellant's arrest scene inactions, the selected verbiage of his official SAPD incident report and the calculated evasive answers he chose to offer in subsequent investigations. In sum Officer Martin appears to have let his sympathetic perceptions regarding the personal hardships, which "might have resulted" from an arrest of Ms. Aquino, to temporarily eclipse his reportedly usual good judgment, compromise his professional training and cause him to act in complete disregard of all of his law enforcement experience. In our judgment clearly such *misconduct, and its collateral effect on the departmental image can only be objectively viewed as collectively prejudicial to good order* (a term we acknowledge is not clearly defined by the courts, but one that has withstood multiple attacks regarding vagueness – citations omitted).

BIASED INVESTIGATION

Appellant's attack on the accuracy, completeness and objectivity of SAPD's internal investigation (Sergeant M. Riggs), together with certain proven errors (omission/commission) by members of the San Antonio Regional Investigation Committee (SARIC), is not completely void of all credibility or merit. Based on the persuasive evidence of record the

thoroughness, corroboration and communication of these two investigating divisions, at least on this occasion, appears to have been less than complete.

As a result certain portions of their individual evidentiary discoveries (conclusions) *presumably did not reach the eyes/ears of all members of the chief's advisory committee, nor even Acting Chief Trevino*. However, because the chief's committee is only advisory in nature and responsibility, there is insufficient credible evidence or reliable reason in our record for us to summarily conclude, or even *presume* that such omissions *fatally flawed* (unduly influenced) the chief's final disciplinary conclusions.

Aside from our evaluation that such errors (omissions) were proven to only be marginally involved in the final disciplinary outcome, appellant had both the opportunity and the obligation to timely bring any/all such (*alleged errors of omission*) to the chief's attention as part of the constitutionally mandated "Loudermill" review. If such revelation was done such "errors" become "moot." If not raised appellant was, or reasonably could have been professionally represented at such final pre-disciplinary review, therefore ensuring that all his defensive arguments were properly raised (*i.e.* waiver/last clear chance). Furthermore, we find nothing in the Supreme Court's (Loudermill and prodigy) opinion that suggests that any such

"unintended incompleteness" or "non-presentation," occurring during such final evidentiary review, constitutes a *per se fatal denial of due process*.

On balance we find that the internal investigation conducted by SAPD Investigator Riggs was, for our purposes substantially complete, factually objective and preponderantly proven to be reasonably true at least insofar as such investigator's findings related to the charges (rule violations) specified in Acting Chief Trevino's letter of indefinite suspension. Furthermore, the credible testimony of Acting Chief Trevino convinces us that he did not *mechanically* accept the factual conclusions expressed in either Internal Affairs Investigator Riggs' report or the ("incomplete/inaccurate") contents of the SARIC Prosecution Guide, as alleged by Martin's counsel.

Essentially all of the credible evidence of record regarding Officer Martin's alleged wrongdoings appear to have been *independently* examined and *objectively evaluated* by Acting Chief Trevino prior to making his final decision. In retrospect, we find such identified (above referenced) errors of investigation and incompleteness, as defensively relied on by appellant's counsel, to be of *de minimis* nature and/or of *immaterial weight* regarding appellant's plea for a *summary (reversible error) decision* based on such allegations.

MOTIVE/DISPARATE TREATMENT

Notwithstanding our above defined conclusions concerning the preponderantly proven wrongdoings acted out by Officer Martin, ***we cannot ignore two issues which do tend to credibly mitigate strongly against appellant's termination***.

The *first* involves appellant's *motive* for releasing Ms. Aquino, without any direct or inferential reference to her and her involvement in his SAPD official report. We are convinced that Martin's actions and reactions were void of any improper or self-rewarding motive; such "proven purity of purpose" cannot be ignored. But, as discussed hereinabove, appellant's avowed "over policing concerns," although arguably legitimate, also cannot completely excuse this officer's distorted representations and his "intended inference" in his report that Ms. Aquino was completely *uninvolved* in this sequence of events. Had we found the slightest evidence of a selfish or personal ulterior motive we would not have hesitated to summarily sustain Acting Chief Trevino's disciplinary decision. We would also note parenthetically that a factually correct report from Officer Martin would presumably have made no significant difference in the degree (Class B Misdemeanor) of criminal charges to which Driver Martinez was ultimately exposed.

The *second* issue involves disparate treatment. Martin *alternatively* contends that he has been treated *disparately* because he was terminated (indefinite suspended), on this occasion when in fact other SAPD officers, including Officer Grataski, have arguably committed "*similar or equally egregious transgressions,*" but have only been assessed minor or non-career ending remedial disciplinary sanctions.

Counsel for the city does not deny the multitude, nor the wide range of disciplinary sanctions proven to have been historically imposed on SAPD officers. Instead he answers such disparity arguments by emphasizing that to "successfully" demonstrate actionable disparate treatment an appellant must offer preponderant proof that the "*comparator officer was in fact similarly situated.*" On that point we affirm that in a disciplinary context all employees who engage in the same type of conduct should, if *reasonably possible* be treated essentially the same.[26] However, our review of case law indicates that it is equally well established that the proponent of such a defense must present preponderant proof that both the *disciplined* and *undisciplined* employees' proven *misconduct* was of "*comparable seriousness.*"[27]

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[26] How Arbitration Works, Elkouri and Elkouri, 6th Edition, p. 995-999.
[27] AutoZone, Inc. v. Reyes, 272 S.W.3d 588, 594 (Tex. 2008). Attachment 9 citing Ysleta Indep. Sch. Dist., 177 S.W.3d 913, 917 (Tex. 2005).

Furthermore, according to our reading of the applicable case law, such proof must also credibly establish that *the operative situations and conduct of the two employees to be compared was "nearly identical."*[28] In our experience that particular proof requirement has proven to be a ponderous burden. Employees with different vocational responsibilities, different supervisors, different capabilities, different work rule violations, and different historical disciplinary records are not generally found to be "nearly identical."[29] Our experience has also taught us that the conduct of the two complainants being compared are not to be ruled "clearly identical" when the differences between their otherwise proven comparable misconduct appears to be "partially explained" by the differences in judgment emanating from *two different supervisors*.[30]

Through his attorney Martin offered a copious volume of SAPD officers' disciplinary records, most of whose proven acts of actionable misconduct (both on/off duty) were wide ranging in terms of both nature and severity. However, after our examination of such offerings we found very little in the way of *actual (factual) comparability*. He appeared to heavily rely on vaguely written factual descriptions of prior disciplinary

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[28] *Id.* citing Ysleta Indep. Sch. Dist., 177 S.W.3d at 917; see also Winters v. Chubb & Son, Inc., 132 S.W.3d 568, 578 (Tex.App.—Houston [14th Dist.] 2004, no pet.); Kelley v. Humble Indep. Sch. Dist., No. 01-05-00761-CV, 2007 WL 926505, at *8 (Tex.App.—Houston [1st Dist.] Mar. 29, 2007, pet denied) (mem. op.).

actions imposed upon SAPD officers. Furthermore, many of those cited officers were allowed to *settle their disciplinary differences through face-to-face negotiations with the incumbent chief*; an option that exclusively rests with the departmental chief and therefore cannot be reliably viewed as having dispositive or precedential effect.

As noted insufficient credible evidence was offered to assist us in determining *if any* of these examples cited by appellant's counsel could be reasonably and credibly included in the category of being "similarly situated." Furthermore, we would note parenthetically that when we were reviewing Martin's defensive claims (examples) of disparate practice, we also found it significant that there was no credible evidence offered that Interim Chief Trevino was the *decision maker* in many of those cited (similarly situated) instances. Here again, another recognized criterion that must be clearly evaluated and weighed when exploring for similarly situated comparators.[31]

Even assuming *arguendo* that we had found that there were *proven comparable examples* of disparate practice, at most such examples would have served only to *"mitigate," not "invalidate"* the reasons and

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[29] AutoZone, Inc., 272 S.W.3d at 594 (citing Ysleta Indep. Sch. Dist., 177 S.W.3d at 917).
[30] *Id.* citing Wallace v. Methodist Hosp. Sys., 271 F.3d 212, 221 (5th Cir. 1001).
[31] See Elkouri & Elkouri, How Arbitration Works, 6th Edition, Chapter 8.8.D.iii. BNA 2003.

disciplinary conclusions articulated by the chief for summarily terminating a long term, proven proficient police officer.

Although we found no cited examples to be clearly and convincingly *dispositive* of the defensive claim of disparate treatment, based on such a voluminous evidentiary record it seems indisputable that SAPD has no clear and consistent policy or practice regarding (a) categories of wrongdoing (major/minor violations), (b) ranges of punishment, or (c) the recognized viability and remedial value of an established and consistent progressive disciplinary sanctions schedule.

CONCLUSIONS AND AWARD

In this appeal we find much of the city's/SAPD's factual evidence to have been sufficiently credible and reasonably persuasive. Although obligated by oath and professional position to tell the truth, on this occasion appellant acted and/or spoke untruthfully on many of the subjects that he knew, or reasonably should have known were of material interest to both the district attorney, the city's investigators and to us.

However, as noted hereinabove, his motivation for not clearly reporting as "fact" things that he knew actually happened, or did not happen, seems unclear, but indisputably in no discernible way were such actions/answers *self-rewarding*. He was, in our judgment, accurately

perceived by multiple members of the SAPD staff as an excellent and professional police officer who unexplainably elected to conceal improper conduct and/or evidence that he knew, or reasonably should have known to be incompatible with strict law enforcement and good police work. All of this incongruous conduct from a person professionally trained, sworn and committed to protect and honestly serve the citizens of San Antonio, Texas.

WHEREFORE we are compelled to answer **Issue No. 1** as follows:

Issue No. 1: The City of San Antonio, Texas, DID sufficiently prove the truth and correctness of the above described allegations of wrongdoing (rules violated) contained within San Antonio Police Department Acting Chief of Police Anthony Trevino's termination notice issued to San Antonio Police Department Officer Mathew Martin on or about September 30, 2015.

However, with regard to Issue **Number 2,** based on the mandates of the collective bargaining agreement, the cited judicial/arbitral precedents and the credible evidence of record, including all relevant *aggravating* and *mitigating* circumstances, we are persuaded that Acting Chief Trevino's decision, although not *patently* arbitrary or capricious, does not sufficiently satisfy the tests and purposes we know to be historically associated with the *punishment portion of the "just cause" standard.*[32] Therefore, we are

[32] Hill & Sinicropi, Remedies in Arbitration (BNA 1981); NAA, The Common Law of the Workplace, 2nd Edition, NA of A – BNA 2005.

compelled to answer the *second stated* issues as follows, giving due regard to the scope of our acknowledged contractual and statutory authority:

Issue No. 2: The City of San Antonio, Texas, DID NOT persuasively and preponderantly prove it had sufficient cause to issue an indefinite suspension to San Antonio Police Department Officer Matthew Martin based on those preponderantly proven charges referenced hereinabove. *Ergo* we hereby order the reinstatement of SAPD Officer Matthew Martin, but only under the following terms and conditions:

1. Although the city *DID* have just cause to impose a stringent disciplinary sanction against SAPD Officer Matthew Martin, it DID NOT preponderantly prove it had sufficient cause to permanently terminate his services effective September 30, 2015. Wherefore, the discharge of Officer Martin is hereby reduced to a very lengthy *disciplinary suspension, without pay or benefits, except the accrual of seniority and retirement (length of service) credits.* Such (disciplinary) suspension shall be considered to have begun on the date of his announced termination (indefinite suspension) (September 30, 2015) and shall be deemed by this award to have continued until October 1, 2016, provided ALL of the following conditions are timely satisfied.

2. When calculating Officer Martin's entitlement to lost compensation under this award, for the period from October 1, 2016, until all of the following conditions are satisfied, Officer Martin shall be compensated only as follows:

A. *Straight Time Pay* to be calculated at his September 30, 2015 patrolman rate (no overtime, shift differential, holiday pay, vacation pay or other special/regular pay supplements including longevity and any interim departmental increases).

B. The totality of such pay shall be based on only regular straight time work hours appellant would have normally been required to serve as a patrolman (no overtime or special

assignment pay) during such reimbursement period.

C. Appropriate deductions shall be made for taxes, retirement, insurance and any other such pay adjustments in effect on appellant's last day of active service (September 30, 2015).

D. Appellant's eligibility for SAPD group medical insurance, if any, shall begin the date he is fully qualified hereunder to actively return to active service.

E. Before returning to the active payroll Officer Martin must be approved for return to full patrolman service by the city's designated medical physician.

F. Officer Martin shall successfully demonstrate his knowledge and ability to resume all of the responsibilities of his patrolman position. Any reasonable amount of retraining determined necessary by the city shall be successfully completed prior to grievant's return to active service.

G. Failure to timely comply with all such conditions shall constitute a violation of this award *per se*, and Officer Martin will then be summarily deemed by this arbitrator to have been *properly terminated* effective September 30, 2015.

This (LAST CHANCE/FINAL DISCIPLINARY WARNING) disciplinary sanction shall remain a part of Officer Martin's SAPD employment record for a period not to exceed thirty-six (36) calendar months, measured from this award date. Thereafter this disciplinary suspension may be considered as an appropriate part of his employment history in any relevant future vocational (misconduct) involvement.

We hereby retain jurisdiction for an elapsed period of six months to ensure the proper interpretation and application of this award.

Rendered March 30, 2017.

DON B. HAYS, Hearing Examiner