

THE MATTER OF STATUTORY APPEAL
Between

**COMBINED LAW ENFORCEMENT
ASSOCIATIONS OF TEXAS
MATTHEW LUCKHURST**
Union/Employee

and

CITY OF SAN ANTONIO, TEXAS
City/Employer

Case No. AAA 01-16-0005-1986
FC-2016-086

HEARING CONDUCTED AT:

TIME: 9:00 A.M.
DATE: November 7, 8, 9, 2018
ADDRESS: 111 Soledad Street
San Antonio, TX 78205

APPEARANCES:

Hearing Examiner:

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FACTUAL BACKGROUND

PRELIMINARY STATEMENT

This is a contractual appeal pursuant to the collective bargaining contract between City of San Antonio, TX, referred to as the "City" and the San Antonio Police Officers' Association, referred to as the "Association," and included the San Antonio Police Department, General Manual, referred to as "RULES," as part of the directives to Police Officer Matthew Luckhurst, called "Luckhurst," or the "Officer" of disciplinary action by the City. The City indefinitely suspended the Officer for several alleged violations of the Rules as stated in the General Manual. On October 28, 2016, the Chief of Police William P. McManus, called the "Chief," filed a written statement or "charging letter" with the Fire Fighters and Police Officers Civil Service Commission as referred to in the TEXAS LOCAL GOVERNMENT CODE. The Combined Law Enforcement Officers of Texas, representing the Officer filed a Notice of Appeal to a third-party independent hearing examiner. The matter was not resolved and the hearing was set, witnesses were examined and cross-examined.

STATEMENT OF FACTS

The following statements are adopted and found as true as to each and all of the matters as set forth below. The foregoing statements are adopted as findings of fact and where necessary as conclusions of law. Wherein conclusions are necessary to this award, findings shall be deemed to be conclusions, and where findings are necessary to the award, any conclusions shall be deemed to be findings.

Stipulated Facts.

The parties agreed that the hearing examiner had authority to conduct the hearing and issue a final and binding decision.

Evidentiary Facts of the Incident

Luckhurst testified that on May 6, 2016, he was on bike patrol with Police Officers David Ramos, called "Ramos," and Steve M. Albart, called "Albart," when they entered a parking lot facility at the area of Houston Street and Interstate Highway 35 overpass where large number of homeless persons stay despite several "No trespassing" signs posted. Ramos testified there were religious organizations that bring prepared meals for the homeless persons. Ramos testified that he and Albart had gone under the overpass and told the homeless persons to leave this location as instructed by supervisors. Ramos testified that despite the no trespassing violations, the officers do not always arrest the homeless, but give them an opportunity to leave. Ramos testified that on the date of this incident, he had seen Luckhurst ask the homeless persons to clean up the trash. He stated the majority of the homeless have tote bags or luggage that carry their meager effects that they put unwanted food in.

Luckhurst stated that he observed trash, food containers, food-to-go bags, and toiletries littered on the ground at the location. He demanded for the persons to assist in picking up the litter. Luckhurst said that

one male was sleeping, seated, and leaning on the embankment when Luckhurst asked him to leave the location. Luckhurst stated he was moving slowly to gather his possessions. Luckhurst stated he noticed what he thought was dog feces, condoms, vomit, personal hygiene products and a discarded slice of bread. He stated the dog feces was close to his bike and feet. He stated it had occurred in the past he had stepped or ridden through feces. He stated he saw a discarded slice of bread and used it to grab the dog feces. He stated he placed the feces inside a discarded food container close by. He stated the food container which was already half eaten of a prepared meal (sandwich and an empty bag of chips). Luckhurst stated he assumed the male would pick it up, with the bread and feces, and throw it away properly. He stated it was not his intention for the feces to appear as food. He stated he viewed the food container as trash and believed the male would too as he picked up other trash around him.

Ramos testified after asking the homeless to leave the area, the majority started to comply, some complained and one male said with the F-word no, but overall they complied so he and Albart started to ride away, and waited for Luckhurst at the intersection of San Saba and Houston, which was a half block away.

Luckhurst stated to the IA investigator in his 200-OR:

While conducting a patrol-by at the intersection of Houston and IH-35, I observed several individuals loitering in the parking lot that was littered with Styrofoam food containers. Many of the loitering individuals left the area as Officer Ramos, number 1675, Officer Albart, number 121, and I approached.

We reminded the remaining persons they were in violation of criminal trespass. I noticed a piece of dog feces on the pavement and picked it up with a piece of bread, and placed it inside one of the half-eaten prepared meals.

I observed another male who had not vacated that area, and placed it in close proximity of him. The male woke up as I threw the container down on the ground. He picked up several containers as he walked away.

The male opened the container containing the feces on the sandwich bread and threw it on the ground away he smelled it.

On July 31, 2016, Luckhurst gave a response in the statement after the Garrity warning as follows:

While conducting a patrol by at the intersection of Houston and I-35 I observed several individuals loitering in the parking lot that was littered with styrofoam containers of food containers. Many of the loitering individuals left the area as Ofc. Ramos #1675, Ofc. Albart #121, and I approached. We reminded the remaining persons they were in violation of criminal trespass. I noticed a piece of dog feces on the pavement and picked it up with a piece of bread and picked it up with a piece of bread, and placed it inside of the half-eaten prepared meals. I observed another male who had not vacated that area, and placed it in close proximity of him. The male woke up as I threw the container down on the ground. He picked up several containers as he walked away. The male opened the container containing the feces on the sandwich bread and threw it on the ground away he smelt the smell. I returned to the location and properly discarded the remaining tainted food items. Ofc. Ramos #1675 nor Ofc. Albart #121 knew of my lack of judgment.

Riggs read into the record the statement Luckhurst gave in response to this question he was asked

during the investigation as "I assumed the feces being inside that discarded food container, the male would pick it up and throw it away properly . . . I viewed the food container as trash, and believed he would too. The male also picked up other trash around him." Ramos testified that this incident could have possibly happened before Luckhurst had [REDACTED] and had a [REDACTED].

Luckhurst testified that he met up with Ramos, who asked what took him so long and Luckhurst told them he had stepped in dog feces again and had ridden his mountain bike without fenders over it so he had picked it up as he explained. He testified that he had laughed when talking to them. Ramos testified that after he and Albart had waited for Luckhurst, he approached and advised them he threw some fecal matter in a Styrofoam case. Ramos testified he was taken aback for a second. He testified he said, "dude, what the f__" Luckhurst testified that Albart said "you can't be doing that. You have to go pick that up." Ramos testified that Luckhurst rode back over there and wasn't gone more than a minute when he came back and said he had thrown it away.

Ramos testified that Luckhurst's demeanor when coming from the incident with the homeless person was "Just funny, laughing" and thought it was a joke. Ramos testified a few days after the incident, he started hearing people in the locker room bringing up the facts of the incident, but in a totally different fashion than what had occurred. He testified he heard that Luckhurst had made a sandwich and force-fed someone, which he knew without a doubt was not true but Luckhurst had spread the rumors because he was a prankster. Riggs testified that several of the officers interview said Luckhurst was a jokester or prankster. Ramos testified it blew up into something that it wasn't. Ramos testified that if he had reported it, it probably would not have become what it had become, which was similar to the childhood game of hearsay, which distorts the original statement. Ramos testified that the City would not have been liable because he did not believe anything happened. Ramos testified he believed when Luckhurst left the poop it was a joke. Ramos testified that he did not believe Luckhurst had ill intent to the homeless persons. Ramos testified he heard several agencies had looked for the homeless person involved in this incident but to no avail.

Ramos testified that he was present on another occasion when Luckhurst encountered a [REDACTED] person under the bridge. He testified he was familiar with Procedure 503, which requires arrest of individual with active Class C Misdemeanor. There was a video of the encounter, which recorded Luckhurst attempting to verify that there was an active warrant for a person, referred to as Joseph Morales, called "Morales," who may be the [REDACTED] person encountered in this incident. Ramos testified that unless the warrant is confirmed or verified by the municipal court that issued the warrant, the officer is not allowed to arrest the suspect. Ramos testified that on bike patrol, the bike was without an MDT so the officer calls the bike patrol office to verify if the warrant is active.

Ramos testified that Luckhurst, pursuant to 410.13, should have had his body cam turned

on when he gets off his bike and interacts with a citizen or responds to a call, in which a key card was made up from the dispatch. The video recording on the body cam is docked at the end of the shift to be available to be reviewed and retained for a minimum of one-hundred and eighty days with no officer able to delete it.

Ramos testified that on July 31, 2016, or at the end of July or early August, there was a roll call in which the incident with the fecal sandwich was mentioned. Ramos testified that Luckhurst said they are talking about me. Ramos testified that Luckhurst did not admit to the allegations stated in the roll call but that he was the one being mentioned.

Patrol Officer Michael Marotta, referred to as "Marotta," testified he was not at the location of the incident but had a close friend, Rodriquez, who repeated a rumor of what happened without reporting it to his supervisor. Marotta testified that Rodriquez told Marotta that he had heard that Luckhurst had taken two slices of bread, got feces, put into the bread, handed it to a homeless person, who bit it, was disgusted and spit it out. Marotta testified he brought it up to his supervisor because it was so egregious. Marotta testified that on August 9, 2016, he gave his statement to IA. Marotta testified that on July 31, 2016, he met Luckhurst in the sergeant's office and they discussed the incident with Luckhurst describing the incident to him. He stated that Luckhurst said he had put dog feces into a single slice of bread and handed to a homeless person in a tray. He stated Luckhurst stated the homeless person opened the tray and threw it away after seeing what it was, which he considered had happened in the summertime. Marotta stated that the story told him by Rodriquez was completely unbelievable and the one by Luckhurst was 180 degrees different from what he had heard from Rodriquez.

Sergeant Phillip Misek, referred to as "Misek," who was the night shift supervisor for the bike patrol. Misek filed a formal complaint notice based on the statements of Marotta, who repeated what he had heard. Misek reported to Lieutenant Carrillo, who talked to Luckhurst. Misek testified it was a fair statement that if the incident had occurred eight (8) months' prior it would have been something that would have come up. Misek testified that Luckhurst had an [REDACTED] injury [REDACTED] that prevented Luckhurst from riding a bike and he was on desk duty for a period of time. Misek testified that no homeless person reported Luckhurst feeding a homeless person a fecal sandwich.

Misek testified that Luckhurst was required to turn on a body cam on when he responds to a call. He testified there is no need to turn on while he is on his bike but to engage any time he makes contact with a citizen. Misek had the ability to preserve body cam footage back to February 1, 2016, however, there was no recorded incident.

Sergeant Michael Riggs, referred to as "Riggs," is the sergeant in Internal Affairs assigned to investigate this incident. Riggs testified to the various reports, correspondence, statements, and the other

documents created by him. He testified that there were respondent and nonrespondent reports. He testified there could have been a violation filed for violation of the body cam procedure. Riggs testified that the three charges were sufficient to support an indefinite suspension. There was no video footage covering the incident except regarding the accusation of Luckhurst's failure to take action on an active warrant. There was no footage on the victim of the fecal sandwich incident. The complaint was an administrative complaint to which he was assigned. Once Riggs completed his investigation then the officers accused are called into his office and given access to the information before they are questioned. Riggs testified that the 200-OR's were completed the night the incident was discovered by the chain of command. The next step after interviews of the officers is to forward to the lieutenant and captain in the IA. He testified the case is then put on the schedule of the Advisory Action and Administrative Review Board made up of the deputy chief, captain, lieutenant, sergeant, detective, two patrol officers and seven (7) civilians to whom the accused officer may tell his side of the story. Riggs testified that six sworn and three civilians sustained the RULE 3.04C violation with one civilian walking out. He testified that the range of discipline was six officers and three civilians for indefinite suspension. Riggs testified that six officers and three civilians voted to sustain RULE 4.10E with six for five days and two civilians for indefinite suspension. He testified that on RULE 4.03 six officers sustained with three civilians sustaining with six officers for a written reprimand, one civilian for five-days suspension and two for five days. Riggs testified that the Chief was the final decision maker.

Riggs testified that in the search for the victim for about roughly eight working days, a little over a week and a half, 12-day period, he went out in the evening and early morning hours before work in the area of this incident. Riggs testified that he tried to contact anyone and everyone to see if anyone had been talking about it or could lead to the victim who was subject to this investigation. He was referred to Haven For Hope where he spoke to several people in a diligent search for the alleged victim. The case packet from Riggs does not contain any statement of the canvass looking for the victim.

Patrol Officer Richard Boyle, referred to as "Boyle," was on bike patrol the entire year, 2016. He testified he submitted a report of his understanding of the incident. Boyle was in the civil disturbance unit, which is a prestigious unit. He testified he was at the roll call on July 31, 2016, when he heard Misek describing the incident. He testified that after roll call, he met with Luckhurst, who stated it was he who was discussed in the roll call, but that he had not fed the sandwich to a homeless person. Boyle testified that Luckhurst stated he put the tainted sandwich on a food tray and commanded the homeless person to pick it up, which he did but discarded when he saw what it was. Boyle testified that Luckhurst told the story to others, which got embellished each time he told it. Boyle testified that Luckhurst was telling the homeless person to discard the trash.

Luckhurst stated that in hindsight he should have thrown the "sandwich" away himself rather than believing the homeless male would throw it away. Luckhurst testified that his initial intent was that it was

not a joke. Luckhurst testified that he did not "provide" the sandwich to the male. The members of the Police Department gossiped about this incident throughout the department and it was reported to the news outlets. Luckhurst did not immediately report the incident because nothing happened that would require him to report. Riggs testified it was his duty, pursuant to Procedure 207.04, to evaluate allegations and identify issues by looking at the motives, defenses, and excuses for the acts of the officer. He testified that concluded that Luckhurst had no viable defenses.

Riggs reviewed some video, which showed at least two (2) homeless persons, one of which was a male dressed in female attire. Luckhurst asked for the identification, which was stated to be Morales. Luckhurst requested dispatch to search under that name, which the dispatcher stated there was a warrant search by the dispatcher. The dispatcher confirmed that there was an active warrant for a nonviolent traffic violation. Luckhurst informed the male about the warrant and recommended it to be taken care of before saying "Take off." There was an officer in a car with a MDT, who another bike patrol officer conveyed the incident with the [REDACTED] male and stated there were no prostitution warrants for Morales.

Luckhurst responded to an IA inquiry that he had been trained previously by a Field Training Officer that one active municipal court warrant for a nonviolent offense can be used as a tool in later conduct for himself and other officers. Luckhurst stated he would rather utilize his time for potentially more serious offenses, especially on a summer weekend, and further he understood the policy states to arrest for active municipal court warrant he did not feel necessary to over criminalize the [REDACTED] individual. He stated his motivation being that the person could remain free from incarceration and be informed Morales go away but to get the warrant taken care of.

The Chief testified that he was to maintain good order and discipline. He described the process as to start with a complaint, investigated by IA, then presented to Complainant and Administrative Review Board, with their recommendation to him, with a Loudermill hearing, then he provided a charging memo of notice of corrective action to the Civil Service Commission. The Chief testified that the action by Luckhurst violated RULE 3.04. The Chief stated his belief was that Luckhurst intent was that the homeless person would try to eat the fecal sandwich, which would bring discredit on him and the City. He testified that the officers who prepared the statements as nonrespondent were "horrified" that one of their members would do that, because it would bring disrepute on the department and the action was inhumane. The Chief testified that this unit was termed as a directive patrol, similar to pass-by.

The Chief did not consider Luckhurst's action as a joke. He testified that if this individual had consumed that, it would have caused serious health issues with the City being liable. The Chief testified that the City had a guiding principle of mutual respect by treating everyone with dignity and fairness. This guiding principle is on placards all over the city.

The Chief testified that Luckhurst obtained verification from the dispatcher and should have arrested Morales. The Chief testified that Luckhurst did not answer the questions in the IA interview when the warrant was not verified.

The Chief recognized the vote by the CARB as recommending indefinite suspension. The Chief testified that he averaged out the votes; however, these were in favor of sustaining the discipline. The Chief testified that he cannot remember talking to the chain of command for Luckhurst. The Chief testified the case was so egregious that he does not want officer with this inhumanity on the force.

The Chief testified that he recognized Rule 4.10E that required the officer report a potential liability to the City. The Chief recalled the case with [REDACTED] who was not disciplined for obscenity but the Chief did take corrective action. He testified there was a distinction between feeding someone a fecal sandwich and engraving a penis on the action of a pistol. The Chief recognized that a mistake in a report does not require a negative finding and a lapse in memory is not indicative of untruthfulness.

Sergeant Richard Fischer, referred to as "Fischer," testified he was a supervisor sergeant since 1996. He testified that Luckhurst had a solid work ethic, was a young energetic man, and his demeanor was always polite. He had seen some information on television about the incident. He testified he had never seen the conduct by him that was alleged in this case. Fischer testified that Luckhurst enforced the law as given to him.

Sergeant Wayne Shoquist, referred to as "Shoquist," was sergeant of the gang unit. He knew Luckhurst as an outstanding officer, motivated to enforce felony warrants. He testified that Luckhurst would not give a fecal sandwich to a homeless person.

Police Officer Rodney Lucas, called "Lucas," testified he did not have any issues or problems with Luckhurst. He testified he would not pick up dog feces but he would move it to prevent stepping in it.

Sergeant Richard Silva, referred to as "Silva," was the sergeant supervising Luckhurst. He testified Luckhurst was a very good officer.

Police Officer Harley Rose, referred to as "Rose," was jokingly referred by Luckhurst as the "Old Man." Rose testified that he knew the incident with the fecal sandwich had occurred before June 17, 2016, because that was when he was on vacation. He testified he would not have been able to hear it if after May, because he heard it in the office. He testified that Riggs was trying to figure out the block time so that he could check the body cam video to determine if Luckhurst was riding the bike. Rose testified he heard about the incident at least three months prior to June 17, 2016. He testified that if June 17, is the sixth month of

the year, simple mathematical analysis, indicated that earliest it could be heard about it according to the report would have been March 2016. He testified that if Luckhurst injured his [REDACTED] attending martial arts class, and he was put on light duty, he could not have been riding his bike on the date alleged. Rose testified he would have been impossible for Luckhurst to have committed the acts alleged between March 16, 2016 and July 31, 2016.

Police Officer Juan Pena, referred to as "Pena," testified that Luckhurst conducted himself like any other police officer, dealing with a stressful situation. He testified that stepping in the dog feces was not very pleasant experience. He testified that an officer coming across feces would act proactive to prevent it from being a hazard to other officers. He testified that Luckhurst would not act malicious toward a homeless person.

PARTIES' POSITION

CITY'S POSITION

The City argued that Luckhurst violated Rule 3.04, 4.03, and 4.10, based on a factual basis as stated in the written statement pursuant to Chapter 143. The City argued that Luckhurst's appeal failed because he committed the acts for which he was accused and the mitigating factors urged do not explain, excuse, or justify his behavior, and his defense of a statute of limitations is waived, unproven, and disproved. The City further stated Luckhurst failed to establish a case of disparate treatment.

The City argued that the factual basis for the rule violation was proven by a preponderance of evidence as required by Section 28-10-C of the CBA. The City relies on the 200-OR stated by Luckhurst.

The City argued that the main defense is that the occurrence happened prior to the 180-day statute of limitation. The City argued the defense fails because Luckhurst did not present it until the time of the arbitration, and even if the defense is not waived, the City has ample evidence to show the events more likely than not did in fact occur within the applicable time frame.

The City argued that the CBA requires the incident occurred within 180 days of the discipline. The City argued that it must prove the occurrence in question happened on or after May 1, 2016. The City argued that Luckhurst testified, and it was not rebutted, that he was on light duty April 6, 2016, until June 14, 2016, and the statements were gathered on July 31, 2016, with the City being required to show the incident occurred between June 15, 2016, and July 30, 2016, with Albart answering he believed it occurred "1-2 months prior to July 30, 2016. The City argued Ramos stated it occurred in June or May. Luckhurst stated he cannot recall the exact date and time. Luckhurst testified he believed it happened prior to a [REDACTED] he had in early April 2016. The City argued Ramos stated it was possible it occurred prior to [REDACTED] in April 2016, possible in January or February 2016.

The City argued that Luckhurst will assert that the time frame is supported by the testimony of Rose and Pena. The City argued that the strongest evidence is by answers given to individuals at the scene. The City argued Ramos said it occurred in May or June. The City argued the evidence presented by Riggs was his time line based on the interviews. The City argued that Craig Rodriguez and Boyle stated the incident was within the 180 days. The City argued Boyle was not malcontent or have ulterior motives.

The City argued that Luckhurst makes no mention of his certainty at the arbitration of the events that happened before April, only that it was "before July 9." The City argued that Luckhurst admits he did not tell the Chief at the Loudermill hearing of this defense.

The City argued that the 180-day works as a statute of limitation and established a time limit for disciplining officers based on the date when the claim accrues, citing *Barras v. Barras*, 396 S.W. 3rd 154 (App. 14 Dist. 2013) and *Metal Structures Corp. v. Plains Textiles, Inc.*, 470 S.W.2d 93, 99 (Tex.Civ.App.-Amarillo 1971, writ ref'd n.r.e.). The City argued that the affirmative defense must be pleaded or it is waived, citing TEXAS RULES OF CIVIL PROCEDURE, Rule 94, which provides the opposing party with fair notice of the defensive issues to be tried and to allow time to determine what proof may be needed to meet the defenses pleaded, citing *Musso v. Cronley*, 422 S.W.2d 840 (Civ. App.1967) and *Reid v. Associated Employers Lloyds*, 164 S.W.2d 584 (Civ. App.1942, writ refused). The City argued the affirmative action was waived. The City argued that in the alternative, the lengthy delay to invoke his defense should be seen as reason to doubt the creditability of Luckhurst. The City argued that Luckhurst said, in writing, that if he becomes aware of any additional information relevant he would bring it to the IA. The City argued that Luckhurst's statement in September 2016 was at best that he did not know the date. Luckhurst did not offer an explanation of how his memory was refreshed. The City noted that Ramos waffled in his testimony by raising the possibility it could have been earlier than April.

The City argued that Luckhurst had two witnesses who offered testimony they heard about the incident earlier than April but both were close friends of Luckhurst. The City argued that Rose was a close friend with Luckhurst and gave the only exculpatory testimony made after the others statements. The City argued Pena did not make his statement that the incident was during Fiesta to IA or a supervisor.

The City argued that Luckhurst stated there was body-camera footage that would clear him of the charges, which he did not tell to IA. The City further argued Riggs did not find any footage of video recording of Luckhurst riding his bike in the alleged time.

The City argued the evidence supports finding that Luckhurst violated RULE 3.04 with little debate over the severity of his actions. The City argued that his actions were called into question immediately after the incident. The Chief testified it was clear to him that this was a serious violation. The City pointed out

that all the officers agreed the homeless person should not be humiliated and the Chief relied on Luckhurst own testimony as the most damning evidence.

The City argued that the violation of RULE 4.10 tracks closely to the other facts. The City argued that the RULE mandates the member *shall immediately report* incidents that *may be liable*. The City argued that Luckhurst never reported it.

The City argued that RULE 4.03 is an unconnected incident that occurred on July 8, 2016. Luckhurst admitted he failed to make the arrest on an active warrant but argued the warrant was not verified. The City does not claim this violation standing alone supports the indefinite suspension.

The City argued Luckhurst raised an issue of disparate treatment. The City argued the standard of review was articulated well by Arbitrator Louis V. Baldovin, Jr. in *In the Matter of the Arbitration between Officers R. Hawkins and D. Howard and City of San Antonio*, AAA Case No. 71 390 00014 91 (Arb. Baldovin 1991), which stated the facts in that case did not evidence discipline imposed exceeded the limits of reasonableness. The City argued that allegation of disparate treatment must show the employees are similarly situated and misconduct was of comparable seriousness, citing *Ysleta Independent School District v. Monarrez*, 177 S.W.3d 915, 918 (Tex.2005), quoting *Smith v. Wal-Mart Stores, Inc.*, 891 F.2d 1177, 1180 (5th Cir.1990). The City argued Luckhurst was different from [REDACTED] in that [REDACTED] was a captain and Luckhurst was a Patrol Officer and [REDACTED] discipline was sexual in nature.

The City argued the Chief and the CARB agreed to the indefinite suspension for some of the charges. The Chief described the conduct of Luckhurst as “inhumane” and “certainly not conduct you would expect from a police officer.”

ASSOCIATION'S POSITION

The Association argued that the Chief's letter of suspension dated September 28, 2016, relied on the testimony of Riggs, would be barred from suspending Luckhurst pursuant to Article 28, Section 19 of the CBA. The Association argued that the Chief alleged that the incident was as stated by Luckhurst in his IA interview and response to questions. The Association argued that the allegations were untrue as would have been confirmed if the victim had been discovered by a diligent search by Riggs. The Association argued there was no victim or complaining witness.

The Association argued the City has the burden of proof because the 180-day is not a statute of limitations issue but is an evidentiary issue, with the proponent of the evidence bearing the burden of proof, and the City failed to meet the burden. The Association argued that although Luckhurst does not have the

burden, he proved this without any contravention.

The Association argued the City is without authority to introduce the encounter by Luckhurst with the alleged victim as required by contractual evidentiary limitation set forth in the CBA at Article 29, Section 19. The Association argued Luckhurst reviewed his medical records and denied the May 6, 2016, encounter, which happened before March 16, 2016, except the violation of RULE 4.03 on July 8, 2016.

The Association argued that Luckhurst denied the encounter on May 6, 2016, because records show he injured his [REDACTED] on March 16, 2016, which required [REDACTED] on April 6. The Association argued the May 6 violation was wrong because he could not ride the bike between March 16, 2016, and June 14, 2016.

The Association argued that if the City stated the incident happened between June 15, 2016, and July 31, 2016, Riggs could have located the Body Worn Cameras footage to depict the alleged encounter. The Association argued that in addition Rose heard the embellished story from Luckhurst before he went on vacation on the June 17, 2016, and heard the story at least three (3) months before such dates.

The Association argued Rose stated he started vacation June 17, 2016, and heard the story at least three (3) months ago. The Association argued their story was corroborated by the martial art's class, which Rose had extensive information about their experience in Jiu Jitsu class and he heard the story in relation to his vacation. The Association stated Rose said the injury happened in March 2016. The Association argued that after the injury, Rose did not see Luckhurst riding his bike because he was unable to ride the bike as he was on light duty. The Association argued that Rose knew Luckhurst had [REDACTED] with [REDACTED] for [REDACTED]. The Association noted that Rose knew it was impossible for Luckhurst to have committed the act alleged with the homeless person between March 16, 2016, and July 31, 2016, and his story was corroborated as Luckhurst having had [REDACTED]. The Association argued that Misk confirmed the dates by Luckhurst being unable to ride his bike while recovering.

The Association argued that Pena refused to enroll in Jiu Jitsu because to the injury by Luckhurst and he recalled it during Fiesta which spanned April 14 and April 24, 2016. The Association argued that Pena confirmed the date of the incident in March. The Association argued the City failed to refute allegations that incident was before March 16, 2016. The Association argued Misk had the ability to pull attendance and duty assignments for Luckhurst for March 16, 2016, until June 14, 2016 to show Luckhurst riding a bike if necessary to refute Luckhurst's claim.

The Association argued the City failed to follow IA Procedure 207, Anticipate Defenses, which 207.04A states for IA to consider Luckhurst was on or off duty, which Riggs failed to investigate if he was out due to [REDACTED]. The Association argued that the City did not consider criminal violations. The

Association argued that Riggs did not investigate the possibility if Luckhurst had his body cam activated to show when he was not on light duty from March 15, through June 14, 2016. The Association offered Riggs testimony that he did not make an effort to determine whether the incident happened before Luckhurst had [REDACTED].

The Association argued that the City failed to perform adequate investigation as required by Procedure 410. The Association argued that Riggs testified that he had authority to order Digital Media Evidence from February 1, 2016, to July 31, 2016, to determine what happened during that time by researching the contacts. The Association argued the City has no idea when the alleged events for the first allegations with the homeless man happened because the witnesses stated, "I assume" or speculate. The Association argued the Chief stated Procedure 410.06(D)(3)(b), (c) mandated the body cam be activated when Luckhurst talked to citizens, which could have been authenticated to show he was on duty at the alleged appropriate times.

The Association argued that the City is without authority; to complain of acts which purported to happen on May 6, 2016, because the 180th day following March 16, would have been September 12, and the Chief's written statement was served on Luckhurst forty-six too late, with the City failing to produce any evidence that Luckhurst's conduct was continuous activity or criminal conduct.

The Association argued that the CBA states any deadline or time restriction may be modified; however, neither party may be compelled to waive its right to insist upon the deadline provided by the CBA. The Association argued the City and the Chief are precluded from introduction of evidence or otherwise complain of any acts earlier than the one hundred and eightieth calendar day immediately preceding the date in which the Chief suspends or demotes an officer. The Association argued this language imposes an evidentiary rule of admissibility upon the City and is not a statute of limitation but the employee bears no burden of proof if the City cannot meet the evidentiary requirement of admissibility. The Association argued that there was no basis alleged in the written statement to extend the 180 days and there was no alleged criminal conduct.

The Association alleged that Marotta, and later, the Chief embraced the rumor of the most egregious conduct. The Association argued that Marotta admitted it was the act not the rumor that was egregious as it is agreed that had it been given to throw away, it would have been acceptable; however, Luckhurst embellishes and exaggerates the facts. The Association argued that there were no eye witnesses other than Luckhurst at the hearing. The Association argued the City lacked concrete evidence of the encounter, and puts events in a false light. The Association argued that the totality of the allegation of making a sandwich and providing it to a homeless person was false as the City put the events in false light. The Association argued that the testimony of Luckhurst said there was a problem with trash was corroborated by the

testimony of Boyle, who said that the trash problem was out of control that lead Luckhurst to direct someone to clean up the trash. The Association stated Luckhurst was trying to clean up in discarding the dog feces.

The Association argued that the bread was a tool in lieu of a latex glove to pick up trash not make a sandwich. The Association argued that Ramos confirmed there was abandoned food as trash. The Association argued that Luckhurst had stated that he had stepped or ridden through feces, condoms, vomit, or personal hygiene products, which he repeated to Ramos and Albart, who remember his comments. The Association argued the City was operating under the false assumption that the homeless persons were starving and he clearly discarded the material.

The Association argued that the allegations were understood by all as a wild story and hearsay that was distorted. The Association argued that Luckhurst was not heartless or inhumane as was belied by the testimony of those who know Luckhurst and by his own explanation of what actually happened.

The Association stated the IA file included 17 statements from witnesses the City failed to call, which the Chief testified contrary to the 17 statements in the IA file regarding Luckhurst joking, trying to be funny, playing jokes, telling goofy stories, joking with unbelievable stories, use of odd sense of humor, use of dry sense of humor, and cannot be taken seriously. The Association argued that the failure of party to call an available witness raises a presumption that the witness' testimony would be adverse to the position of the party that could have called him. The Association argued that the Chief claimed he read the IA file and officers who wrote reports were horrified at what Luckhurst did except that none except possibly Marotta ever stated they were horrified.

The Association argued that in reality this is a "no witness" case, wherein there is no victim or complainant, citing *In re: City of San Antonio, Texas and Individual Grievant*, AAA Case No. 71-390-0313-88, 94 LA 147, 94 Lab. Arb. (BNA) 147 and *In the Matter of Arbitration City of San Antonio, Texas and San Antonio Police Officers Association (Grievance G)*, AAA 71 390 00242 94. The Association argued that these cases indicated no witness to the accused event or was a "swearing match."

The Association argued that hearsay alone could not be used to support the charge, citing *Blanchard v. Firemen's Civil Service Commission of the City of Fort Worth*, 577 S.W.2d 337 (Tex.App.-Fort Worth, 1979, rev'd on other grounds). The Association further argued that the opposing party is adequately protected against the loss of the right to cross-examination.

The Association argued that the Chief's allegation of Luckhurst's failure to arrest Morales for municipal tickets would be a violation of RULE 4.03; however, the Chief failed to charge Luckhurst with violation of Procedure 503, which is a more specific rule. The Association argued the failure to cite the

specific rule should exonerate Luckhurst on this allegation because it fails the test of reasonableness citing, NORMAN BRAND AND MELISSA H. BIREN, DISCIPLINE AND DISCHARGE IN ARBITRATION, 2-64 (Bloomberg BNA 2016).

DISCUSSION

JURISDICTION AND DUE PROCESS

The parties entered into a collective bargaining agreement that sets forth that Luckhurst must perform the conditions precedent to appeal an indefinite suspension pursuant to the contract law. The hearing examiner was authorized to conduct the hearing. There were no issues of jurisdiction asserted by the parties.

STATED AND ALLEGED DISCIPLINARY CONDUCT

The legislature provided for the continued tenure of police officers, conditioned upon provisions for good behavior and subject to the City's showing cause for disciplinary action, as set forth in the Code, § 143.051. Pursuant to the Code, the City empowered the Civil Service Commission to promulgate rules and regulations, as "CSC Rules." The City alleged Luckhurst 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 as follows:

Violation of Applicable CSC Rule

This police department CSC Rules stated as violated by Luckhurst were as follows:

Violation of RULE 3.04 - RESPONSIBILITY TO SERVE THE PUBLIC C. CONDUCT AND BEHAVIOR

This rule states an officer shall serve the public through direction, counseling, assistance, and protection of life and property. The rule further states that members shall respect the rights of individuals and perform their services with honesty, sincerity, courage, and sound judgment.

The rules further states that 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. By his admission, Luckhurst place dog feces between two (2) slices of bed and placed the "sandwich" close to the body of a homeless male. It is permissible for the officer to request that the homeless person to pick up and discard the trash but this loose and uncaring conduct, as stated by the Chief, violates the mission of the City.

The City accused Luckhurst for his handling of the fecal sandwich in that he did not follow the ordinary and reasonable rules of good conduct and behavior, and committed an act intending to bring reproach or discredit on themselves or the department. This violation is support by Luckhurst's statements and testimony. He may not have intended to commit an act to bring reproach or discredit but he in fact according to his admission of his acts, should have been aware that his action could bring reproach and discredit because it was an act against a homeless person. Further, Luckhurst began to spread the story with some embellishment. The story got worst and worst as repeated. The Chief was correct in sustain this charge.

Violation of RULE 4.03 - REQUIREMENT TO TAKE ACTION

This rule states that on-duty members are required to take prompt and effective police action conforming to department polices with respect to violations of laws and ordinances and matters affecting public safety coming to their attention, or of which they have knowledge. On July 8, 2016, the Officer came into contact with Joseph Morales, called "Morales," near the Houston Street and Interstate Highway 35 overpass. The Officer wore a body cam which recorded this incident whereby the Officer admonished Joseph Morales, called "Morales," regarding Criminal Trespass and after a warrant check determined that Morales had an outstanding (active) warrant for his arrest and yet told him to leave the location and take care of the warrant. Luckhurst failed to take prompt and effective police action by arresting Morales. The City accused Luckhurst that on July 8, 2016, he came into contact with Morales. The warrant by definition would have instructed any law enforcement officer to execute by arresting Morales. Riggs agreed that it is mandatory for an officer to confirm the status of the warrant from the issuing agency. The video shows that Luckhurst confirmed with the dispatcher that the warrant was active, which required Luckhurst to execute the warrant. The evidence is sufficient to sustain this accusation within 180 days.

Violation of RULE 4.10 - DUTY TO REPORT INCIDENTS E. INCIDENTS WHERE THE CITY MAY BE LIABLE

This rule states that members shall immediately report all incidents in which it appears the City of San Antonio may be liable for damages. The failure of Luckhurst to report this incident which could have resulted in the City being liable for possible sickness of the homeless person or degrading comments about the attitude of the department to homeless persons. The duty to report would have occurred immediately after the incident with the fecal sandwich. The only problem with this Rule is the debate over the determination by the officer if the City may be liable in a given situation. There is no question but that the City would be liable for an officer "providing" a fecal sandwich to a homeless person but Luckhurst actions in handling the tainted matter are sufficient to require his reporting the matter at some point which he did not do; therefore, the Chief is correct in assessing discipline for this matter. The evidence is sufficient to sustain the charge.

Just Cause for Disciplinary Action

The Chief's reasoning was appropriate and his assessment of indefinite suspension was reasonable based on just cause for Luckhurst's action whether intentionally or grossly inappropriate, regarding the fecal sandwich being placed in the container close to the homeless person. Further, the requirement that he take action on the active warrant, and failure to report the incident involving the homeless person gave just cause for disciplinary action. The City agreed that Luckhurst's failure to take action on the warrant was not sufficient to support termination and majority of CARB said written reprimand. Therefore, there is just cause for assessing indefinite suspension for Luckhurst actions with the fecal sandwich and the homeless person but not for indefinite suspension for requirement to take action on the active warrant. The failure to report the incident was not considered as serious as the acts against the homeless person but the violation resulted but the failure to report prevented, the City from the timely investigation of this incident had it been known by the supervisors. There was a great deal of harm by the rumors in the department that could have been avoided. The City relied on the cumulative effect of the three violations for the termination. However, the fecal sandwich matter is the only offense that standing alone support's termination according to the review and testimony.

DISCIPLINARY ACTION

Due Process and Procedural Requirement

The written statement or charging letter assessed discipline for Luckhurst's actions with the fecal sandwich, failure to take action on the active warrant, and failure to report the incident with the homeless person. The Association on behalf of Luckhurst argued there was a violation of procedural due process as stated in the so called "180-day rule." All of these violations were alleged to have been committed when the incident with the homeless person occurred except the failure to take action on the active warrant. Therefore, the failure to assess discipline within the 180 days prohibits the introduction of evidence or complain of the fecal sandwich incident or failure to report. The only violation permitted as within the 180 days is the failure to take action with the discipline assessed as written reprimand or five (5) days temporary suspension. The indefinite suspension is overturned due to the violation of the 180-days prohibition.

The rule is an affirmative defense requiring the officer to raise the issue by offering a prima facie or going forward with the evidence that gives rise to the issue that the incident requiring discipline occurred earlier than the 180 days with the burden shifting to the City to bear the burden of proof on the issue as a whole. In this case the Association offered the testimony of Rose and Pena, which not only gave rise to the issue but carried the day on the burden of proof.

The parties entered into a collective bargain agreement setting forth the rights and duties of the

parties. The authority offered by the City as requiring the Association to bear the burden of proof includes Rule 94, is not made part of the CBA as a contractual requirement agreed to by the parties. The authority offered by the City that the Association must prove the 180-day violation is the authority for litigants in general as TEXAS RULES OF CIVIL PROCEDURE, Rule 94 and Section 16.051 of the Texas Civil Practice and Remedies Code as well as the common law in *Barras v. Barras*, 396 S. W. 3d 154 (App. 14 Dist. 2013), *Metal Structures Corp. v. Plains Textile, Inc.*, 470 S.W.2d 93, 99, *Musso v. Cronley*, 422 S.W.2d 840, and *Woods v. Williams M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex.1988). The legislature provided for the continued tenure of a police officer dependent upon his good conduct and behavior as set forth in TEXAS LOCAL GOVERNMENT CODE, Chapter 143, as parties are allowed to be governed by a collective bargaining agreement as is the case in this dispute. Any reference to affirmative defenses in divorces, adverse possession, special issues, or other cases may be cited as persuasive but are not authoritative as precedence.

The City relied on the testimony of Ramos and Albart while the Association relied on the testimony of Rose and Pena on the factual dispute of when the incident actually occurred. The City's only reservation with the testimony of Rose and Pena was that they were close friends of Luckhurst. The argument is not persuasive as they do not show any untruthness, inconsistency, or discrepancy in Rose or Pena's testimony. Further, the IA had ability to corroborate testimony by means of having the video tape preserved and reviewed to show if Luckhurst was riding his bike during the time the City relates that the incident occurred. All three officers at the location of the incident on the date of the incident were required to have a body cam activated when running off the homeless people, who were trespassing. Riggs did not investigate into the time of the [REDACTED] and Luckhurst being out of work during the time alleged as the date of the incident. Riggs testified he did not know for certain if the incident happened before Luckhurst [REDACTED]. Riggs testified that July 31 was the date the IA received the notice of the incident but he did not research whether there was any video recording of Luckhurst encountering a homeless person between February 1st and May 6th. Riggs testified he could have requested the video tape on July 31st. Boyle testified he remembers Luckhurst on light duty but does not remember if the incident was before or after.

The Association, on behalf of Luckhurst, raised the issue of disparate treatment, pursuant to *Ysleta Independent School District v. Monarrez*, 177 S. W. 3rd 915 (Tex. 2005) in which it is stated that "Similarly situated" claims rely on holding that "[t]he legislature intended to correlate state law with federal law in employment discrimination cases," found in *Wal-Mart Stores, Inc. v. Canchola*, 121 S. W. 3rd 735, 739 (Tex.2003); *NME Hosp., Inc. v. Rennels*, 994 S. W. 2d 142, 144 (Tex. 1999), in that employees are similarly situated if their circumstances are comparable in all material respects, including similar standards, supervisors, and conduct. To prove discrimination based on disparate discipline, the disciplined and undisciplined employees' misconduct must be of "comparable seriousness." Although "precise equivalence in culpability between employees is not the ultimate question," *McDonald v. Sante Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976), the Fifth Circuit has held that to prove discrimination based on disparate

discipline, the plaintiff must show "that the misconduct for which [he] was discharged was nearly identical to that engaged by both employees. *Smith v. Wal-Mart Stores, Inc.* 891 F.2d 1177, 1180 (5th Cir. 1990) (quoting *Davin v. Delta Air Lines, Inc.* 678 F.2d 567, 570 (5th Cir. 1982)). In the [REDACTED], a captain, was involved in a penis having been engraved on the pistol action as a joke but Luckhurst was a patrol officer and involved the maltreatment of a homeless person. These are simply not alike.

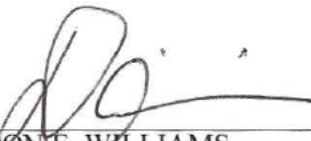
The discipline of Luckhurst is reduced to five (5) days suspension due to the only offense allowed under the 180 days is the failure to arrest Morales. The only offense properly assessed by the Chief that can not be considered into evidence under the 180-day Rule is his failure to take action on the warrant. Luckhurst must be fit for duty due to the length of time since the discipline.

AWARD

Just cause existed to support the five (5) days suspension.

1. Luckhurst received reasonably and appropriate due process in the disciplinary process.
2. The indefinite suspension was not supported by admissible evidence.
3. The hearing process did developed matters which justify and compel modification of the indefinite suspension.

DATED this 10th day of March 2018.



DON E. WILLIAMS
Hearing Examiner