WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Arbitration between

Yakima Police Patrolman's Association

and

Case No. 134804-P22

MG Discipline

City of Yakima,

AWARD

Appearances:

For Yakima Police Patrolman's Association:	Cline & Associates, by Cynthia McNabb
For City of Yakima:	Summit Law Group PLLC by Sofia Mabee with Jesse Taylor on the brief
Arbitrator:	Susan J.M. Bauman

Pursuant to the terms of the collective bargaining agreement between the Yakima Police Patrolman's Association, hereinafter YPPA or Association, and the City of Yakima, hereinafter City, Yakima or Employer, and the laws of the State of Washington, the undersigned was appointed to hear and decide a dispute between the parties regarding discipline of MG. The matter was held virtually, via Zoom, on April 13 and 14, 2022. Both parties had the opportunity to present evidence and make arguments. The hearing was transcribed. After the close of the hearing, the parties submitted the matter on written briefs which were received by June 10, 2022, whereupon the record was closed. Based upon all the evidence presented and arguments made, the Arbitrator renders this Opinion and Award.

ISSUE

The parties were unable to stipulate to the issue. The YPPA frames the issue as follows:

> Whether the discipline imposed, which was a two-week suspension, along with a performance improvement plan and mandatory training, and removal of a squad

comports with the collective bargaining agreement under Article 11 and the just cause provisions therein.

The City frames the issue as:

> Was the 80-hour suspension of Sergeant MG supported by just cause? If not, what is the remedy?

The parties stipulated that the undersigned would frame the issue based on the evidence and testimony presented. Accordingly, the issue to be decided is:

> Was the discipline imposed on MG supported by just cause? If not, what is the remedy?

RELEVANT PORTIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 10 – MANAGEMENT RIGHTS

The City recognizes that the exercise of management rights shall not conflict with specific provisions of this agreement. The Association recognizes the exclusive right and prerogative of the City to make and implement decisions with respect to the operation and management of the Police Department. Such rights and prerogatives include, but are not limited to, the following:

. . .

(7) Discipline personnel for just cause.

. . .

ARTICLE 11 – EMPLOYEES' RIGHTS

. . .

Section 1 – Discipline and Discharge. All discipline must be based upon just cause. Any discipline shall be imposed in a manner least likely to embarrass the employee before the public or other employees. Any disciplinary action imposed upon an employee may be the basis for a grievance through the regular grievance procedure.

Disciplinary actions or measures shall include the following: verbal reprimands; written reprimand; transfer for disciplinary reasons; suspension; demotion, or discharge. Discipline shall be progressive in nature where appropriate.

FACTS

The City of Yakima, Washington operates a police department which is budgeted for 144 sworn officers, including a Police Chief, two (2) captains, several lieutenants, sergeants and police officers. There are five (5) bargaining units, including the YPPA which represents the officers and sergeants. The grievant herein, MG, began his employment with the Yakima Police Department in March 2010. He started as an officer in the patrol division. Beginning in 2012, he had ancillary duties in SWAT and as an FTO. He became a firearms instructor in 2014. During that year, he moved to the gang unit and served as a task force officer with the FBI. In December 2018 he was promoted to the position of Sergeant. Prior to his employment with the Yakima Police Department, MG had served in the National Guard and, in 2005, began active-duty service as a commissioned officer. He held the ranks of second lieutenant through captain and separated from the Army in 2009 as a captain.

Prior to the incident giving rise to the instant grievance, MG's personnel file reveals an officer deemed to meet or exceed expectations, with few exceptions.[1] His 2014 evaluation indicates that he received at least three (3) honorable mentions in that year. Overall, MG is perceived as an asset to the Yakima Police Department.

The essential facts of this case are not in dispute. On July 19, 2020, MG was on duty as the D-Squad (Gold Team) Sergeant. At approximately 3:41 AM, Officer IA and Officer LH were dispatched to a welfare check at 1504 N. 1st Street, at the Days Inn Hotel. From the telephone number of the 911 caller, who had hung up before speaking with the 911 operator, the officers knew the owner of this number had been involved in a domestic violence (DV) situation prior to this time. Therefore, they anticipated another DV. IA went to the hotel office to see what room the caller was in. LH encountered a thirteen-year-old female in the parking lot. He inquired if she was Samantha and she identified herself as AB who knew Samantha. AB directed the officers to room #235.

When the officers arrived at room #235, they encountered a nineteen-year-old male identified as Austin Brunner and a nineteen-year-old female identified as Samantha White, the owner of the phone that made the 911 call. Upon interviewing the involved parties, the officers learned that Brunner had sexually assaulted AB by engaging in sexual intercourse with her. The officers immediately understood the gravity of the situation, and requested MG to come to the scene. When he arrived, they advised him of the circumstances. The Officers continued their investigation and determined that White orchestrated and participated in the sexual assault of AB. According to statements made, White was curious about her sexual preferences and used AB as leverage to lure Brunner to the hotel. White messaged Brunner to come to the hotel. Once he arrived at the hotel, White and Brunner sexually assaulted AB. White engaged in sexual contact with AB, while Brunner engaged in sexual intercourse with her. AB confirmed each of these facts while the Grievant was present.

[1] In 2016 he was ranked as Needs Improvement in the area of "Produces acceptable quantities of quality work." Since that time, he has consistently been evaluated as meeting expectations in this area. In 2011, he received a verbal reprimand due to a preventable rear-end collision. In June 2020, he received a "formal counseling" regarding the need to hold daily musters.

Mr. Brunner was subsequently taken into custody by IA for rape of a child in the second degree, a class A felony. Based on the circumstances known to MG at the time, he determined that there was probable cause for White's arrest, for rape of a child in the second degree under accomplice liability. MG also knew that alcohol was present in the room where this incident occurred. White and Brunner both smelled of intoxicants and they admitted consumption. MG and LH collected numerous alcohol containers and emptied them. White's two-year-old child was sleeping on the second bed inside the hotel room and was present during the sexual assault of AB.

LH and MG discussed the custodial arrest of White. Although LH thought she should be taken into custody, MG determined that it was not appropriate or necessary at that time. He believed that a summons was the appropriate law enforcement action in this circumstance. He felt that there was no compelling reason to take her into custody that night, citing that the victim was with her guardian, he didn't believe AB was in further or immediate danger, the two-year-old was there, and the process would take a long time.

Although LH indicated that he believed that the sheets needed to be collected during the initial investigation, MG told him that "given the circumstances" MG did not believe that they needed to be collected. He felt that the sheets could provide DNA evidence that would show Brunner was present, but this was obvious since three law enforcement officers encountered White and Brunner inside the room.

LH also wanted to collect White's phone, but MG did not feel it necessary to collect the phone as evidence since officers had already collected Brunner's phone. White had shown her phone to LH and disclosed that all of her messages to Brunner had been deleted. MG felt that the administrative better course of action was for a detective to author a search warrant for Facebook records that could provide the deleted messages. He knew that the Yakima Police Department has a forensic digital evidence examiner who has the ability to recover deleted messages.

Contrary to the opinion of LH, MG did not feel it necessary or appropriate to take White's child into protective custody. He apparently also did not believe there was legal authority to place a child in protective custody under these circumstances and he sought no advice regarding this decision.

At the end of his shift on July 19, 2020, MG encountered Officer DD who previously worked in the Special Assault Unit (SAU) (otherwise known as sex crimes). MG requested that DD review the facts of this investigation. DD did so and took exception to the fact that White was not arrested, evidence was not collected, and White's child was not taken into protective custody. DD explained that her considerations were the normal and expected practice during incidents like this. After talking to DD, MG directed LH to return to White's hotel room and attempt to collect the sheets using consent. In the event that White chose not to consent he directed officers to obtain a search warrant. White was still present in the room with her child, and she consented to the officers taking the sheets.

Upon learning the details of this incident, Lieutenant CS, MG's supervisor, sent a memo to Captain SB on July 23, 2020, in which he stated that he believed MG violated several policies regarding efficiency and officer responsibilities. Lieutenant CJ was assigned to do an Internal Affairs investigation of the incident. He interviewed Detective MD who had interviewed AB on July 21 and subsequently interviewed and

arrested Samantha White and took protective custody of her son by placing him with CPS. Lieutenant CJ also interviewed DD about her interaction with MG regarding this matter; Sergeant RB who is the SAU Detective Sergeant and who reviews all of the reports from patrol regarding sexual assault matters; Officers IA and LH who were at the scene in question; and the Grievant, Sergeant MG. In addition, Lieutenant CJ solicited emails sent/collected by Sergeant RB and retired YPD officer MP. Lieutenant CJ also solicited information from the prosecutor's office and Child Protective Services. It is unclear as to whether Lieutenant CJ reviewed the Grievant's personnel file at any time.

After Lieutenant CJ completed his report, it was presented to the Chief at a "round table" discussion with the Command Staff called together to advise the Chief as to the appropriate discipline for MG. No consensus was reached, but the Notice of Pre-Disciplinary Hearing to MG dated September 21, 2020, stated:

> *If the Chief of Police determines the allegations of misconduct and violations are sustained, the anticipated disciplinary action may result in discipline up to and including demotion, suspension or a combination of the two based on mitigating or aggravating information and factors provided during the hearing.*

The notice of the pre-disciplinary hearing, known as a *Loudermill* hearing, also listed the language of Civil Service Commission Rule 18.01 which made it appear that MG was going to be disciplined for, among other things, dishonesty, intemperance, immoral conduct, insubordination and cowardice. At the *Loudermill* hearing, the Grievant was represented by Officer JY, Chair of YPPA, and Attorney Mark Anderson. Each of these individuals raised the issue of notice to MG regarding the Rule 18 inclusion in the Pre-Disciplinary Hearing Notice and questioned if MG was being accused of any of these things and, if not, why were they in the Notice. Chief was not interested in hearing of this concern, or discussing it, saying, "We are not here to debate the merits of the letter or the allegations."

After discussion of these issues was cut off, MG provided the Chief with a written statement and also verbally addressed his actions of July 19, 2020. MG admitted fully that, upon reflection, he had acted improperly with respect to collection of the sheets and Samantha White's cell phone. He acknowledged that Ms. White should have been arrested and taken into custody at the time, and that her child should have been placed into protective custody with CPS. Further, MG acknowledged that he should not have countermanded his subordinate, LH, and that he should have listened to, and followed, all of the advice provided by DD. MG recognized the need to work on his listening and communication skills and should not have as narrow a focus as he had on July 19.

YPPA asked that MG not be demoted and indicated that a suspension was more appropriate under the circumstances. YPPA did not indicate how long such a suspension should be.

Chief found that Sergeant MG had violated the following rules of the Yakima Police Department:

341.5.7 Efficiency (a) Neglect of Duty
341.2(c) Supervisor Responsibilities

600.3.1 Investigations Officer Responsibilities
612.3 Disclosure of Investigation Information
613.8 Collection and Testing of Biological Evidence

Further, he found that General Rule 18.01 of the Civil Service Commission for Police Officers, Corporals, and Sergeants of the City of Yakima had been violated.[2]

In his initial Notice of Disciplinary Action dated October 29, 2020, the chief imposed the following disciplinary actions:

- 106.7 hours suspension from duty
- Successful completion of a Personal Improvement Plan (PIP). Failure to successfully complete the PIP could result in potential discipline up to demotion and or termination.
- Loss of shift bidding opportunity for Patrol Division Year-2021 (February 2021 - January 2022) pursuant to Article 13-SHIFT HOURS of the YPPA collective bargaining agreement under a showing of good cause and with advanced notice.
- Assignment to B-squad in the Patrol Division for the remainder of 2020 through January 2022 for mentoring and coaching by a command level officer who will ensure compliance with the Personal Improvement Plan.
- Mandatory Human Resource training, provided by the City of Yakima.

The YPPA grieved this discipline, seeking a reduction in the length of the suspension and removal of Rule 18.01 verbiage. At step one of the grievance procedure, the Chief reduced the 106.7 hours to 80 hours inasmuch as his intent was that it be a 10-day suspension and the collective bargaining agreement defines a day as 8 hours for purposes of discipline regardless of the number of hours an employee works. He declined to make any other changes to the discipline imposed. At the next step of the grievance process, the City Manager denied the grievance in its entirety. However, as noted, the YPPA and the City came to an agreement regarding Rule 18 language in the Notice. The revised Notice of Discipline was dated February 9, 2021, and the instant arbitration ensued.

Additional facts are included in the Discussion, below.

[2] In the initial Notice of Disciplinary Action, the letter spelled out the specific types of acts that could result in discipline. These included dishonesty, immoral conduct, cowardice, dereliction of duty and more. The YPPA took strong exception to inclusion of these offenses, both in the Notice of Disciplinary Action and in the Notice of the *Loudermill* Hearing. With respect to inclusion of the details of Rule 18 in the Disciplinary Notice, the parties appear to have come to an agreement that the general rule will be cited in Disciplinary Notices as it is the basis upon which the Chief can take such action. The specific behaviors listed in the rule will not be stated unless they are pertinent to the case in question. As they are not relevant to the investigation of MG, only the general rule is stated in the revised Notice of Disciplinary Action. They parties have agreed that, despite inconsistencies in the past as to what is to be cited, in the future Notices of Disciplinary Action will only contain allegations that are specific to the case.

POSITIONS OF THE PARTIES

The City

Yakima notes that in disciplinary grievances, the employer has the burden of demonstrating by a preponderance of the evidence that it had just cause to discipline the employee. The City cites the *Daugherty* seven-factor test as the means to determine whether just cause exists. These tests are (1) notice to the employee that the conduct in question could result in disciplinary consequences; (2) the relationship between the employer's rules and "the orderly, efficient, and safe operation" of the organization; (3) whether there was an investigation into the guilt or innocence of the employee; (4) the fairness of said investigation; (5) the sufficiency of the proof obtained as part of the investigation; (6) whether the employer applied its rules, orders, and penalties equally to all employees; and (7) the appropriateness of the penalty.

The arbitrator need only determine whether the discipline decision was arbitrary, capricious, unreasonable, or based on a mistake of fact, without substituting his or her own judgment in place of management's decision. The principles of just cause support Chief's decision to impose an 80-hour suspension against Sergeant MG.

The Union concedes that just cause exists to discipline MG; it agrees that suspension is the appropriate form of discipline. At the Pre-Disciplinary Hearing, the YPPA requested that the Grievant be suspended rather than demoted. Thus, the only issue before the arbitrator is whether the decision to impose an 80-hour suspension, as opposed to any other length suspension, was arbitrary, capricious, unreasonable, or based on a mistake of fact.

There is no question that MG had notice that his misconduct could result in suspension. The rules that MG violated were reasonable. There was a full and fair investigation conducted by Lieutenant CJ who reviewed all the relevant incident reports and interviewed Sergeant RB, Officers IA, LH and DD, Detective MD and MG. He contacted both DCYF and the prosecutor assigned to the underlying case to better understand the impact that MG's action could have on their ability to prosecute the two individuals charged with Second Degree Rape of a Child and to protect the two-year old child that was left in the custody of one of the suspects.

MG concedes that he violated policy. The YPPA asked that he be suspended, not demoted.

The discipline was appropriate. Just cause requires that there be "reasonable proportionality between the offense and the penalty." Many arbitrators have recognized that it is appropriate to defer to management's exercise of discretion with respect to what penalty should be imposed. The decisions that MG made not to collect biological evidence or White's cell phone, and the decisions to not arrest her and place her child in protective custody were "absolutely unacceptable" and "shock [the] conscience."

The City presented extensive testimony establishing the gravity of MG's actions and the impact that these behaviors could have on the ability to prosecute the case against White and Brunner. The City also showed that this was not the first time that MG failed to perform due diligence in an investigation. In March 2019, Sergeant RB chastised MG for failing to collect physical evidence at the scene of an alleged sexual assault. On two other occasions, members of MG's squad failed to collect evidence and obtain affidavits to assist with the prosecution of domestic violence cases. MG had also been counseled for failing to inform a lieutenant about a serious crime, just as in the instant case where he failed to fully inform Lieutenant S of this crime. MG had also received formal counseling for insubordination when he failed to follow Department protocol requiring daily musters.

The discipline imposed on MG is commensurate with the discipline imposed on other employees. Chief imposed a 21.34-hour suspension on an officer who used unprofessional language and profanity during an interaction with a citizen. The Chief imposed a 32-hour suspension on an officer who had deleted text messages from his work cellphone in violation of the City's records retention policy. This officer had previous discipline. Neither of these cases of misconduct were related to criminal cases.

Prior disciplinary action is not a prerequisite for imposing a suspension. The Chief imposed an 8-hour suspension on an officer who failed to further investigate a statement by a domestic violence victim that she had been sexually assaulted. This was an inexperienced officer who did not explore as much as he should have. He was not a supervisor.

The community of Yakima expects YPD to hold higher ranking officers accountable. The Chief has imposed discipline to reflect that expectation. He imposed a 32-hour suspension against a sergeant who acted aggressively against an officer who attempted to de-escalate an interaction with a citizen. This was not in the context of a criminal act, and there was no danger to the public. That misconduct was not the same as directing officers to violate policy and not taking responsibility, as was the case with MG.

MG's actions caused a break in the chain of custody, evidence was destroyed, and a minor victim was left with no legal protection against further contact from her abuser. Although MG's actions warranted suspension up to demotion, Chief imposed only a suspension as requested by the YPPA. The Chief exercised his managerial discretion to fashion discipline that was appropriate in light of the information presented to him during the *Loudermill* hearing and the severity of MG's misconduct. He did not act arbitrarily or capriciously by so doing.

The grievance should be denied in its entirety.

The Yakima Police Patrolman's Association

The YPPA contends that this matter presents a fundamental due process violation inasmuch as the pre-disciplinary/*Loudermill* hearing afforded to the Grievant was fundamentally tainted by bias and predisposition. Sergeant MG was entitled to due process, which includes notice and an opportunity to be heard. Here, the patently false allegations of dishonesty, immorality, insubordination, *et al* in Rule 18.01(b) were listed in the pre-disciplinary notice without a factual basis. At the *Loudermill* hearing, the

decision-maker refused to consider whether the false allegations were included, tainting the entire process. Both in bringing the false charges and refusing to issue a decision consistent with true and proven facts, Chief failed to provide due process to MG. The pre-disciplinary hearing can only be called a sham.

This failure of due process was not corrected by the Amended Notice of Discipline issued following the grievance process. The Grievant has a right to a full and fair *Loudermill* hearing with an opportunity to fully respond to the charges brought. A grievant cannot present his or her side of their story, as required, if the charges are patently false. The hearing provided to MG is clearly a case where the "supervisory official is so biased that the right-to-reply is meaningless". The Chief was advised that the pre-disciplinary letter, which serves as a notice of the charges, contained charges that were false and for which no evidence existed to support the inclusion of such charges. However, Chief refused to hear evidence on that issue, instead stating that he did not believe the constitutionally protected *Loudermill* was for that specific and sole purpose. The very next day, Chief imposed discipline in a publicly available document that knowingly contained false information. The taint of bias is evident and cannot be corrected by this arbitration proceeding.

At the hearing itself, the decision maker must be willing to listen to the employee's side of the story. A review of the transcript shows that the Chief did not take the *Loudermill* seriously, had no intention to hear what the Association, the Association's attorney or the Grievant had to say, and was only interested in hearing a defined script from the Grievant.

The parties to this dispute, the City of Yakima and the YPPA, have previously relied on iterations of the Daugherty seven elements of just cause to evaluate whether the discipline imposed on employees met the just cause standard articulated in the collective bargaining agreement.[3] This case presents a whole host of just cause violations, including that the discipline imposed was not progressive, it was disproportionate, it was punitive, and it failed to consider any mitigating circumstances. Discipline may be considered excessive if it disproportionate to the degree of the offense, it is out of step with principles of progressive discipline, if it is punitive rather than corrective, or if mitigating circumstances are ignored. Arbitrators often modify disciplinary penalties where there are mitigating circumstances that lead the arbitrator to conclude that the penalty is too severe or that the employer lacks, or failed to follow, progressive procedures.

In this matter, there is no question that the level of discipline imposed was intended to be punitive. The Employer included both discipline and performance corrective measures in the consequences imposed. However, the Employer completely failed to take the corrective measures seriously. Thus, it is a fair assumption that correcting the behavior was not an interest for the City. The Personal Improvement Plan (PIP) was the assignment of a book or two for MG to read. There was no follow-up, no performance coaching or retraining or other measurables imposed to ensure that MG's performance was being corrected. Even the few items in the PIP were neglected and the Chief failed to ensure that they were completed. Training that was ordered to be issued by the Human Resources Department never occurred and the Chief did not follow up or know of the failure to provide that training until the day of the arbitration hearing.

[3] These seven tests are delineated above.

The City has been a party to several other disciplinary arbitrations where the issue of progressiveness in discipline is in question. Under the Daugherty tests and the *Scherzinger* decision, the City must consider issues of progressiveness when administering discipline to represented employees in the YPPA. Just cause requires that discipline be progressive in nature. Corrective measures are preferable to punitive measures whenever possible.

The conduct in question in this case was a first offense for the Grievant. Imposition of a long suspension on an employee with long seniority and a good work record is unjust. No evidence was introduced by the Employer that MG had an inability to learn from his mistakes. In fact, his performance reviews state the opposite. The Employer offered no evidence that the Employer has a pattern and practice of imposing eighty (80) hour suspensions on a first offense. The history of discipline in the City of Yakima is to impose forty hours or fewer for officers with prior discipline in their files. Imposition of 80 hours on MG fails on the element of just cause requiring discipline to be progressive.

The evidence in the hearing made clear that the Employer sought to create a record of "aggravating" information to support an excessive discipline for MG. Lieutenant CJ was not a neutral factfinder in that he sought to create a record of concern from outside third parties. The failure of Chief to consult MG's personnel file, replete with information regarding his character and ability to learn quickly and easily take correction, is evidence that there was never an intent to issue the most appropriate individual disciplinary response for MG, taking into account both the aggravating and mitigating information in his files and records.

Additionally, while the City may have disagreed with the reasoning provided by the Grievant, MG provided mitigating information to inform the City why he made the choices he did. Just cause requires that the information provided by the Grievant be considered in rendering a disciplinary decision. Ignoring information provided by MG and characterizing his words and explanations as "failing to take ownership" violated his just cause rights under the collective bargaining agreement.

Discipline that is administered under the just cause standard must be consistently applied throughout the organization. The burden is on the Employer to show that its discipline is being consistently applied for like situations. The City of Yakima has not met this burden. The record is awash with examples of the City applying lesser forms of discipline for similar or worse misconduct. Lieutenant S was given one day for poor decision-making that resulted in the death of a citizen. An Officer with prior discipline was given forty-six (46) hours of suspension for failing to conduct a search resulting in an attempted suicide. Two officers were given one day suspensions where their failure actually hurt the prosecution of a case and where the failure of the officers happened after this case, calling into question whether this employer has actually trained its employees effectively.

Almost all of the prior cases referenced in this matter involving discipline of other employees are distinguishable in that they involved less punishment for like or worse offenses or, in one case, the same discipline for a far worse case. There is no Employer evidence that shows that the discipline administered to the Grievant was consistent. On this record alone, the 80-hour suspension of Sergeant MG must fail.

YPPA is not arguing that no discipline is warranted here. It asserts that agreeing to some administration of discipline does not mean the Employer gets a blank check. The burden is on the Employer to ensure that the discipline is administered consistently. Chief's testimony makes clear that he made no effort to be consistent and did not consider comparability or consistency in determining the level of discipline. Any evidence of the reputation of the Yakima Police Department being diminished by the performance failure of MG had been manufactured by Lieutenant CJ who, himself, sought to reveal the actions of an employee to outside third parties, the prosecuting attorney's office and CPS.

The YPPA seeks a decision consistent with the principles of just cause and a finding that the Employer failed to comply with the just cause requirements of the collective bargaining agreement. The Association further requests a decision overturning the eighty (80) hours of suspension and order a level of discipline more consistent with principles of progressiveness and proportionality. Finally, YPPA requests a ruling finding that the City of Yakima violated MG's constitutional due process rights.

DISCUSSION

The YPPA raises two major issues in this case: Were the constitutional rights of MG violated by the language of the notice of the pre-disciplinary hearing and the initial notice of discipline by virtue of the Employer's inclusion, without a factual basis, of the language of Civil Service Commission Rule 18.01, and whether there was just cause for the imposition of an eighty (80) hour suspension in this case.

Were MG's Constitutional Rights Violated?

Civil Service Commission rule 18.00 is entitled "Disciplinary Actions." Section 18.01 is entitled "Causes for Disciplinary Actions" and reads as follows:

> The tenure of everyone holding an office, place, or employment under the provisions of RCW Title 41 and these Rules, respectively, shall be only during good behavior and any such person may be removed or discharged, suspended without pay, demoted or reduced in pay, or deprived of vacation privileges, holiday time, compensatory time, or other special privileges for any of the following reasons:
>
> a. Incompetency, inefficiency or inattention to or dereliction of duty;
> b. Dishonesty, intemperance, immoral conduct, insubordination, cowardice, discourteous treatment of the public or a fellow employee, or any other willful improper conduct on the part of the employee; or any willful violation of the provisions of RCW Title 41 and these Rules, respectively;
> c. Mental or physical unfitness for the classification which the employee holds; or failure to maintain an efficiency rating above the minimum requirements;
> d. Promotion by an police employee of disaffection among the members of the department;

e. Excessive use of force or inhumane treatment of any person;
f. Dishonest, disgraceful, immoral or prejudicial conduct;
g. Drunkenness or use of intoxicating liquors, narcotics, or any other habit forming drug, liquid or preparation, to such extent that the use thereof interferes with the efficiency or mental or physical fitness of employees, or which precludes the proper performance of their functions and duties;
h. Conviction of a felony or misdemeanor involving moral turpitude;
i. Engaging in such political activity or activities as prohibited by applicable state or federal laws;
j. Willful refusal or failure to comply with the order or direction of a supervisor or superior officer issued to implement a statute, ordinance, departmental regulation or in the line duty;
k. Any other act or failure to act, which in the judgment of the Civil Service Commission, is sufficient to show the offender to be an unsuitable or unfit person to be employed in the public service.

This Civil Service Rule forms the bases upon which the Chief can take disciplinary action against an employee such as Sergeant MG. The notices of internal investigation and administrative interview listed specific rules and regulations of the Yakima Police Department that the Grievant was alleged to have violated. These documents made no reference to Rule 18 or its subdivision, rule 18.01. The Notice of Pre-Disciplinary Hearing and Notice of Discipline, however, included the heading of Rule 18.01, Causes for Disciplinary Action and specifically recited sections a, b, and k. In particular, testimony made clear that the Chief felt MG's actions on July 19, 2020, demonstrated incompetency (part of 18.01.a), acts of omission or commission tending to injure the public service (part of 18.01.b), and failure to act (part of Rule 18.01.k). While the Notices in question did not spell out how the Cause of Action cited violated these aspects of Rule 18.01, the documents also did not specifically reference the manner in which the behaviors violated the specific rules and regulations of the Police Department. That is, the documents did not make a specific link to the behavior and the rule alleged to be violated. Nonetheless, YPPA has vigorously contested the recitation of the portions of Rule 18.01 that are cited and not relevant to the events in question. In particular, YPPA has taken issue with the inclusion of the verbiage of Rule 18.01.b with its reference to dishonesty, intemperance, immoral conduct and cowardice.

Inasmuch as Notices of Disciplinary Action are available to members of the public, the YPPA has a valid concern about such language being included. This concern, however, does not rise to the level of being a constitutional violation as argued by the YPPA. Although *Loudermill* does require that a public employee be given notice of the accusations against him, and the opportunity to respond to the accusations, there are no facts in this case to support the argument that false charges were brought against MG in the Notice of pre-disciplinary hearing. At most, the Employer was insufficiently selective in identifying those aspects of Rule 18.01 that were applicable to the case. The Chief made clear at the hearing that the Grievant was not being charged with dishonesty, immorality, cowardice, etc.[4]

[4] To be sure, the Chief could have expressed a greater willingness to discuss the YPPA's concern about the Notice and its inclusion of the quoted language of Rule 18.01. An open and honest discussion between the parties could go a long way in improving the relationship between the YPPA and Chief.

In its grievance, the YPPA contended that the City never included the Rule 18.01 language in prior disciplinary notices. At hearing, and after review of numerous notices of disciplinary actions, it was clear that the City had been following this practice for years, although without consistency. Although the portion of the grievance regarding the Rule 18.01 language was denied by both the Chief of Police and the City Manager, an agreement was reached, prior to the arbitration hearing in this case, that only the introductory portion of Rule 18.01 would be utilized in Notices of Discipline unless specific subsections of the Rule were applicable to the case at issue. The Notice of Disciplinary Action in this case, dated February 9, 2021, complies with this Agreement.[5]

The record includes numerous documents that include a recitation of Rule 18.01 in Notices of Pre-Disciplinary Hearings and Notices of Discipline. The undersigned, while agreeing with the YPPA that this practice is detrimental to YPPA members and should cease, it is difficult to conclude that MG's constitutional rights have been violated when this issue has not been raised in any of these other cases and his actions were violative of some of the sections of Rule 18.01 cited. The undersigned does not have jurisdiction to vacate any of these prior disciplines on constitutional grounds. That, in essence, is what the YPPA requests. If MG's rights have been violated in this case, the persons disciplined in other cases where inappropriate parts of Rule 18.01 were cited have also had their constitutional rights violated. The undersigned respectfully declines the invitation to make such a finding, but strongly urges the YPD to follow the agreed-upon practice in the future and only cite relevant portions of the rule in any *Loudermill* hearing notice or disciplinary notice.

Was there just cause to impose an eighty (80) hour suspension on the Grievant?

The parties agree that Grievant Sergeant MG violated rules and policies of the Yakima Police Department and that his actions (and inactions) rise to a level that imposition of a suspension is appropriate.[6] The terms of the collective bargaining agreement are clear that progressive discipline is to be imposed, where appropriate. The facts of this case are such that a verbal or written reprimand is not adequate to reflect the severity of the rule violations that occurred. The YPPA contends that an eighty (80) hour, or ten (10) day suspension is not comparable to, or consistent with, past disciplinary actions taken by the Employer and is not progressive in nature. The City contends that the actions of the Grievant "shock the conscience" and warrant the imposed-upon suspension, if not more, especially given MG's position as a supervisor.

[5] The agreed-upon resolution of this issue, insofar as the language to include in Notices of Disciplinary Actions, should be expanded to use in Notices of Pre-Disciplinary Hearings *(Loudermill)* so as to avoid potential constitutional claims of this nature in the future.

[6] The Employer points out that the Chief initially sought to demote and suspend the Grievant but that he was persuaded at the pre-disciplinary hearing to issue only a suspension. It is the Employer's contention that the Union asked for a suspension and should not now be heard to argue about the length of said suspension. Though the YPPA and the Grievant requested that only a suspension be imposed, they did not indicate the length of the suspension they believed to be appropriate and now argue that the 10-day suspension imposed is not consistent with prior discipline imposed by the Department.

Were this the first instance of discipline issued by the Yakima Police Department, the undersigned would not have difficulty in upholding the suspension and denying the grievance. This would be the case, even in the context of the need to impose progressive discipline, where appropriate. However, this is not the first instance of discipline issued to members of the YPPA. Accordingly, the discipline must be viewed in the context of other disciplinary action taken by the Department. The fact that Chief has been Chief since May 1, 2019, is not relevant to the analysis. It is not a question of whether Chief has consistently imposed discipline on members of the Yakima Police Department, but whether the discipline imposed by the Department is consistent with comparable penalties for similar or like offenses and similar prior disciplinary records.

The YPPA contends that the discipline is not consistent with prior discipline and that the investigation conducted by Lieutenant CJ was not fair and un-biased. To support the later contention, the Association points to the fact that comments were solicited from the prosecutor's office and CPS as to the impact that MG's actions could have on the ability to prosecute the case due to the lapse of time between officers being present at the hotel and the time the sheets were collected, potentially resulting in a break in the chain of custody. From CPS, Lieutenant CJ apparently asked about the potential impact on the child by having not been taking into protective custody immediately. Questioning outside agencies to ascertain whether a YPD member has violated the rules and regulations of YPD is totally inappropriate. Lieutenant CJ, from his own experience and training could have come to these conclusions without sharing the situation with outsiders, potentially embarrassing MG, in direct violation of Article 11, Section 1, of the collective bargaining agreement which requires that "discipline shall be imposed in a manner least likely to embarrass the employee before the public or other employees."

It does not appear that Lieutenant CJ was neutral in his investigation. It appears that he looked for as much aggravating information, and as little mitigating information, that he could find in the Grievant's prior record. He did, properly, interview the personnel involved in the matter, but he should not have made contact with the prosecutor or CPS. Although the investigation was not entirely fair, as previously noted, the facts of what occurred on July 19 are not in question, and the Grievant has acknowledged his actions and had recognized the mistakes that were made. Accordingly, the discipline will not be voided.

The undersigned agrees with the Employer that the Grievant, inasmuch as he is a Sergeant and supervisor of patrol officers, should be held to a higher standard than patrol officers, much like police officers generally are held to a higher standard of truthfulness than the general public. This factors into the level of discipline that may be appropriate, but it cannot form the basis for a suspension that is significantly inconsistent with other discipline imposed by the Yakima Police Department.

A review of the Grievant's personnel file reveals that MG is a well-respected and competent officer. Prior formal discipline includes only one reprimand for an avoidable automobile accident. He received formal counseling for failure to hold daily musters. Other allegations of misconduct, characterized by the Employer as "failure to perform due diligence in an investigation" are not documented in his personnel file and cannot serve as a basis for a higher level of discipline in a due process analysis.[7] The personnel

[7] The other instances of "failure to follow due diligence", failure to inform a lieutenant about a serious crime, failure to collect evidence at a scene of a crime, and a number of other allegations regarding Sgt. MG's performance are

file also includes honorable mentions that are not cited in Lieutenant CJ's report and appear to have been unknown to Chief.

The Employer argues that MG received appropriate discipline and that the undersigned should defer to management's exercise of its management rights with respect to what penalty should be imposed. It argues that the undersigned should not substitute her judgment for the discretion reasonably exercised by the Employer.

The Employer also contends that the discipline imposed on MG is commensurate with discipline imposed on other employees. Chief imposed a 21.34-hour suspension against an officer who used unprofessional language and profanity during an interaction with a citizen. This officer had prior discipline, but took responsibility for his actions, which did not involve a felony crime or place anyone in danger. The Chief also imposed a 32-hour suspension against an officer who had deleted text messages from his work cellphone in violation of the City's record retention policy. This officer also had prior discipline, but the misconduct in question was also not related to a criminal case. The Chief also imposed eight-hour suspensions on officers who failed to further investigate a statement by a domestic violence victim that she had been sexually assaulted. Since the officers were inexperienced and did not intentionally disregard evidence, and were not supervisors, the eight-hour suspension was appropriate.

Inasmuch as the community expects YPD to hold higher ranking officers accountable, Chief imposed a 32-hour suspension against a sergeant who acted aggressively against an officer who attempted to de-escalate an interaction with a citizen. That misconduct did not occur in the context of a criminal act, there was no damage to the public, thus not at the same level as directing subordinates to violate policy and not take responsibility.

All the examples utilized by the City to support its contention that the 80-hour suspension was reasonable, were cases that occurred under Chief. Omitted from that recitation was the ten-hour suspension issued to Lieutenant S in September 2020, where the actions of the Lieutenant directly resulted in the death of a civilian.[8] Lieutenants are not in the YPPA bargaining unit. However, as supervisors they should be held to a higher standard than members of the YPPA bargaining unit.

As noted above, the question to be considered is not whether discipline issued to MG by Chief is consistent with other discipline issued by Chief, but whether the discipline issued is consistent with other discipline issued by the Yakima Police Department. The City submitted a report prepared by Lieutenant CJ that

contained in emails solicited by the Internal Affairs investigator, Lieutenant CJ, from Sergeant RB, an individual known throughout the Department for authoring and retaining emails complaining about other employees. Some of the emails were from MP, a retired member of the YPD. There was no reliable testimony about their content.

[8] Lieutenant S directed an officer to take an individual to the hospital in a squad car rather than accompanying the person to the hospital in an ambulance as requested by the EMTs who did not want to transport the individual in handcuffs without a police officer present. The person was left unattended in the squad car and aspirated in the back of the car. Chief issued an eight (8) page letter to the community to explain this event.

purports to show all sustained discipline issued to YPPA members in the Yakima Police Department since 2016, the year the data base was started.[9]

A review of that document shows that, other than terminations, suspensions of 10 days or greater occurred in two cases besides that of MG. In the case of Officer U, the evidence shows that this officer was involved in a romantic relationship which resulted in a neglect of duties, 4794 minutes of personal cell phone usage during duty hours and 491 minutes of duty time unaccounted for. This amounts to more that 88 hours of time he was paid and did not work. He was suspended for 107 hours. Given that he was paid for 88 hours that he had not worked, this actually equates to a 19-hour suspension. The record is silent as to whether any criminal investigations were compromised, or lives endangered by this officer's absence from duty.

Officer A received a 16-day suspension in June 2019 for violations of standards of conduct. In August 2019 he was suspended for 3 days for conduct unbecoming. He received a 10-day suspension in February 2020 for violations of standards of conduct and courtesy/disrespect. He has since retired from the YPD, and the factual bases of these cases are unknown to the undersigned.

As noted, sergeants are held to a higher standard than the officers they supervise. Unfortunately, the chart of discipline imposed on YPPA members since 2016 does not differentiate between officers and sergeants. Other evidence adduced at hearing, however, indicates that Sergeant DC was disciplined for failure to complete over 400 reports that he was assigned and upon which he took no action, contending that he was unaware that he was supposed to process them. From a memo dated January 5, 2017, to then Chief Dominic Rizzi from Gary Jones, Captain-Patrol Division, Lieutenant Watts recommended that Sergeant C be subjected to a loss of 150 hours of disciplinary time. Captain Jones concluded that 32.01 hours loss of pay would be more appropriate. The chart provided by Lieutenant CJ shows that Sergeant C was suspended for three days. The record herein is silent as to the nature of the reports that Sergeant C neglected to process, but there is no doubt that many of them involved criminal cases, and some might have evidenced failure on the part of officers to obtain appropriate evidence or make appropriate arrests.

Another case involving discipline of a sergeant resulted in a 32-hour suspension where the sergeant in question was involved in a heated discussion with a community member and told an officer who tried to intervene to calm the situation to back off. This Sergeant also failed to write a report on the situation and failed to activate his mobile audio/video equipment as required. This behavior, in public, has greater potential to harm the relationship between the Yakima Police Department and the community than did that of MG.

In another case, an officer failed to conduct a thorough search of a prisoner who then used his belt to attempt suicide. This officer received a suspension and loss of pay totaling 46.58 hours. He had previously been suspended for 21.33 hours due to his failure to conduct a thorough preliminary investigation of a crime scene or take appropriate action to document domestic violence. This officer had a prior record of discipline including for sleeping on duty, traveling at excessive speed through the city, and engaging in a

[9] A ten-year history might provide a better picture of the manner in which discipline has been issued by the YPD, but all we have is the history from 2016.

vehicle pursuit without request from a supervisor or advising said supervisor, and traveling at 81 miles per hour on streets with medium traffic.

In November 2021, two relatively new officers who responded to the same scene, were each given an 8-hour suspension and additional training in domestic violence investigations when they responded to a welfare check and the female said she had been physically and sexually assaulted whereas the male present said that the sex had been consensual and his daughter who was present on the premises said she did not hear a struggle. One officer believed the female, the other believed the male. They took no photos, collected no evidence and did not call a supervisor for assistance. Possible prosecution of the male was clearly compromised.

It is difficult to compare each of the cases cited above with the instant case. Each is different, and each resulted in a different disciplinary action being taken by the Employer. For the most part, all received a lesser suspension than the Grievant, whether they had prior discipline or not, or were a lieutenant, sergeant or a patrol officer.

The salient facts of this case are that MG failed to collect, or cause to be collected, evidence including the sheets and the cell phone. He failed to take Samantha White into custody, and he failed to take her two-year old son into protective custody. He failed to submit his own written report on the case until specifically directed to do so after the investigative hearing. He also failed to recognize his errors at the time of the investigative hearing. He did, however, acknowledge his failure to act properly during the pre-disciplinary (*Loudermill)* hearing and at the arbitration hearing in this matter. His actions did not constitute knowingly or willfully violations of rules but, rather, significant lapses of judgment. After passage of time, he recognized that he had taken too narrow a perspective on the situation and should have followed the suggestions of LH at the scene and Officer Diaz thereafter. MG appeared to be quite contrite about his behavior and has clearly learned his lesson.[10]

Sergeant MG violated numerous policies of the Yakima Police Department and should be suspended for same. The penalty imposed upon him, 10-days without pay, is not consistent with prior discipline imposed by the Yakima Police Department and is not progressive. Because he has an almost perfectly clean personnel file, has acknowledged his failures, has complied (to the extent possible) with the PIP and other provisions of the disciplinary action imposed on him, and because he is a supervisor, it is appropriate to suspend the Grievant for a period of five (5) working days.

Based on the above and the record in its entirety, the undersigned issues the following

AWARD

The grievance is sustained in part. The Employer had just cause to suspend the Grievant, but only for a period of five (5) days or forty (40) hours. MG is to be made whole for any loss of pay or benefits for five

[10] There is no evidence that since the events in question, almost two years ago, MG has failed to perform up to the standards expected of him by the Yakima Police Department and Chief.

(5) days. The undersigned reserves jurisdiction over the specification of remedy if either party requests, in writing with a copy to the opposing party, within thirty (30) days of the date of this award.

Dated at Madison Wisconsin, this 30th day of June, 2022.

__/s/_____

Susan J.M. Bauman