In the Matter of the Disciplinary Appeal Regarding	)
	)
SAN JOSE POLICE OFFICERS' ASSOCIATION AND OFFICER [redacted],	)
	)
Appellant,	)
	) **OPINION AND AWARD**
and	)
	)
CITY OF SAN JOSE,	)
	)
Respondent	)
	)

APPEARANCES

For the Respondent:

[redacted], Esq.
[redacted], Esq.
Office of the City Attorney
200 E. Santa Clara St., 16th Floor
San Jose, CA 95113
[redacted]

For the Appellant:

[redacted], Esq.
Attorney at Law
Rains Lucia Stern St. Phalle & Silver, PC
220 Montgomery St., 15th Floor
San Francisco, CA 94104
[redacted]

INTRODUCTION

The San Jose Police Officers' Association is appealing the decision of the City of San Jose to discharge Officer [redacted] from his position with the San Jose Police Department. The City's action was based on charges of inappropriate conduct by

[redacted] toward a female citizen and the unauthorized access and use of the CLETS[1] system to obtain and use information about that female citizen.

[redacted] denies engaging in any misconduct. The Association also argues that even if [redacted] committed the misconduct alleged, the Department did not have just cause to terminate his employment.

This Arbitrator was selected by the parties. A virtual hearing was held on May 6 and May 7, 2024. [redacted] was present and represented by counsel. Both sides presented opening arguments, testimony, and documentary evidence in support of their respective positions. The matter was taken under submission on July 19, 2024, upon receipt of the parties' post-hearing briefs.

ISSUES

The parties stipulated to the following issues:

1. Was there just cause for discipline?

2. If not, what is the appropriate remedy? (T. 7.[2])

STATEMENT OF THE FACTS

Background

At all relevant times, [redacted] was employed as a police officer by the

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[1] CLETS is an acronym for the California Law Enforcement Telecommunications System.

[2] References to the transcript of the hearing produced by [redacted], CSR No. 11613 for May 6, 2020 will be designated as "T. ___." References to the transcript for May 7, 2024, will be designated as "T2. ___."

San Jose Police Department. He commenced employment with the Department on October 20, 2019. (Stip., ¶ 1.) At the time of his discharge, he had a little more than three and a half years of service with the Department. [redacted] had no prior instances of discipline on his record.

As a member of the Department, [redacted] was subject to the Department's Duty Manual. Section C 1438 of the Duty Manual provides:

> **C 1438 SOCIAL CONDUCT ON AND OFF DUTY:**
> While on duty, department members will not:
>
> - Encourage, suggest, offer or accept sexual favors.
> - Encourage, suggest, offer or provide leniency in enforcement in return for sexual or social encounters.
> - Encourage, suggest, offer, or perform any services in the line of duty in return for sexual or social encounters.
> - Engage in sexual activity.
> - Engage in any form of sexual harassment.

(J-3.)

Section C 1438 of the Duty Manual provides:

> **C 1312 SEXUAL HARASSMENT:**
>
> Sexual harassment is a form of workplace harassment prohibited by City Policy Manual section 1.1.1. Refer to City Policy Manual section 1.1.1 for descriptions of the type of conduct that can be considered sexual harassment, as well as for the City's policy on consensual sexual or romantic relationships.

(J-4.)

City Policy Manual section 1.1.1 prohibits sexual harassment and has the following definitions and explanations of sexual harassment:

"Sexual Harassment" is a form of workplace harassment as described above and is defined to include, but is not limited to:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

. . . .

- The harasser can be the victim's supervisor, a supervisor in another area, a manager, a coworker, or a non-employee like a vendor or a member of the public.

. . . .

Examples

Examples of action that may lead to sexual harassment complaints and which must be avoided include, but are not limited to, those listed below.

- Unwanted sexual advances or pressure for dates or sexual favors.

(J-5.)

The Duty Manual also has restrictions on accessing sensitive and controlled information. Section C 2003, defines "Authorized Receivers" as follows: "To obtain access to, receive and use and disseminate CORI [Criminal Offender Record Information], a person or agency must show a need to know and a right to know the information being sought." (J-6.[3]) Section 1.6.4 of the CLETS Policies, Practice and

[3] Internal Affairs Sergeant [redacted] testified that the fact that [redacted] was a sworn police officer satisfies the "right to know" element. (T. 80.)

Procedures Manual defines "system misuse" to include "querying . . . romantic partners." (J-7.)

The Events Leading to the Discipline

On April 29, 2022, at around 11:00 a.m., [redacted] participated at a community policing event at [redacted], which was designed to foster trust between the community and the Department. Sergeant [redacted], Lieutenant [redacted], Officer [redacted], and Captain [redacted] also attended the event. (Stip., ¶ 3.)

While there, [redacted] engaged in a conversation with a woman (here identified as Jennifer Doe), who attended the event with her child. It is undisputed that during this conversation, there was some banter about "bad" things Doe had or had not done. [redacted] also asked Doe where she lived.

[redacted] believed that Doe was behaving flirtatiously with him. (Stip., ¶ 4.) [redacted] acknowledged the conversation and acknowledged having some interest in further contact with the woman. Doe did not share that interest.

Doe left the event with her son, driving in her minivan. (Stip., ¶ 4.) At some point that day, Doe called her mother and told her about the encounter with [redacted].

On May 2, 2022, at approximately 10:10 a.m., [redacted] stopped in the middle of the street near Doe's house, left his car with the driver's door open, and attempted to engage Doe in conversation near the driveway of her residence. Her residence was

approximately a half mile from the location of the community event. (Stip., ¶ 5.)

According to Doe, at approximately 9:15 a.m. that morning, she was sitting in her vehicle and parked in the driveway of her home, which is located behind a 7-Eleven store located on [redacted] in San Jose. According to Doe, she sat in her vehicle for approximately 30-40 minutes. Doe reported that after she finished her call with her friend and stepped out of her vehicle, she saw [redacted] approach. (Stip., ¶ 9.)

Doe was not interested in speaking with him, and [redacted] left less than a minute after he first spoke with Doe. Immediately after [redacted] left, Doe contacted a former police officer she knew who had organized the community policing event. She then called the Department and made a complaint. That same day, at the request of the "CID" (Criminal Investigation's Division), Doe came to the CID office and provided a statement to Sergeants [redacted] and [redacted]. (Stip., ¶ 6.)

Doe told CID that during the event, she and her son stood in line to meet an SJPD Officer and experience a patrol vehicle. Doe reported that when she and her son reached the front of the line, they were greeted by the uniformed [redacted]. Doe reported that as she was taking pictures of her son in the patrol vehicle, [redacted] made conversation with her. (Stip., ¶ 7.)

According to Doe, [redacted] stated that she looked familiar and asked if they had met before. He pulled his face mask down to expose his entire face. Doe reported that she told [redacted] that she had never met him before. Doe reported that [redacted] asked if

she lived in the area and she told him that she lived behind the 7-Eleven on [redacted]. Doe reported that as she and her son were walking away, [redacted] said: "I hope to see you soon." (Stip., ¶ 8.)

The Investigation

The CID Investigation

CID investigations are criminal. Investigators look to see whether an officer has committed a crime. CID investigators do not look into possible policy violations. (T. 47-48.)

During her CID interview, Doe stated that as she stepped out of her vehicle on May 2, 2022, she heard a male's voice exclaim: "Hey! Hey!" She looked in the direction of the voice and observed a male driver exiting a vehicle that was stopped in the street. The man asked her if she recognized him. Doe then recognized the driver as [redacted] from the school event days before. Doe reported that [redacted] then asked what "bad things" she was doing in reference to her comment at the school event. Doe reported that she told [redacted] she was only joking when she made that comment and that she had to pick up her son and go meet with her husband. Doe began to walk into her home. [redacted] returned to his vehicle and left the area. Doe identified [redacted] to the CID investigators from a group photograph of the school event on the school's website. (Stip., ¶ 10.)

On May 3, 2022, Sergeants [redacted] and [redacted] spoke with Doe's mother by phone.

Doe's mother provided them with a statement.

On May 4, 2022, Sergeants [redacted] and [redacted] spoke with [redacted] ("[redacted]"), a parent of a child who attended the [redacted], who also attended the event. [redacted] provided them with a statement. (Stip., ¶ 12.)

[redacted] told CID that on May 3, 2022, she had heard Doe reporting the incident to [redacted] President. [redacted] then told Doe she had an awkward experience with [redacted] as well. The President requested [redacted] report her encounter with [redacted] to Internal Affairs. (Stip., ¶ 13.)

[redacted] reported to CID that she attended the Event on April 29, 2022, with her son. She parked her vehicle in the same area as the patrol vehicles. As she exited her vehicle, [redacted] approached her vehicle and made friendly small talk. After taking her son to obtain photographs inside the patrol vehicle, [redacted] then took her son to another area to play with his classmates. (Stip., ¶ 14.)

[redacted] described the [redacted] as tall, 6'2", with dark skin, and a longer face. She reported that he was wearing a mask but would remove the mask off and on throughout their interactions. (Stip., ¶ 15.)

[redacted] reported that when the officers were preparing to leave the school, [redacted] approached the area where her son was playing. He called out her son's name and stated he was leaving. [redacted] walked over to her son and directed him to say goodbye to [redacted]. [redacted] and [redacted] then spoke for approximately three minutes.

During this conversation, [redacted] shared some personal information relating to his past work experiences. [redacted] then told [redacted] to "take off your glasses so I can look at you and recognize you later." [redacted] then raised her sunglasses and quickly lowered them back onto her face. [redacted] and [redacted] separated and [redacted] left the school. [redacted] stated that she was concerned [redacted] may have taken down her license plate. (Stip., ¶ 16.)

On May 10, 2022, Sergeants [redacted] and [redacted] spoke with [redacted] ("[redacted]"), a mother who also attended the Event. [redacted] provided them with a statement. (Stip., ¶ 17.)

[redacted] voluntarily came to the CID office on May 6, 2022, and provided a statement about the incident to Sergeants [redacted] and [redacted]. (Stip., ¶ 17.)

A CLETS and Versaterm audit revealed that [redacted] conducted a records check via DMV Inquiry of Doe's license plate ([redacted]) on April 29, 2022, at approximately 12:40:39 p.m. A CAD/Netviewer check revealed [redacted] had finished his duties at the community policing event where he met Doe at approximately 12:38:27 p.m., according to that database. [redacted] did not conduct a records check of Doe's name or her address. (Stip., ¶ 19.)

A GPS audit of [redacted]'s marked patrol vehicle showed it was in the approximate area of [redacted] at approximately 12:39:12 p.m. The next ping of Officer [redacted]'s vehicle showed it in the approximate area of [redacted]. at approximately 12:41:12 p.m. (Stip., ¶ 20; See J-9, EX000074.)

On or about May 20, 2022, CID delivered the case to the District Attorney's office for review. (Stip, ¶ 21.) On or about July 29, 2022, CID was notified by the District Attorney's office that no criminal charges would be filed. (Stip., ¶ 23.)

The Internal Affairs Investigation

On or about June 29, 2022, Sgt. [redacted] was assigned the Internal Affairs Administrative investigation into [redacted] interactions with Doe. (Stip. ¶ 22.) [redacted] testified that when a complaint gets to IA, his primary responsibility is to interview the subject employee. (T. 40.) At the end of an investigation, he can make one of three "findings": exonerated, not sustained, or unfounded. (T. 40.) IA sergeants are not allowed to find that any allegation is "sustained." (T. 41.) Sustained findings can only be made by the chain of command. (T. 41.)

During his investigation, [redacted] reviewed the materials gathered by CID. (T. 46.) He also reviewed the audit showing the computer dispatch records from the day of the school event and GPS records regarding the positions of [redacted] patrol. (T. 47.)

[redacted] filed his IA report on April 15, 2023. (J-9.) In his report, he referenced the statement that Doe provided to the CID. She told CID investigators that during her conversation with [redacted], he kept saying that he recognized her. In response, she said something to [redacted] about not knowing her "in a bad way." She felt uncomfortable about her interaction with [redacted] and later talked to her mother about the encounter. (T. 54-55.)

During the interaction, [redacted] asked her whether she lived in the area. She told him that she lived near the 7-Eleven. (T. 55.)

[redacted] concluded that [redacted] perceived Doe as having made a sexual advance by the "bad way" comment. But he did not believe that [redacted] made any "sexual advance" toward Doe. Rather, he was "flirtatious." (T. 96.)

The second encounter occurred three days later, when [redacted] approached her as she was in her driveway in front of her home. According to Doe, [redacted] asked if she had been doing any bad things. She told him she had been joking during their conversation at the school. She also told him that she needed to go and pick up her son. (T. 56-57.)

[redacted] also reviewed the statement that Doe's mother provided to CID. According to [redacted], that statement was "largely consistent" with Doe's. (T. 57.)

[redacted] also reviewed the statement [redacted] provided CID. [redacted] also claimed to have had an uncomfortable interaction with [redacted] at the school event. (T. 59-60.)

[redacted] also reviewed the voluntary statement that [redacted] provided to CID. (T. 61.) According to [redacted], [redacted]'s description of the first interaction with Doe was similar to Doe's. (T. 61.) [redacted] indicated that Doe had said something to her son, who was inside the patrol car, about not getting into trouble "like mommy." [redacted] thought Doe was being friendly and flirty and meant "getting into trouble" in a naughty or sexual way. (T. 62; J-9, EX00065.)

In his CID interview, [redacted] was asked if he thought Doe was "coming on to him." He replied, "Yes, with the naughty comment." (U-H, p. 59 [MB 182].) In that CID interview, [redacted] indicated that he thought that Doe's attitude toward him was something "worth exploring." He also used the phrase "no booty on duty," in recognition of the Department's prohibition against engaging in sex while on duty. (T. 62.)

With regard to his contact with Doe on May 2, [redacted] said that he stopped at [redacted] in southeast San Jose and then drove back to [redacted]. As he was driving home, he decided to stop at [redacted]. As he was passing [redacted], he remembered that Doe lived there. When he looked over and saw she was in her driveway, he made a u-turn, drove back, and contacted her. (T. 63.)

Because there was a trailer parked in the driveway and because of the direction he was traveling, [redacted] view of Doe's driveway was limited. (T. 66-67, 123.) According to [redacted], [redacted] said that he remembered her car and the yoga pants she had worn to the school event. (T. 64.)

[redacted] told CID that he asked about how her son was doing and, remembering the joke, asked if she had been getting into any trouble lately. (T. 64-65.) He did not go to [redacted] after he left Doe's house. (J-9, EX000065.)

With regard to running Doe's plates, [redacted] could not recall exactly when he had done that. He told CID that when he saw Doe get into her vehicle after the school event, he noticed that her registration sticker was a color that might have indicated that it

was out of date. (T. 68.) He told CID and IA that he was not planing on issuing her a citation or a warning. (T. 68, 171-72.) He also told CID that "curiosity killed the cat." (J-9, EX000051.)

[redacted] testified that the IA interview had a different focus than the CID interview. The CID interview focused on whether [redacted] had committed a crime. The IA interview focused on policy violations related to both the DMV licence plate inquiry and his social conduct toward Doe. (T. 69.)

[redacted] testified that he wanted to give [redacted] an opportunity to clarify or correct any statements he provided to CID, which had been a year prior. [redacted] did not have any changes. (T. 69-70.) For example, [redacted] asked [redacted] what his "law enforcement purpose" was when running Doe's plate. [redacted] told [redacted] that he did not know how to answer that question. (T. 68-69.) However, [redacted] did not provide [redacted] with a copy or recording of his CID interview prior to the commencement of the IA interview. (T. 147.)

According to [redacted], neither [redacted] nor his representative ever asked for materials from the CID interview. (T. 149-50.) [redacted] acknowledged that it is difficult to recall statements that a person made a year prior and that a person in [redacted] situation would only "generally" remember what was said. (T. 148.)

[redacted] acknowledged that an out of date registration is a violation of the Vehicle Code. He also acknowledged that officers routinely run plates of parked cars to see if a

car is stolen or associated with a crime. (T. 81, 179.) testified that simply running a plate is a mundane, everyday type of inquiry for police officers. (T. 82.) also testified that officers have the discretion not to take any law enforcement action for low level offenses like an out of date registration. (T. 86, 180.) He also acknowledged that did not look at other data bases that might have had personal information about Doe. He merely entered her plate number. (T. 83-84.[4])

also acknowledged that during the CID investigation, both Doe and indicated that during their conversation, she had provided with information about where she lived. According to , Doe told him that she lived "directly" behind the 7-Eleven. Doe told CID that she told that she lived "by the 7-Eleven. (T. 84.[5]) Doe told CID that Doe and differed regarding knowledge of her name. said she told him her first name. Doe told CID that she did not give her name. (T. 85.)

At the end of his IA report, wrote that the question of whether violated the Department's policy on social conduct should be forwarded to the chain of command for findings as to "whether his off-duty comments rose to the level of

[4] In his CID interview, stated that he had not written Doe's plate number down. He just remembered it. (U-H, , p. 46 [MB 169].)

[5] CID conducted two interviews of Doe. In the first, Doe told CID that she told that she lived "over by the 7-Eleven." (U-C, p. 2 [MB] 51.) In the second, Doe told CID that she told that she lived "around here, over by the 7-Eleven." (U-B, p. 5 [MB 11.].)

inappropriate and unwelcome sexual remarks or advances that would constitute a violation of [section C 1438].” (J-9, EX000073.)

> However, [redacted] report also contained the following statements:
>
> Other than these two contacts, Officer [redacted] had not had any other contact with [redacted]. During these contacts, there were no overt or implied mentions of any sexual favors or activity.

(J-9, EX 000070-71.)

> There is no indication in either Officer [redacted] statement or [Doe’s] statement that either of the two contacts between them involved any discussion of sexual favors.

(J-9, EX 000072.)

[redacted] testified that there is no definition of sexual harassment in C 1438. It is defined in City Policy Manual 1.1.1. However, that section is focused on workplace harassment as is C 1438. (T. 70-71.) [redacted] testified that [redacted] behavior “could” fit within the definitions. He testified there was a “nexus between unwelcome sexual advances and Officer [redacted] position as a police officer and his role at that community event on duty.” (T. 73.)

[redacted] recommended that the allegations of procedural violations of C 1438 Social Conduct on and Off Duty and C 2003 Authorized Receivers of CLETS information against [redacted] be returned to [redacted] chain of command for findings and recommendations. (Stip., ¶ 25; J-9, EX000075.)

[redacted] testified that the finding could be sustained based on [redacted] own

statements of how he perceived the contact . . . and how he reacted to the contact, and his own stated goals in the contact," which [redacted] "perceived as flirtatious behavior." [redacted] believed that [redacted] "used" his position to get the initial contact and then used his position to get more information about her from her motor vehicle record. (T. 74.) He acknowledged that [redacted] did not take any physical actions that were sexual in nature. (T. 89.) Nor did [redacted] make any comment that was expressly sexual in nature. (T. 92.)

[redacted] also testified about the map and time line created by CID showing that [redacted] accessed the CLETS system two minutes after he was finished with the school event and that he likely drove past Doe's house after leaving the school. (T. 74-76; J-9 EX000074.)

[redacted] acknowledged that there was no evidence that [redacted] ever pressured Doe to do anything. (T. 160.) He also testified that no one ever concluded that [redacted] had been watching Doe's house. (T. 162.)

On April 24, 2023, Lt. [redacted] received the completed Internal Affairs Investigation. [redacted] was assigned to review the investigation, determine a finding, and make a recommendation. (Stip., ¶ 26; T. 221.)

[redacted] testified that he has attended numerous community events while an officer with the Department. (T. 222.) If he had ever been approached by a female who wanted to flirt, he would have said something to the effect of: "I'm flattered. But we're

here for a community policing event." (T. 223.) He testified that it would not be professional to pursue a personal relationship after such an event. (T. 224.)

[redacted] attended the event at issue. However, he did not observe any of the interactions between [redacted] and Doe. (T. 225, T2. 42.) He testified that [redacted] conduct undermines the reason why the Department participated in the event. (T. 227.)

Lt. [redacted] testified that he is aware of officers who started relationships with people they met on duty. He is not aware of any officers who were disciplined solely for that. (T2. 37-38.) He also testified that [redacted] continued to work as an officer for the one year period between the incidents with Doe and his placement on administrative leave. (T2. 41.)

On or about May 9, 2023, Lt. [redacted] sent his Findings and Recommendations in IA Case #I2022-0211 to Chief of Police [redacted] through his chain of command. [redacted] found the allegation against [redacted] of a violation of Social Conduct On and Off Duty (C1438) to be sustained. Lt. [redacted] found the allegation against [redacted] of a violation of Authorized Receivers (C2003) to be Sustained. (Stip. ¶ 27; T. 228.[6])

Lt. [redacted] testified that he believed that [redacted] violated C 1438 at the school event because he "furthered" the flirting instead of moving away from it. (T. 230.) C 1438 was again violated when [redacted] stopped by Doe's home a few days later.

[6] [redacted] left the Department a few months after submitting his report. (T2. 70.)

(T.230-31.) He testified that he did not believe that [redacted] had to explicitly say anything about sex in order for there to be sexual harassment. (T. 231.) [redacted] did not believe that [redacted] stopping by Doe's house was him just being friendly or cordial. (T. 232.)

Lt. [redacted] testified that [redacted] provided different explanations for making contact with Doe at her home. [redacted] said that he was coming from the mosque and was heading to a sporting goods store when he saw Doe at her house. According to [redacted], Doe's residence is not on those paths. (T2. 47.) He also testified that the fact that Doe had been on her phone for 30 plus minutes before the encounter with [redacted] suggests that he was waiting outside of her house until she got out of the car. (T2. 48.)

Lt. [redacted] also testified that he did not believe [redacted] was truthful when he claimed that he thought that Doe had an expired registration tag. (T. 234.) [redacted] believed the sole reason why [redacted] ran the plate was to verify where she lived. (T. 238.) However, [redacted] report never accused [redacted] of lying. Nor did the report use the words dishonest or untruthful. (T2. 53-54.) Nor did the IA report include an allegation of dishonesty. (T2. 55-56.) However, it was not necessary to make such allegations in order to determine whether [redacted] violated the Department's duty manual. (T2. 73-74.)

Lt. [redacted] also testified that he believed that [redacted] was in front of Doe's house when he ran Doe's license plate. He acknowledged, however, that there is no GPS

evidence or data that placed [redacted] vehicle in front of Doe's house on the day of the school event. (T2. 65.)

Lt. [redacted] recommended a disciplinary review panel ("DRP") for [redacted]. (Stip., ¶ 28; T. 238.)

On May 30, 2023, the DRP convened to discuss [redacted] case (IA Case # I2022-0211). Based upon the information received at the DRP, including a review of the Personnel and Internal Affairs files, Chief [redacted] recommended that [redacted] be dismissed from City service. (Stip., ¶ 29; J-11.)

On June 5, 2023, at approximately 6:00 a.m., [redacted] was served with a Notice of Intended Discipline ("NOID"), which notified him of the intent to recommend that he be dismissed from his position of Police Officer with the SJPD and the reasons for the disciplinary action. (Stip., ¶ 30; J-11.) In the NOID, [redacted] was advised of his right to a *Skelly* conference and the option to respond in writing. (Stip., ¶ 31; J-11, EX000152.)

[redacted] filed a timely request for a *Skelly* hearing. (Stip., ¶ 32.) A *Skelly* conference was held on July 10, 2023, in order to provide [redacted] with an opportunity to respond to the NOID and present any information for consideration before a final determination was made on the proposed disciplinary action. Both parties participated in the *Skelly* hearing. (Stip., ¶ 33, J-13.)

On July 13, 2023, [redacted] was served with a Notice of Discipline ("NOD"), notifying him that he would be dismissed from his position of Police Officer with the

SJPD, effective July 14, 2023. (Stip., ¶ 34; J-11.) [redacted] filed a timely appeal to binding arbitration. (Stip., ¶ 35.)

The Decision to Discipline [redacted]

Under Article 25.8 of the parties' Memorandum of Agreement ("MOA") the Department has the right to impose discipline for cause. (J-1.)

Acting Chief [redacted] testified that he first heard about an issue with [redacted] in 2022, when he was the Assistant Chief of Police. He was the person who authorized the CID investigation. (T2. 135-36.)

Between the time the IA investigation started and concluded, Chief [redacted] had one contact with [redacted] that he could recall. [redacted] mentioned that he (Chief [redacted]) was going to see something onhis desk about him ([redacted]) and that he [redacted]) would like to discuss it. According to [redacted], [redacted] responded that such a conversation would be inappropriate and they had to let the investigation run its course. (T2. 137.)

Chief [redacted] did not recall any other specific contact with [redacted] prior to this incident. However, he acknowledged that he might have seen [redacted] on prior occasions. (T2. 173.)

Chief [redacted] received the investigatory packet after it went up the chain of command. Because the allegations were serious and sustained, he recommended that the matter be sent to the Disciplinary Review Panel. (T2. 137.) The purpose of the panel is "to get as complete a picture as possible about the officer involved." (T2. 138.) [redacted]

testified that he did not really know [redacted], other than "in passing." (T2. 138.)

Chief [redacted] met with the DRP. All members agreed that discharge was the appropriate penalty for [redacted] misconduct. (T2. 140, 175-76.) According to [redacted], the discussion centered around the seriousness of the allegations, how damaging they were to the Department, and the Department's need to maintain the trust of the community. (T2. 142.)

Chief [redacted] testified that he agreed with Chief [redacted] decision to terminate [redacted] employment with the Department. (T2. 178.) He did not, however, have any one-on-one conversation with [redacted] in which [redacted] explained the reason for his decision. (T2. 174.)

Chief [redacted] testified that he was not "reassured" by [redacted] responses to questions during the investigation. For example, he was concerned that [redacted] said that he had used the CLETS system to get information "out of curiosity." [redacted] needed a law enforcement reason to run Doe's plate, not just curiosity. He thought [redacted] statement that "you can learn a lot about a person from whether their car was currently registered" was "a really bizarre statement" that "definitely didn't satisfy what is required" under the Department's policy. (T2. 143.) Like others, [redacted] testified that officers must have a "need to know" before accessing information via CLETS. (T2. 164.)

Chief [redacted] was also concerned that [redacted] found Doe to be flirtatious and wanted to explore that. Yet [redacted] claimed that his presence at her house was a coincidence. (T2. 143.) [redacted] concluded that [redacted] ran Doe's plate with the

intention of trying to further social contact with Doe and that was exactly what he did. (T2. 144.) He testified that his conclusion was also based on [redacted] statement that he was married but wanted to explore a relationship with Doe. (T2. 144.)

Chief [redacted] compared [redacted] case to that of an officer (referred to as [redacted]) who committed similar misconduct. (T2. 145.) In that case, as here, an officer used the CLETS system to gather personal information about a citizen and the officer's explanations for doing so "just didn't ring true." (T2. 151.) [redacted] testified that [redacted] misconduct was more serious than [redacted] because [redacted] had no preexisting relationship with Doe. (T2. 151.)

Chief [redacted] testified that he found some of [redacted] answers during his IA interview to be "dishonest." (T2. 167.) But he did not ask IA to investigate [redacted] for dishonesty. (T2. 167-68.) He thought it would be harder to prove dishonesty in [redacted] case than it was in [redacted] case. (T2. 168.)

Chief [redacted] acknowledged that [redacted] was also charged with being dishonest and that no such charge was brought against [redacted]. (T2. 152-53.) [redacted] testified that he did not think that difference warranted a different disciplinary result. He also continued to maintain that [redacted] conduct was worse. (T2. 154.[7])

Chief [redacted] also testified that discipline is not imposed on an allegation by allegation basis. The Department imposes a single penalty for all of the misconduct. (T2.

[7] There is also testimony indicating the [redacted] case might still be under review. (T2. 162.)

161.)

Chief [redacted] testified that [redacted] violated C 1438 by "encouraging" sexual favors through his "dialogue" with Doe. He also believed that [redacted] was guilty of sexual harassment. (T2. 155.) Joseph also believed that [redacted] "used" his "official police capabilities to further " the misconduct when he had the follow-up visit with Doe at her home. (T2. 155-56.)

Although the City policy on sexual harassment describes it as a form of "workplace harassment," Chief [redacted] testified that sexual harassment can occur between a harasser and a "member of the public." [redacted] specifically cited the example in the policy regarding "Unwanted sexual advances or pressure for dates or sexual favors." (T2. 156-67.) [redacted] believed that Doe interpreted [redacted] actions in stopping at her home to be an "unwanted sexual advance" with "sexual" innuendo. There was no mutual attraction and no agreement to have any level of social engagement. (T2. 158.) According to [redacted], "Showing up at [Doe's] house off duty and asking her what sort of naughty things she had done that he might be interested in" was [redacted] "encouraging sexual behavior." (T2. 165-66.[8])

According to Chief [redacted], Doe was alarmed and concerned by [redacted] behavior. Doe's reaction to [redacted] behavior had an impact on his decision to terminate [redacted] employment. He was concerned what would happen if an officer

[8] In response to a question on cross-examination, [redacted] indicated that he could not identify a "specific sexual activity" that [redacted] was encouraging. (T2. 167.)

who had done "something like this" had a later, similar interaction with another citizen. If that happened, the public would want to know why the Department had retained someone who had done this while in a "position of trust." (T2. 159.)

Chief [redacted] acknowledged that he did not listen to the audio tapes of [redacted] interviews. Nor did he conduct any investigation of his own. He relied on the facts represented by [redacted] and [redacted]. (T2. 169.)

Chief [redacted] did not believe [redacted] claim that he knew where Doe lived from what she told him at the school and that he did not need to use the CLETS system in order to find her address. (T2. 170-71.)

With regard to the fact that [redacted] was kept on duty for a year after the initial allegations came to light, Chief [redacted] testified that the Department's policy is to let officers continue to work while an investigation is pending and not automatically place them on administrative leave. Officers are only placed on immediate administrative leave if the Department believes the employee is going to be arrested or discharged. (T2. 177-78.)

The City Manager's Decision

[redacted] is the Assistant Director of the Office of Employee Relations. (T. 184.) When the Department recommends formal discipline, she or the Director of Employee Relations reviews the disciplinary packet and makes the final decision on discipline. (T. 189.) In making such a review, she determines whether the level of discipline is commensurate with the findings of the investigation. (T. 187.) [redacted] also

reviewed the NOID. (T. 188.)

In this case, the Department recommended dismissal, which [redacted]' office agreed with. She testified that she gives the Department's recommendation "a good deal of deference." According to [redacted], the Department's recommendation in this matter "made sense" given [redacted] conduct. (T. 189.)

[redacted] did not participate in the *Skelly* meeting. She learned what happened at the *Skelly* meeting from the *Skelly* officer and considered that as part of her decision-making process. (T. 190-91.)

It is unclear whether [redacted] personally reviewed the disciplinary packet in this case. She initially testified that she had done so. She then testified that she "generally" reviews the findings and recommendations in disciplinary packets and then thumbs through the balance, "sometimes" keying in on additional information. She does review findings and recommendations with "a greater degree and finer tooth comb." (T. 209.)

With regard to the charges, [redacted] believed that there was a conversation between [redacted] and Doe at the school event where [redacted] believed that Doe was being flirtatious and that he was open to that behavior. (T. 191.) After the event, he accessed information about Doe's vehicle through the CLETS system. He then made contact with her at her home, which Doe was not expecting and which made her uncomfortable. (T. 192.)

[redacted] testified that the officers are not to use official channels to access information to satisfy an officer's curiosity. (T. 192-93.) She also concluded that

[redacted] behavior violated the City's policy against sexual harassment, which prohibits making unwanted sexual advances or sexually charged comments. (T. 194-95.) According to [redacted], the policy includes making advances or comments to members of the public. (T. 195.) She also testified that sexual harassment policy covers off-duty conduct by an officer who originally met a member of the public while on duty. (T. 196.)

[redacted] testified that she considered [redacted] argument at the *Skelly* meeting that the Department could not prove that his intent regarding Doe was sexual. (T. 196.) [redacted] did not find that argument to be credible because she found it "more likely than not that he was seeking to further some personal gain by making contact with [Doe]." Otherwise, he had no reason to run her plate or make contact with her days later. (T. 197-98.) In fact, he admitted that he had no law enforcement reason for running her plate. (T. 198.)

In determining the appropriate level of discipline, [redacted] considered the impact of [redacted] actions on Doe. According to [redacted], Doe was "appropriately and understandably unnerved by the experience." (T. 199.) [redacted] testified that the City cannot allow police officers to make innocent citizens feel "vulnerable" as a result of violating the trust that citizens place on the Department. (T. 199-200.)

[redacted] testified that she disbelieved [redacted] claim about the possible out-of-date registration sticker. (T. 201.) He did not intend to take any action. He also indicated that he ran the plate because he wanted to satisfy his curiosity. (T. 203.)

Doe's Testimony

Doe testified that she attended the school event with her three-year-old son. (T.

109.) At the event, participants had the opportunity to line up at one of two patrol cars to speak with an officer and have the children in a patrol car. Her conversation with [redacted] started while her son was in his patrol car. (T. 109.) At the time, both she and [redacted] were wearing masks. (T. 109-10.)

According to Doe, the entire interaction lasted five to six minutes. Doe testified that she was uncomfortable with [redacted] questions about whether he knew her and his statement that her face looked familiar. (T. 111.)

Doe testified that her demeanor was positive. Her son was excited to meet and speak with a police officer. However, she was disappointed that [redacted] attention was on her and not on her son. (T. 111.)

Doe denied that she was flirtatious with [redacted]. She did not intend for [redacted] to think that she had any interest in any social interaction. (T. 112.) Instead, she thought that [redacted] was flirting with her and that made her uncomfortable. (T. 115.)

Doe testified that when she told [redacted] that he would not know her from anything bad, she meant that he had never arrested her. She did not intend the remark to be flirtatious. (T. 113.)

Doe acknowledged that she told [redacted] that she lived around the 7-Eleven. During the CID interview, she indicated that it would not have been difficult for [redacted] to find her house without knowing the exact address: "[I]f he was trying to just search for me and then saw my car right away, because I park outside . . . . It's pretty easy to find me . . . ." (U-C, p. 7 [MB 56].)

Doe testified that she would not normally tell a stranger where she lived but that because [redacted] was a police officer, she responded to his inquiry. She also testified that she "just wanted to end the conversation." (T. 114.) She did not intend her response as an invitation for him to stop by her house. (T. 114.[9])

With regard to the interaction the following Monday, Doe testified that after dropping her children off at school, she spent about 40 minutes in her car, which was parked in her driveway, speaking on the phone with a friend. (T. 117.) At the time, her mother was walking in and out of the house, doing laundry and checking on her. When her garage door opened and she got out of her car, she heard someone call her name. (T. 117.)

Doe turned, saw a person and heard him ask whether she recognized him. She said no and walked toward the back of her car. (T. 117.) The man then got out of his car and walked closer. He then referred to the school event and asked how her "kid" was doing. (T. 118-19.[10]) At that point, she recognized him and felt "uncomfortable and amazed that he knew where [she] was." (T. 119.) She was also scared because someone she did not know had showed up at her house. She testified, "I just wanted it to end." (T. 119.)

[redacted] told her that he was in the area to see a friend and noticed that her

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[9] During her CID interview, Doe stated that at the end of her conversation with [redacted], he said, "Ok, I'll see you soon." (J-9, EX00061.)

[10] Doe testified she was certain that [redacted] referred to her "kid." (T. 135.) However, when interviewed by CID, she stated, "And he asked me, "Where's your son." (U-C, p. 2 [MB 51].

garage door had been open. He also asked her what kinds of things she would do that were bad. She interpreted that as [redacted] trying to lead to something sexual. (T. 120.) As a result, she felt both "scared" and "uncomfortable." (T. 121.) She testified: "I didn't know his intentions. I don't know what was going to happen next." (T. 121.) To get him to leave, she told him that she needed to pick up her child. He then left. (T. 122.)

Doe testified that she assumed that [redacted] had been watching her for a while because she had been in her car for 45 minutes and [redacted] arrived as soon as she exited the car. (T. 122.) As a result, she contacted [redacted] who was a DA investigator, and related the incident to him. (T. 125-26.) [redacted] notified Sgt. [redacted] who then notified CID. (J-9, EX000092.) Then the Department contracted Doe. (T. 125.) She testified that the incident resulted in her installing a security system at her home and having trust in the police. (T. 126.)

Doe denied telling CID that it would have been easy for [redacted] to find her house based on her initial conversation with him at the school. (T. 129.) She testified that she thought [redacted] had sexual intentions when he made the comment about her doing "bad things," along with the fact that he just showed up at her home. (T. 129.)

[redacted] Testimony

[redacted] testified that he was born in [redacted] and that English is his fifth language. (T2. 190.) He is married with two children. (T2. 192.)

[redacted] came to the United States in 2001 and lived in New York City. (T2. 191.) While in New York, he worked as a volunteer police officer. (T2. 192.) [redacted]

moved to California in order to pursue a career in law enforcement. (T2. 192.)

[redacted] believes that he had a reputation in the Department as a hard worker. (T2. 192.) He also considers himself to be friendly "to a fault" and that his friendliness is the reason he is in his current situation. (T2. 193.)

[redacted] testified that because of his personality, the Department has placed him in public-facing roles. (T2. 193.) He testified that Captain [redacted] told his sergeant ([redacted]) to use him for community events. (T2. 193.) He testified that he had contact with Chief [redacted] at many of these events. (T2. 194.) He also testified that he worked at fifteen or more community events subsequent to the incident in May of 2022. (T2. 194-95.) He also continued to work many hours of overtime both before and after May of 2022. (T2. 196.)

[redacted] testified that an officer named [redacted] was the person who recruited him to the SJPD. (T2. 196.) Later, [redacted] successfully sued the Department for racial discrimination. (T2. 196-97.) According to [redacted], there were times Chief [redacted] saw him and [redacted] in conversation. (T2. 198.) [redacted] testified that on one such occasion, the Chief appeared to give him a negative look. (T2. 199.)

With regard to the incident at the school community event, [redacted] testified that it occurred during [redacted], when he was fasting during the day. (T2. 201.) He went to the event at the request of Sgt. [redacted]. (T2. 202.)

During the event, parents and children lined up to get into his patrol car or a patrol car assigned to another officer. Each family would stop by, have a picture taken, and he and the parent would chat for a couple of minutes while the child was in the police car.

(T2. 202.)

According to [redacted], when Doe's son got into the patrol car, Doe said something to him along the lines of, "Don't get into trouble like Mommy." [redacted] asked her name and she told him. He then responded that she looked familiar, and he asked if she lived in the neighborhood. (T2. 203.) She responded, telling him that she lived on [redacted] right by the 7-Eleven. He asked, "By the 7-eleven?" She responded "Yeah, I live right behind the 7-Eleven." According to [redacted], she was very friendly. (T2. 204.) According to [redacted], Doe also indicated that she saw cops at the 7-Eleven all the time. (T2. 205.)

[redacted] denied alluding to anything of a sexual nature. He testified that Doe's "get into trouble" joke was not inherently sexual in any way. (T2. 205-06.[11])

[redacted] testified that as Doe drove away in her car, it looked "from afar" that her registration tag might be expired, which piqued his interest. He did not remember exactly when he ran her plate, as running plates was such a common task. (T2. 206.) He had no intention of giving her a ticket. If the registration had expired, he was just going to tell her. (T2. 207.) [redacted] described himself as a proactive police officer and testified that he frequently ran plates. (T2. 207-08.)

[redacted] testified that at the time he ran Doe's plate, he "100 percent" knew where she lived and that he did not need to run her plate in order to get her address. (T2.

[11] However, during his CID interview, he indicated that her comment was "flirty" and had "some kind of innuendo." (U-H, p. 21 [MB 144].)

210.) He also testified that he passed her house after he left the school. He testified: "So if I'm driving southbound like I was, you can clearly see her house on the corner, and the minivan was parked there." (T2. 211.) He testified that the reason he drove in that direction was because he was going to the [redacted] (T2. 211.)

[redacted] testified that he never "staked out" or watched her house. Nor did he ever park outside her house. (T2. 215.) On the morning of the second encounter, he went to the [redacted] for a while and then had to drop something off at a smaller [redacted]. After, he wound up on [redacted], heading toward [redacted] in order to go to [redacted] [redacted] (T2. 216.)

As he was driving north on [redacted], he spotted Doe in her driveway. According to [redacted], he was trained to always look around as he drives and not merely look straight ahead. (T2. 216.) He then made a U-turn and stopped in the middle of the road. (T2. 216-18.) He testified, "I was like, hey, I'll go say hi to the lady from the other day." (T2. 218.) According to [redacted], this was not the first time that he had said hello to someone he had met at a police event. (T2. 218-19.) His only intent was, "To say hello . . . . Nothing else." He exited his car, leaving the engine was running and the car door open. (T2. 219.)

[redacted] testified that Doe's garage door was open. He also saw her mom walk out and he said hello to her. (T2. 220.)

[redacted] testified that he greeted Doe, reminded her of who he was, and asked how she and her family were doing. (T2. 216.) When she said "fine," he "referred to her joke" and asked, "What kind of trouble are you getting into lately?" She said, "No,

nothing" and told him she needed to have lunch with her husband. He returned to his car and left. (T2. 217.) According to [redacted], the whole interaction lasted no more than thirty seconds. (T2. 217.) During this interaction, he never got close to her. (T2. 218.)

[redacted] testified that he repeated Doe's joke back to her as a conversation starter. He testified: "So for me it was just like a normal casual conversation with no intent to do anything besides that." (T2. 221.) He testified that it was Doe's joke. He has been married for 22 years and has two children. He had no sexual intent behind the remark. He testified that he has never cheated on his wife and never will. (T2. 222.)

[redacted] testified that he was nervous when called in for his CID interview. He felt pressured to make a statement. He was not informed of the charges against him. (T2. 224.)

[redacted] testified that he told the investigators that he had not done anything wrong and that he was just being friendly with Doe. He told them he had not done anything sexual in nature. (T2. 225.) He knew that as a police officer, if "you lie, you die" so he was completely honest in his interview. (T2. 226.)

[redacted] testified that he was not shown his prior statements to CID before the start of the IA interview. (T2. 227.) During the CID interview, he was asked about his "curiosity killed the cat" statement. He stated:

> No, I'll be honest with you. Curiosity killed the cat. Meaning, why did I run the fucking plate? "Maybe I should have even not run it, "I'm thinking to myself . . . ." I run plates all the time. We all do.
>
> . . . .
>
> That's what I meant, Sarge, by curiosity killed the cat. I think I should have

> not fucking run it. I own up to my own mistakes. It's not even a mistake. It's just a step I should have never done.

(T2. 229; U-H, p. 57 [MB 180].) When asked whether he could have found Doe's house without running her plate, he told the CID investigators: "1000%." (T2. 238; U-H, p. 57 [MB 180].) He also told [redacted] that he routinely runs plates if there is any reason to do so and the checking to see if a vehicle's registration is expired is a primary reason. (U-G, p. 28 [MB 122].)

[redacted] was also questioned at the hearing about the statements he gave to CID about whether he had any sexual interest in Doe. During the CID interview, [redacted] was asked what he thought the circumstances with Doe were. He responded:

> Honestly? I mean, there is [sic] women who like cops. And for me, as far as . . . . Yeah. I am married. I'm not going to sit here . . . . What I'm trying to explain to you is, yes, I'm married, yes, I have kids, yes, I am religious. But at the same time, do I like women? Yes, I do. I'm not going to fucking sit here and lie about it. But I don't like women enough to fucking do something criminal or that will be stupid.

(U-H, pp. 58-59 [MB 181-82].)

Then the following colloquy took place between [redacted] and the CID investigators:

> Sgt. [redacted]:
>
> So, are you saying that you thought she . . . . Did you think she was coming on to you?
>
> [redacted]
>
> Yes, with the naughty comment. Yeah. So I was like is it something to

explore? Yes.[12]

Sgt. [redacted]:

Did you think that by her telling you basically exactly where she lived?

[redacted]:

Yes. Being flirty and making a naughty comment, that she likes to get into trouble, did I think that it might be something? Yes. But at the same time, the way I look at it is that you cannot be sure, obviously. So, when I saw her, and I happened to see her . . . . I mean, I would've seen her another time probably in the area because that's where I patrol, I'd be like, "Hey, how are you doing?" And at that point, it would've been more she would've either advanced and I would've had more signs telling me to advance a certain way. Or, "Hey, how are you?" And leave, which . . . . Actually, believe it or not, on that Monday, I saw that she was not very happy about it. I'm like, "Okay. Good. Goodbye." You're not going to pursue something that is not there obviously. You got to be stupid to do that. So for me, when I say that she was not as . . . .

Sgt. [redacted]:

She was different.

[redacted]:

She was different. Probably was having a freaking bad day. I was just like, "Fuck it. Goodbye." And I didn't even think of it anymore.

(U-H, pp. 58-59 [MB 181-82].)

With regard to that interchange, [redacted] testified that he likes women and is attracted to them. He testified:

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[12] He testified that he did not know if Doe's "naughty" comment was "more" than a joke: "I can't read into what other people are thinking." He testified: "Some people can make it innuendo, some people can make it as a joke, but I can't tell for certainty." (T2. 279.)

> I mean, like . . . if I see a person and it's a good looking person . . . . That does not in any way, shape, or form say that I'm going to cheat on my wife and have extramarital sex or anything like that. It is just the appreciation of beauty . . . .

(T2. 231-32.) He testified that he would not cheat on his wife and risk losing his career. (T2. 233.) He testified that he never wanted to have sex with Doe or anyone else. (T2. 256.) He testified that even if Doe had wanted to "advance" their relationship he would not have acted upon it. (T2. 257-58.)

[redacted] testified that when he told investigators that a positive response from Doe was "something to explore," it did not mean that he wanted to have sex with her. It was "more like" meeting people and becoming friendly. (T2. 281-82.)

[redacted] was adamant in testifying that he did not run Doe's plate in order to obtain her address. Similarly, he testified that he did not purposely go to her house on the way back from the mosque. It was pure coincidence. (T2. 239.)

[redacted] acknowledged that he was told at the CID interview that it was voluntary and that he could leave any time. He also acknowledged that he did not request a union representative or an attorney. (T2. 243-44.) He also knew that the interview was part of a criminal investigation. (T2. 245-46.) He also knew that the interview was about his interactions with Doe. (T2. 245.)

[redacted] testified that he understood that making unwanted sexual advances toward a woman while on duty would be a violation of the duty manual. (T2. 253.) He also knew that as a police officer, there were lines he could not cross and that he had to be

careful of how he behaved while in uniform. (T2. 254.)

Additional Evidence and Testimony

Discipline Imposed on Other San Jose Officers for Unauthorized Use of CLETS

In 2017, Officer [redacted] was discharged for the unauthorized access of sensitive information, maintaining contact with prohibited persons, possession and sale of illegal steroids, and some unspecified conduct unbecoming a police officer. (U-J.)

In 2005, Officer [redacted] was demoted from his position as a lieutenant for "numerous" instances of unauthorized access to DMV data bases, contacting a female employee at her personal residence 10-12 times, driving to the residence of a female while on duty and waiting for her to come home in order to pursue an unwelcome personal relationship, contacting that female at work to pursue an unwelcome relationship and being untruthful during his administrative interview. (U-K.)

In 1997, Officer [redacted] was given a letter of reprimand for accessing a Deparment of Justice database in order to reestablish contact with a friend. The officer acknowledged his mistake and cooperated in the investigation. (U-L.)

In 2018, Officer [redacted] was given a 40-hour suspension for accessing a police report without the need to know or the right to know. The Notice of Discipline also cited a prior 6-month suspension eleven years prior. (U-M.)

Finally, as indicated previously, Officer [redacted] was discharged for unauthorized access to data bases in order to access personal information about someone with whom he had a prior dating relationship. The NOD cited three instances. The NOD also cited the

use of the information he obtained in order to contact that person. It also charged [redacted] with dishonesty. Finally, the NOD cited two oral counselings issued in 2020 and a 10-hour suspension for a variety of charges including conduct unbecoming. (C-2.)

Officers Routinely "Run Plates"

[redacted] was an officer with the SJPD for more than five years. (T2. 8.) During part of that time, he served as a field training officer ("FTO"). (T2. 12.) He testified that a "good proactive police officer" should be "running plates." (T2. 12.) In any given shift an officer should run 20-50 plates. (T2. 13.) He testified that enables officers to know if a car has stolen plates on it. (T2. 13-14.) Officers should also run plates if there is reason to believe that the registration is expired. (T2. 15.) He acknowledged that running plates is akin to a "fishing expedition." (T2. 29.)

Prior to his retirement, [redacted] was a lieutenant with the SJPD. (T2. 76.) He testified that running plates was a habit for those working patrol. (T2. 79.) He testified that an out-of-date registration would be a cause for running a plate. (T2. 80.) He also testified that after running a plate, an officer has the discretion as to whether to give a citation or a warning or do nothing at all. (T2. 80.)

Like [redacted], [redacted] characterized running plates as a "fishing expedition." (T2. 80.) It is an element of proactive policing. (T2. 81.) However, he testified that it is not okay to go on a fishing expedition for personal information so that an officer can pursue a potential romantic relationship with someone. (T2. 97.)

[redacted] served as an SJPD officer from 1999 until his retirement in

2023. (T2. 180.) At one point, he worked on the same team as [redacted]. (T2. 181.) Like others, he testified that proactive officers run plates all the time. (T2. 182.) He also testified that an expired registration tag provides a legitimate basis for running a plate. (T2. 182.) He also testified that officers need not intend to issue a citation in order to run a plate. (T2. 183.)

Character Evidence Regarding [redacted]

[redacted] testified that when he worked with [redacted], [redacted] was always willing to go above and beyond what was required. [redacted] testified that the Department was understaffed and that [redacted] was always eager to respond to calls in districts outside of his assigned area. (T2. 9-10.) [redacted] also testified that [redacted] was "extremely honest." (T2. 10.)

[redacted] also testified that [redacted] was great in dealing with the public. He had a great ability to deal with kids and was always eager to engage members of the public in conversation. (T2. 11.) He testified: "If he asked how you or your day was, he actually meant it." (T2. 11.)

[redacted] also testified that officers are not trained to flirt with members of the public. (T2. 21.) He testified that officers are not supposed to use community events as a place to pursue relationships with women who attend. (T2. 25.)

[redacted] testified that [redacted] work was essential to solving a case involving a suspected student with a gun. (T2. 77.) [redacted] testified that [redacted] was reliable, always willing to go the extra mile, and always willing to handle a call for service at the end of

his shift instead of leaving it to someone on the next shift. (T2. 77-78.) He also testified that he had experience seeing how [redacted] behaved at community events and that he never saw [redacted] say or do anything inappropriate. (T2. 78.)

[redacted] testified that [redacted] was a hard worker and was very personable with citizens. (T2. 181.) [redacted] has no issues with [redacted] regarding [redacted] honesty and integrity. He never witnessed [redacted] do anything inappropriate. (T2. 182.)

Knowing Where Doe Lived

[redacted] testified that if someone had told him they lived directly behind the 7-Eleven on [redacted] and [redacted], he would know where that person lived. (T2. 18.) He also testified that police officers frequently stop at 7-Eleven locations where they can access restrooms. (T2. 17.) [redacted] provided similar testimony. (T2. 184.)

[redacted] testified that knowing that Doe lived behind the area of the 7-Eleven does not mean that [redacted] did not have to run Doe's plate to find her house. He testified: "Knowing the area where a residence is located and knowing the exact residence are two different things. So by running the licence plate, he was able to know exactly where she lived at." (T2. 51.)

Handling of the Internal Affairs Investigation

[redacted] handled more than 30 IA investigations in his career with the Department. He testified that in reviewing an IA investigation, he reviewed the entire IA packet. If serious discipline was at issue, it was important to "cross your T's" and "dot your I's."

(T2. 82.) It would also be important to interview the officer's supervisors. (T2. 82-83.) He would also listen to all audio recordings. (T2. 83.)

[redacted] testified that a lieutenant's review of an IA report can include investigation and fact-finding. (T2 84.) If he determined an officer was dishonest, he would include that in his report. (T2. 85-86.) Dishonesty is a serious allegation and it would be "odd" not to document such a conclusion. (T2. 86.)

[redacted] testified that he read the IA report and the report prepared by [redacted] regarding [redacted]. He also reviewed transcripts of [redacted] CID and IA interviews but did not listen to them. (T2. 88-89, 100.) [redacted] concluded that there was more that [redacted] could have done to substantiate the conclusions regarding misconduct. (T2. 89-90.)

[redacted] was asked about the sentence in [redacted] report that states: "These statements clearly support the possibility that Officer [redacted] arrival at her residence and comments to [Doe] outside of her home were somewhat sexual in nature." He testified that the sentence does not express confidence that anything has been sustained. Rather, it sounds like suspicion, surmise, and conjecture. (T2. 111-12.) He testified, regarding [redacted] conclusion, "I'm just trying to figure out what [redacted] said that was sexual in nature." (T2. 122.)

However, [redacted] acknowledged that was not [redacted] final statement regarding the charges. Instead, [redacted] specifically found "based on the totality of the circumstances" that [redacted] actions in driving to Doe's home did "rise to the level of

inappropriate and unwelcome romantic advances that would constitute a violation . . . of C 1438." (T2. 121.)

[redacted] also testified that given the gap in time between the CID interview and the IA interview, he would have given [redacted] a chance to look at his statements to CID before the IA interview. (T2 112-14.) He testified that the failure to do so was unfair to [redacted] (T2. 115-16.)

[redacted] testified that if a reviewing lieutenant does not have any questions after reading an IA report, that lieutenant does not have to do any further investigation. Nor does a reviewing lieutenant have to interview the officer. (T2. 99.)

Finally, [redacted] testified that he did not participate in the DRP in this case and that he was not aware of the discussion the DRP panel in this case. (T2. 103-04.)

POSITIONS OF THE PARTIES

The City's Position

The City argues that it had just cause to discipline [redacted] for violating Duty Manual Sections C 1438 and C 2003. According to the City, its investigation and conclusions were based on [redacted] own statements and admissions. The City argues:

> Grievant testified in the arbitration that he stands by the statements he made in both interviews and was being completely honest in both interviews. The only reasonable conclusion from those statements is what Grievant himself explained: He identified a potential romantic opportunity while on duty, used his access to the DMV database to satisfy his curiosity about the target of his romantic aspirations, and then appeared at her home a few days later to see if she was as interested as he was in pursuing a relationship."

(City Br., p. 5.)

With regard to the claimed violation of C 1438, the City claims that [redacted] interpreted Doe's "demeanor" at the school event to be sexually suggestive and "used this conversation . . . to further an unwanted romantic and sexual interest." He told CID that she was coming on to him" with the "naughty comment" she made. (City Br., p. 6.)

According to the City, it did not just examine and rely on the conversation in a vacuum. Following the flirtatious conversation, [redacted] used his position to obtain her street address. Days later he drove to her house.

According to the City, [redacted] driving to Doe's house showed that he used the DMV search to pursue an unwelcome sexual advance and romantic interest. While [redacted] claimed his stopping at her house was a coincidence, that claim lacks credibility. The trailer at her house would have blocked his view given the direction [redacted] was driving that morning before turning around and stopping his car. The amount of time he had to notice Doe was extremely limited given the direction he was traveling and the limited viewing angle. The fact that she had just stepped out of the car after being on the phone for 40-45 minutes also makes [redacted] claim of coincidence to be most unlikely.

[redacted] statements during the CID interview also support the City's position. He stated that when he saw Doe, there were two possibilities. She might have been receptive to him, in which case he would have "advanced" the possible relationship. If she did not seem to be receptive, he would have moved on, as he did that day.

According to the City, because [redacted] believed Doe's comment at the school

event was suggestive, he referred back to it a couple of days later during his brief conversation with Doe. That makes it "clear" that [redacted] "was looking to make a sexual 'advance' towards Doe." (City Br., p. 18.) The fact that Doe immediately reported the incident shows that [redacted] advances were unwelcome. As a result, there is support for the conclusion that [redacted] and City reached, i.e., that [redacted] act of driving to Doe's home was an inappropriate and unwelcome romantic advance that violated the Duty Manual's rules regarding social conduct on and off duty.

The City also argues that [redacted] violated Section 2003 when he ran Doe's plate through the CLETS system. [redacted] had no law enforcement purpose for running her plate. [redacted] acknowledged that he had no intention of contacting Doe or of giving her a citation if it turned out that her registration had expired. Proactive policing, in the form of running plates, is only justified is there is a "law enforcement purpose." Here there was none.

The City also argues that [redacted] essentially admitted that he ran her plate in order to pursue a possible relationship. He told CID that he did not need to run the plate to get her address. He said that he saw where she lived when she drove away from the event. He said he had never done anything like that before, and he did it that time because she was being flirty. He told CID, "[I]f she wants to do something about it, I'm not going to be the first one to say no. I mean, no booty on duty . . . . But I mean, if it's consensual and it's two adults and something happened . . . . [I]'m married, but not dead, okay." (U-H, p. 59 [MB 182].)

The City also argues that the investigation was proper and adequate to meet the City's burden. [redacted] knew why he was being interviewed by CID and later by IA. At the CID interview, Sgt. [redacted] told [redacted] he was being interviewed because a complaint had been made against him. Sgt. [redacted] also told him that he was free to leave at any time. At the IA interview, [redacted] was asked if he wanted to retract anything he had told CID investigators. [redacted] did not ask for a transcript of his CID interview before responding. Instead he stated, "no."

According to the City, [redacted] claim that IA could have and should have done more is irrelevant. [redacted] has not challenged the three critical elements that support the charges: he did run Doe's plates with no intent to issue a citation or warning; he did make statements to CID indicating that the initial interaction with Doe was flirtatious; and he did show up at Doe's home a couple of days later. In addition, both Chief [redacted] and [redacted] relied on [redacted] own statement when reaching their conclusions.

The City argues that terminating [redacted] employment was consistent with how it has handled prior similar discipline. Chief [redacted] testified that he believed that [redacted] behavior was worse than [redacted] because [redacted] had a prior relationship with the women he checked on through official data basesm and [redacted] never showed up at the woman's home. Conversely, [redacted] has not presented any evidence of disparate treatment.

Finally, the City argues that termination is appropriate because [redacted] still does not recognize that his conduct was wrong.

The Association's Position

The Association's primary argument in this matter is that the City has not met its burden of proof. [redacted] had two interactions with Doe. Nothing specifically sexual was said by either [redacted] or Doe on those occasions. Nor was there any touching during either encounter. Rather, the whole case stems from a "G-rated joke" that Doe made in front of her child. (Ass'n. Br., p. 7.) The IA report documented that there no implied or overt mentions of sexual favors or sexual activity.

With regard to [redacted] running Doe's plate, [redacted] provided a law enforcement basis, which was his concern that her registration tag was out of date. The City's contrary position is that [redacted] ran the plate in order to determine where she lived. Yet [redacted] suggested that [redacted] did so while being in front of Doe's house, which makes no sense.

The Association argues that the City has the burden of proving just cause based on credible evidence and not merely surmise or suspicion. In support, the Association cites two cases in which courts reversed discipline after concluding that the determinations were based on suspicion, surmise or conjecture. (*Pereyda v. State Personnel Board* (1971) 15 Cal.App.3d 47; *Johnstone v. Daly City* (1958) Cal. App. 1st Dist. 156 Cal.App.2d 506.)

As for the meaning of just cause, the association relies on the Arbitrator Koven's "seven key tests." (*Just Cause: the Seven Tests* (2nd ed. Rev. Donald F. Farwell, BNA, 1992) pp. 23-24.)

The Association argues that the appropriate burden of proof here should be "clear and convincing evidence" because [redacted] did not just lose his job. He lost the ability to continue to work in his chosen profession. In support, the Association cites *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856. The Association also argues that the misconduct here is "of a kind which carries the stigma of general or social disapproval." (Citing *Elkouri & Elkouri*, How Arbitration Works (4th Ed.) pp. 662-63.)

The Association also argues that hearsay, by itself, is insufficient to carry the burden of proof. Citing appropriate authority, the Association argues that even if admissible, uncorroborated hearsay evidence is not, by itself "substantial evidence" that can support an administrative determination. (Citing *In re Lucero* (2000) 22 Cal.4th 1227, 1244-45.)

With regard to the merits, the Association argues that in the absence of sexual or romantic advances, there is no misconduct. A claim that [redacted] was acting to pursue a "sexual interest" is a necessary element to prove three allegations in the NOID: that he participated in the school event "to further an inappropriate and unwelcome romantic interest"; that he accessed the CLETS system for information about Doe "to pursue and unwelcome romantic interest"; and that he used the information he obtained to contact Doe outside her home "to pursue and unwelcome romantic interest."

According to the Association, there was nothing sexual or romantic about the interactions between Doe and [redacted]; accessing CLETS was "entirely standard and

appropriate,"; there is no evidence that [redacted] did or said anything to pursue the romantic interest; and all of the statements used by the City came from answers [redacted] provided at an early morning interview that [redacted] attended without representation.

The Association criticizes the testimony of [redacted], arguing that she provided unsupported and inconsistent answers to simple questions. She did not understand the standards for an officer to run a plate. Nor did she familiarize herself with the entire record of the investigation.

The Association also argues that Doe lacked credibility. She provided inconsistent testimony regarding what she told [redacted] about the location of her home. She testified that [redacted] had sexual intentions when he arrived at her house, something she never expressed to the CID investigators. When testifying, she insisted that [redacted] referred to her "kid" during their conversation at her home. Yet she told CID that he asked about her "son."

The Association argues that the investigation was unfair. The CID investigators failed to tell [redacted] what their investigation was about. Even though the IA investigation occurred a year later, [redacted] never provided [redacted] with transcripts or recordings of his CID interview. Nor did [redacted] ask [redacted] about the statements he later used to support the City's charges against [redacted]a. Similarly, citing the testimony of [redacted], the Association criticizes [redacted] report.[13]

[13] The Association also claims, without citation, that the City lost a number of recordings from interviews conducted in this matter. (Ass'n. Br., p. 71.)

The Association argues that [redacted] POBRA rights were violated. Citing *Cal. Corr. Peace Officers Ass'n v. Cal.* (2000) 82 Cal.App.4th 294, the Association argues that POBRA rights must be applied to criminal interviews. Here, the City did not notify [redacted] of his POBRA rights, give [redacted] time to meet with counsel, or notify [redacted] of the nature of the investigation. According to the Association, [redacted] conceded that if POBRA applied, it would include those rights.

The Association specifically cites Government Code § 3303(g) which states that "If a tape recording is made of an interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation . . . ."

The Association also argues disparate treatment. Citing the testimony of [redacted], the Association argues that progressive discipline should have been used. [redacted] had an unblemished work history and is well-respected for his work with the Department. It cites the case of Lt. [redacted]., who accessed the DMV data base on numerous occasions without authorization and used the information obtained to contact a female city employee on multiple occasions. The City did not discharge [redacted]. It merely demoted him.

Similarly, in 2018, Officer [redacted]. was given a 40-hour suspension for conducting unauthorized CLETS searches and providing false statements to Internal Affairs.

With regard to the [redacted] case, the Association argues that [redacted] was found to have been dishonest, which distinguishes his situation from [redacted]'s.

The Association also argues that other officers have flirted and started

relationships with women while on duty and have not been disciplined.

Finally, the Association argues that the decision to terminate [redacted] employment was based on retaliation. [redacted] had been friendly with another [redacted] officer who was discriminated against.

DISCUSSION

Was There Just Cause to Discipline Officer [redacted]?

Just cause determinations usually have two components. The first component is a factual determination as to what the individual actually did or did not do. The second component relates to the consequences of those actions or the failure to act. Under this second component, there are a variety of considerations, including the question of whether the individual's actions violated work rules, whether those rules were known to the individual, the fairness of the investigation, and whether the choice of penalty was appropriate and consistent with how others who committed the same misconduct have been treated.[14]

As the person selected by the parties to decide this dispute, I am charged with making all of these determinations with the understanding that the City has the burden of proof on all issues. Officer [redacted] starts with a clean slate. The City must prove each act alleged, prove the acts constitute misconduct, and prove that the misconduct found

[14] These considerations are reflected in Koven's "Seven Tests." However, like many arbitrators, I do not use the Seven Tests formulation because I do not believe that a failure of one test necessarily undermines the existence of "just cause."

justifies the discipline imposed.

This proof can be satisfied by direct evidence and circumstantial evidence. A trier of fact is also allowed to use direct and circumstantial evidence, and the statements of the person whose conduct is at issue, in order to determine that person's state of mind.

What is the Appropriate Burden of Proof?

Before getting into these questions, it is appropriate to address the Association's claim that the burden of proof should be "clear and convincing evidence" as opposed to a "preponderance of the evidence."

According to one of the leading treatises, *Discipline and Discharge in Arbitration* (Brand and Birren, Eds., 3rd Ed., 2014) at pp. 12-3 to 12-4:

> There is a divergence of opinion among arbitrators as to which standard of proof applies in disciplinary proceedings. . . . Generally, in more straightforward cases involving normal work rules . . . arbitrators will use the preponderance of the evidence standard. Some arbitrators use a heightened standard when charges involve behavior that could be criminal or demonstrate moral turpitude. For example, arbitrators have applied the clear and convincing standard in cases involving falsification, workplace violence, dishonesty, theft, or similar conduct.

According to *Elkouri & Elkouri: How Arbitration Works*, Ch. 15.3.D.ii.a (Bloomberg Digital Edition):

> Generally, three factors are considered in determining the standard of proof necessary, though none alone seems to be determinative. Specifically, arbitrators consider whether the employee's conduct constituted criminal behavior, whether it involved moral turpitude or social stigma, and whether the sanction imposed was discharge or some lesser discipline. In cases of potentially unlawful conduct, the greater weight of authority favors "clear and convincing evidence."
>
> . . . .

> An arbitrator may require a high degree of proof in one discharge case and at the same time recognize that a lesser degree may be required in others. Similarly, where the proof was not strong enough to support discharge, some arbitrators have nonetheless found it strong enough to justify a lesser penalty.

This treatise also notes an "evolution" toward more frequent use of the "clear and convincing" standard.

The Association has cited a number of court decisions in civil cases that required a hightened burden of proof in cases where the discharge of an employee effectively bars the discharged employee from ever again pursuing his or her chosen profession. (See, e.g., *Ettinger v. Board of Medical Quality Assurance*, *supra*, 135 Cal.App.3d 853, 856.)

The Association argues that a "sustained allegation for truthfulness here" has essentially resulted in [redacted] "excommunication from the field of law enforcement." It also argues that Penal Code § 832.7 could make [redacted] "unhireable" in a variety of other fields.

The Association's position in this regard is well taken. While peace officer personnel records are generally shielded from public view, Penal Code § 832.7(b)(1)(C) provides an exception for:

> Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency involving dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any false statements, filing false reports, destruction, falsifying, or concealing of evidence, or perjury.

Even prior to this recent change in confidentiality, police officers have always

understood the importance of honesty, which is frequently expressed as "If you lie, you die." In practice, a sustained finding of dishonesty is almost invariably grounds for termination of a police officer's employment and undermines the former officer's ability to secure employment with another police agency.

However, [redacted] has not been charged with dishonesty. Nor has he been charged with a crime or any act of moral turpitude. As a result, I do not believe that I need to impose a higher standard of proof when determining the underlying facts. Instead, the serious issue raised by the Association with regard to the consequences of termination on [redacted] future employment prospects will be considered when it comes to the question of what discipline is appropriate.

With regard to the appropriate level of discipline, my position has best been expressed by Arbitrator Kanner in *Caro Center*, 104 LA 1092, 1095 (1995):

> Given the myriad of situations . . . where such penalties have been expunged, modified, or sustained, one fact is clear. Each case can be differentiated by its particular facts so as to justify the Arbitrator's conclusion. In my opinion, . . . where the discipline/discharge appears unreasonable in light of all the facts, the Arbitrator has the authority to modify or vacate it. But I am also of the view that management's decision should not lightly be upset if within broad parameters of reasonableness.

Did the City Violate [redacted] POBRA Rights?

A second issue that must be decided before dealing with the merits is the Association's claim that [redacted] was denied his rights under "POBRA," an acronym for Public Safety Officers Procedural Bill of Rights Act, Gov. Code § 3300 et seq.

POBRA provides certain rights for police officers who are being investigated,

including the right to be informed of the nature of the investigation prior to being interviewed and the right to have ample time to in which to meet with a representative and prepare for the interview.

According to the Association, PORBA was violated when [redacted] was not accorded those rights prior to the CID interview. As a result, the Association argues that the statements [redacted] gave during that interview cannot be considered in determining what if any discipline can be imposed.

However, subdivision (i) of §3303provides an exception to the need to provide those pre-interview rights:

> This section shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer, *nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities*. (Emphasis added.)

The Association cites *California Correctional Peace Officers Association v. State of California* (2000) 82 Cal.App.4th 294, 309, ("CCPOA") for the proposition that the exception in subdivision (i) applies only when the criminal investigation is "conducted primarily by outside agencies without significant active involvement or assistance by the employer."

As the Association acknowledges, there is a split of authority on this issue. The conclusion reached in CCPOA was rejected in 2007 by the court in *Van Winkle v. County of Ventura* (2007) 158 Cal.App.4th 492. The court in *Van Winkle* characterized the conclusion in *CCPOA* as being "dictum that conflicts with the express language of

section 3033 and impedes law enforcement agencies from pursuing their own personnel who commit crimes." (158 Cal.App.4th at p. 499.)

Van Winkle was decided after CCPOA. My research indicates that its holding on this issue has not been questioned in any subsequent published opinion. I also believe that *Van Winkle* is correctly decided as it follows the unambiguous language in subdivision (i). As a result, I reject the Association's reliance based on CCPOA and find there was no POBRA violation.

Nor do I believe there were any serious flaws in the investigation. As will be discussed, I do not necessarily agree with the conclusions reached by the Department and the City. However, I found the investigation to be both fair and thorough. [redacted] participation in the CID interview was voluntary, and he knew what CID was investigating. In addition, the fact that the CID interview took place within days of the incidents meant that [redacted] did not have to rely on distant memories.

In addition, most of the underlying facts are not in dispute. Many if not most of the basic facts have been stipulated. Some of the evidence admitted is technically "hearsay," which is normally defined as an out of court statement admitted for the truth. However, a party's own statements are generally admissible as exceptions to the hearsay rule. In addition, factual determinations may be made based on reasonable inferences and circumstantial evidence.

Did [redacted] Commit the Misconduct as Alleged?

With regard to the merits, the review has to start with the specific charges alleged

in the NOID and the NOD. The first charge against [redacted] alleges:

> 1. On April 29, 2022, while participating in a community event at the [redacted], you engaged a female parent in conversation to further an inappropriate and unwelcome romantic interest.
>
> This conduct is cause for discipline pursuant to San Jose Municipal Code Section 3.04.1370:
>
> > (B) Misconduct
> > (E) Failure to Observe Applicable Rules and Regulations
>
> Your conduct violates the San Jose Police Department Duty Manual Sections C 1438 Social Conduct On and Off Duty.[15]

The only two sections of C 1438 that could have any application in this case are those which state that officer may not "Encourage, suggest, offer or accept sexual favors" and may not "Engage in any form of sexual harassment."

There is not one shred of evidence indicating that [redacted], during his brief interaction with Doe, encouraged, suggested, offered, or accepted sexual favors. Yet, Chief [redacted] testified, "He didn't offer or accept, but I think he was encouraging [sexual favors] through his behavior and his dialogue with this woman."

I have found nothing in the testimony from either [redacted] or Doe that supports a claim that [redacted] "encouraged" sexual favors during his interaction with Doe at the school. The only words that could even remotely be interpreted as having a sexual connotation were those used by Doe, not [redacted].

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[15] The NOD refers to a violation of C 143**3**. (Emphasis added.) Based on the reference to C 143**8** in the NOID and the title of the section ("Social Conduct on and Off Duty"), I conclude that the reference to C 1433 is a typo.

Chief [redacted] also tried to sustain the first allegation by referencing the City's policy against sexual harassment. One again, that attempt fails. The City's definition of sexual harassment requires "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." That did not occur during the interaction between Doe and [redacted] at the school. Again, [redacted] did not say or do anything of a sexual nature during his interactions with Doe at the school event.

Similarly, the Chief attempted to support his conclusion by referring to an example in the City's sexual harassment policy that refers to "Unwanted sexual advances or pressure for dates or sexual favors." Again, there is not a shred of evidence to support a conclusion that [redacted] made any unwanted sexual advances toward Doe at the school or that he pressured her that day for a date or sexual favors.

The second charge against [redacted] alleges:

> 2. On April 29, 2022, following the community event at the [redacted], you used CLETS and DMV records to access the female parent's personal information for the purpose of contacting her to pursue an unwelcome romantic interest.
>
> This conduct is cause for discipline pursuant to San Jose Municipal Code Section 3.04.1370:
>
> (B) Misconduct
> (E) Failure to Observe Applicable Rules and Regulations
> (T) Misuse of City Property
> (V) Any other act, either during or outside of duty hours which is detrimental to the public service
>
> Your conduct violates the San Jose Police Department Duty Manual Sections C 2003 Authorized Receivers of CLETS Information, City Administrative Policy Manual Section 1.2.1 Code of Ethics, and City

Administrative Policy Manual Section 1.6.2 Personal Use of City Equipment.[16]

Here, there is no question as to whether [redacted] accessed data available in the CLETS system. There is also no question that he accessed this information shortly after leaving the event. Exactly where [redacted] was at the exact time is unkown but irrelevant. The only important question is why.

The City argues that [redacted] accessed the data in order to obtain Doe's address. During his CID interview, [redacted] maintained that he knew where she lived and that he could have found her house without doing a records check. He also told investigators he had a question as to whether her registration tag was up to date. Doe credibly testified that she never told [redacted] exactly where she lived.

I have no doubt that [redacted] could have located Doe's residence without the need to do a records check. Doe told him that she lived behind the 7-Eleven, and he knew what kind of car she drove. But knowing approximately where Doe lived or being able to find it is not the same as knowing the exact address.

[redacted] also undermined his claim that he only ran the search because of a possible expired registration tag when, during the IA interview, he talked about how "curiosity killed the cat." When that statement is combined with his acknowledgment that

[16] The parties have not provided me with copies of City Administrative Policy Manual Sections 1.2.1 or 1.6.2. Nor have the parties addressed these specific sections in the closing briefs. As a result, my focus will be confined to the allegation that [redacted] violated Duty Manual Section C 2003, which is part of the record before me.

Doe's comment during the school event about "bad things" piqued his interest, I have to conclude that [redacted] had a mixed motive for running the plate. Based on what he told CID, I have to conclude that at least part of his decision was based on a desire to verify where Doe lived. That is not an appropriate use of the system and does amount to a violation of Duty Manual Section C 2003.

I do accept the testimony from [redacted] and others that proactive police officers run plates all the time. However, motive matters. Police officers frequently stop and frisk individuals as part of their police duties. However, they cannot do so out or curiosity. But for his personal interest, I doubt that [redacted] would have run Doe's plate.

The third charge against [redacted] states:

> 3. On May 2, 2022, you used the information you obtained from CLETS and DMV records to contact the female parent outside of her home to pursue an unwelcome romantic interest.
>
> This conduct is cause for discipline pursuant to San Jose Municipal Code Section 3.04.1370:
>
> (B) Misconduct
> (E) Failure to Observe Applicable Rules and Regulations
> (V) Any other act, either during or outside of duty hours which is detrimental to the public service
>
> Your conduct violates the San Jose Police Department Duty Manual Sections C 2003 Authorized Receivers of CLETS Information, C 1433 Social Conduct On and Off Duty, and City Administrative Policy Manual Section 1.2.1 Code of Ethics.

Once again, there is no doubt that [redacted] stopped by Doe's house a couple of days after accessing the CLETS system while he was off duty. The City maintains that

[redacted] must have been watching Doe's house in order to wait for an opportunity to speak with her. According to the City, the timing of his arrival just when she exited her car was too precise for the encounter to have been a coincidence.

My conclusion is somewhat different. I do not believe it was a total coincidence. Given [redacted] admission that his interest was piqued and that he wanted to "explore" what further contact with Doe might lead to, I have to conclude that [redacted] chose the route he did that morning with the knowledge that he might have an opportunity to encounter Doe. That conclusion is supported by his direction of travel and the fact that Doe and her car would not have been visible until after he passed the corner where Doe lived. If [redacted] has not been looking to see if Doe was around, he would not have spotted her as she passed by.

That supports the City's claim that [redacted] used the information he obtained from the CLETS system in violation of C 2003. With regard to the alleged violation of C 1438, the weakness in the City's position still exists.

At the time of the second encounter, [redacted] was off duty. The only reference to off duty conduct in C 1438 is that "officers will not use their official police capacities to *further*" the listed activities. (Emphasis added.) Logically, because I have concluded that [redacted] did not violate C 1438 in the first encounter, I cannot conclude that there was anything improper that he was trying to "further."

Once again, there is no direct evidence supporting a claim that [redacted] suggested, offered, or accepted sexual favors. Nor is there evidence of any offer by

[redacted] of a quid pro quo for sexual or social encounters.

The City's sexual harassment policy does provide that making "unwanted sexual advances" may "lead to sexual harassment complaints" and "must be avoided." [redacted] admission that he asked Doe "have you been getting into trouble lately" provides some support for a claim that he made an unwanted sexual advance. [redacted] told CID that he took Doe's "getting into trouble" comment as having a "kind of innuendo." As a result, he cannot complain about the fact that Doe believed his comment contained a sexual innuendo.

However, the City's policy is directed primarily at workplace relationships. The definition of sexual harassment in the City's policy requires unwelcome sexual advances or requests that "affects an individual's employment" or "work performance" or creates an "intimidating, hostile or offensive work environment."

Accordingly, the evidence supports the part of the third charge relating to the use of information he obtained through the CLETS system but does not support a violation of C 1438 or a violation of the City's sexual harassment policy.

What is the Appropriate Discipline?

As the analysis and conclusions above suggest, there are two major problems with the City's decision to terminate [redacted] employment with the Department. First, it appears that the City has overcharged [redacted] or at least overstated the seriousness of the charges. There was never any overt suggestion or action by [redacted] that indicated a present intent to engage or encourage Doe to enter into a sexual relationship.

Second, given the Department's history with how it has dealt with cases involving the unauthorized use of confidential records, the decision to terminate [redacted] employment suggests disparate treatment. The Association has presented a number of instances of similar misconduct for which the Department issued lesser discipline.

Conversely, unlike the Chief, I do not believe that the proven misconduct here rises to the level of that supporting the discharge of [redacted] As discussed earlier, dishonesty is a "cardinal offence" for police officers. The City never charged [redacted] with dishonestly, and I have not concluded that [redacted] was dishonest. In addition, [redacted] was only charged with one instance of unauthorized access to confidential information. [redacted] was found to have committed three instances.

The City's overraction to [redacted] misconduct is understandable. I do believe that Doe was traumatized by what happened. Having a relative stranger who is a police officer show up at her home in circumstances suggesting that she has been stalked and that he is looking for some kind of intimate relationship, likely would be traumatic for any woman.

The City has an obligation to prevent such incidents. Meting out discipline serves both to correct the behavior of the individual who commits misconduct and to send a message to those who might be tempted to engage in similar misconduct.[17]

Nor can [redacted] claim to be an innocent victim of circumstances. He believed

[17] I recognize that disipline issues to police officers is supposed to be confidential. I also recognize that what is supposed to be confidential has a way of leaking out.

that Doe might have some interest in have some kind of relationship with him and he pursued that interest. While he did not intend to traumatize Doe, he should have known that showing up unannounced at a female citizen's home was at least inappropriate if not conduct unbecoming of a law enforement officer.

For all of the above reasons, I conclude that I cannot uphold [redacted] discharge.

Because Chief [redacted] also testified that discipline is not done on an allegation by allegation basis, I have not been provided with much guidance as to what the appropriate discipline should be.

The prior discipline imposed by the City for the unauthorized use of confidential information ranges from a letter of reprimand to a demotion. As far as the record reveals, no one has been discharged solely for a single violation of unauthorized access and use of confidential information.

Here, I conclude that the discharge should be reduced to a 90-day suspension. I conclude that this will be sufficient to correct [redacted] behavior and send an appropriate message regarding how serious the Deparment views the kind of misconduct found here. While a 90-day suspension is a harsher punishment than that meted out by the City in the other cases presented, my decision is based on the consequences of [redacted] action, i.e., the trauma caused to Doe and harm to the Department's reputation.

AWARD

[redacted] discharge shall be reduced to a 90-day suspension. He is entitled to

reinstatement and to be made whole for all lost wages and benefits that exceed the 90-day suspension, less income and unemployment benefits earned or which could have been earned during the relevant period between his discharge and reinstatement.

I will retain jurisdiction in order to give the parties the opportunity to work out the remedial details. If they are unable to do so, I will be available for a conference call or an additional hearing date.

Date: August 9, 2024

Jan Stiglitz
Arbitrator