Martin Gran, Esq.
Arbitrator
[redacted]
March 22, 2022

IN ARBITRATION PROCEEDINGS

PURSUANT TO A

MEMORANDUM OF AGREEMENT

In the Matter of a Dispute Between [redacted], Appellant and **City of San Jose,** Employer (Concerning the Suspension of [redacted])	**Case No. ARB-20-0232** **DECISION AND AWARD**

APPEARANCES:

For the Union: [redacted]

For the Employer: [redacted]

PROCEDURAL BACKGROUND

This dispute involves the application and interpretation of the Memorandum of Agreement ("MOA") between the City of San Jose and the San Jose Police Officers' Association. The matter of controversy between [redacted] or "Appellant") and the City of San Jose ("City") was processed through the MOA's grievance procedure and was submitted to arbitration as set forth in the parties' MOA. The parties mutually selected the undersigned to serve as the neutral in this matter and stipulated that the matter was properly before the Arbitrator. This matter was heard on November 8, 2021, via remote video conference. Both parties were afforded a full opportunity to present documentary evidence and to examine and cross-examine witnesses. At the conclusion of the hearing, the parties chose to conclude their presentations via written briefs, the last of which was received by the Hearing Officer on January 13, 2022. The parties agreed that the Arbitrator shall retain jurisdiction in the event a remedy is imposed.

MOA LANGUAGE

Article 25 (Grievance Procedure) Excerpts:

Section 25.5.11

> The parties agree that the arbitrator shall not add to, subtract from, change or modify any provision of this agreement and shall be authorized only to apply existing provisions of this Agreement to the specific facts involved and the interpret only applicable provisions of this Agreement.

Section 25.8.1 (Disciplinary Grievances)

> Employees in the bargaining Unit shall only be disciplined for cause. Discipline is defined to include those matters that are cognizable before the Civil Service Commission plus disciplinary transfers.

SAN JOSE POLICE DEPARTMENT RULES

Memorandum of September 1, 2009 (Subject: Use of Social Networking Sites)

> **Excerpt 1:** The San Jose Police Department (SJPD) has seen an increased popularity of social networking sites (including, but not limited to, MySpace, Twitter, YouTube and Facebook) being utilized by Department members. Employees should be aware that information that is posted on such sites may be considered part of the public domain, and as such privacy of information should not be assumed. There is no violation of Departmental policy in the mere act of maintaining a page or commenting on social networking sites and blogs.

However, the Department has a right to regulate speech in certain circumstances which could result in discipline.

Excerpt 2: Members who interact on social networking sites are subject to the standards outlined in SJPD Duty Manual section C1404, which states: "A member's conduct, either on or off duty, which adversely reflects upon the Department will be deemed conduct unbecoming an officer. Each case of misconduct will be examined to determine if the act was such that a reasonable person would find such conduct was unbecoming a police officer."

In order to avoid engaging in conduct that a reasonable person would find unbecoming a police officer, Department members should carefully consider whether or not to identify themselves as a member of the SJPD or an employee of the City of San Jose. Members should know that any information posted will be visible to the public at large, including: potential citizen contacts, suspects, witnesses, and attorneys. If you choose to identify yourself as a member of the San Jose Police Department, the following guidelines should be considered when posting information on social networking sites.

1. Do not post photographs of yourself or other Department members wearing uniforms or other identifying items in compromising or inappropriate positions.
2. Do not post photos or images depicting crime scenes, evidence or city property.
3. Do not post images of persons working in an undercover capacity, or identify them as undercover personnel.
4. Do not post items or information that may harm the reputation of the City or Department or its employees.
5. Do not use abusive or inappropriate text to attack colleagues or Department and City policies. Duty Manual section C1423 prohibits employees from publicly disparaging or ridiculing written orders or instructions issued by a senior officer.
6. Do not post derogatory or offensive comments related to your official duties.
7. Be mindful that you may be perceived as supporting political and/or social issues or causes. Duty Manual section C1437 prohibits on-duty members from engaging in activities related to political campaigning and willfully being photographed in uniform (on or off duty) with political candidates.
8. Do not post or release confidential or privileged records or information as outlined in Duty Manual section C1912 and further detailed in Duty Manual Chapters C2000, C2100 and C2200.

Memorandum of March 5, 2021 (Subject: Duty Manual Additions: Online Presence)

Excerpt: In 2009, Chief [redacted] issued a Department memorandum regarding the use of social networking sites (2009-027). The directives contained in that memorandum were never added to the Duty Manual. Pursuant to Duty Manual section A 2304 TEMPORARY ORDERS, that memorandum expired twelve

months after issuance. The purpose of this memorandum is to memorialize the Department's guidelines regarding the use of the Internet and social networking sites through an addition to the Duty Manual.

SJPD Duty Manual Section C 1400 (Standards of Conduct):

Department members are highly visible representatives of government and are entrusted with the responsibility of ensuring the safety and well-being of the community as well as the delivery of police services. Since the functions of SJPD have a major impact upon the community, standards of conduct for department members are higher than standards applied to the general public. In this regard, department members will conduct themselves in a manner that does not bring discredit upon individuals, the Department, the City, or the community.

SJPD Duty Manual Section C 1404 (Conduct Unbecoming Officer):

An officer's conduct, either on or off duty, which adversely reflects upon the Department is deemed to be conduct unbecoming an officer. Each case of misconduct will be examined to determine if the act was such that a reasonable person would find that such conduct was unbecoming an officer. The Chief of Police or an authorized representative will evaluate the conduct in question. This evaluation will include as criteria the nature of the violation. In addition, the following criteria may be considered:

- The member's tenure with the Department.

- The severity of the member's past violations.

- The nature and effectiveness of prior corrective action.

- The member's past conduct which was beneficial to the Department.

- The member's past conduct which did not result in disciplinary measures.

SJPD Duty Manual Section C 1736 (Statute of Limitations for Investigating Complaints):

Excerpt: Subdivision (d) of Government Code Section 3304 creates a one year statute of limitations period for notifying an officer of a proposed disciplinary action. Subdivision (d) states as follows:

> "Except as provided in this subdivision and subdivision (g), no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the alleged act, omission, or other misconduct."

The Department must complete its investigation within one year of discovery of the complaint by a person authorized to start an investigation into the conduct. The Department shall complete its investigation of any allegation of misconduct

and serve the Department member with a Notice of Intended Discipline (NOID), within this one year statute of limitations.

SJPD Duty Manual Section C 1805 (Documented Oral Counseling):

A Documented Oral Counseling (DOC) is a written confirmation of verbal notification that performance or behavior needs improvement and a warning of potential future discipline if there is no improvement. Generally, counseling is administered by the first line supervisor and subsequently documented in a memo to the employee. The memo should document the discussion and the improvement expected in the employee's conduct or performance. The memo should be given to the employee and a copy will be forwarded through the Chain of Command to the Internal Affairs Unit (IA). The DOC will not go into the employee's permanent personnel file. However, the employee's supervisor should note the date and subject of discussion for future reference and the underlying conduct should be noted in the employee's performance appraisal for that rating period. For Sworn Personnel – the DOC is a part of the IA file and will be retained in accordance with the City and Department Records Retention Schedules. For Non-Sworn Personnel – the DOC will be routed to the Bureau of Administration Deputy Chief by the IA Unit. After one year, if the problem has not recurred, the memo shall be removed from the BOA Deputy Chief's file and destroyed.

SJPD Duty Manual Section C 1808 (Departmental Authority for Disciplinary Action):

Final departmental disciplinary authority and responsibility rests with the Chief of Police. Supervisory Department members may administer one or more of the following:

- Training - Informal Counseling
- Documented Oral Counseling
- Written recommendations for other disciplinary actions.

SJPD Duty Manual Section E 1107 (Temporary Orders):

Temporary Orders consist of a wide range of topics pertaining to operational functions of the Department. Such memorandums may be informational in nature. Temporary Orders issued on a memorandum form which modify or add policy or procedure will contain a cancellation date. Memorandums used to supply information or rescind existing policy or procedure will remain in force until superseded by proper authority.

- OBTAINING INFORMATION COVERED BY TEMPORARY ORDERS: Department members may obtain copies of these informational and order memorandums from their respective bureaus or from Research and Development.

STATEMENT OF THE ISSUES

The parties were unable to agree on a stipulated Statement of the Issue, and they expressly give the Arbitrator the authority to frame a Statement of the Issues.

The City offered the following Statement of the Issue:

1) Whether the San Jose Police Department had cause to discipline Sergeant [redacted] under the San Jose Municipal Code and SJPD internal policy.

The Union offered the following Statement of the Issues:

1) Whether there was just cause for the City to impose a 160-hour suspension on Sergeant [redacted]
2) If not, what is the appropriate remedy?

After reviewing the record, the Arbitrator finds that the Statement of the Issues shall be as follows:

1) Whether the City of San Jose had cause to impose a 160-hour suspension of Sergeant [redacted].
2) If not, what is the appropriate remedy?

STATEMENT OF FACTS

[redacted] has been employed with the San Jose Police Department ("Department" or "SJPD") since [redacted]. He promoted to the rank of Sergeant in [redacted].

At about the time [redacted] became a police officer in 2007, [redacted] opened a Facebook account and configured it to be as private as possible, meaning that he wanted his Facebook page to only be visible to those he invited or otherwise allowed to see it. [redacted] only invited a small number of close friends, family members and fellow officers to be his Facebook friends, and he did not highlight his status as a police officer on his page. [redacted] did not expect any of his posts to be seen by the general public or Facebook users that he had not previously "friended."

In November 2010, now-retired former-SJPD Police Officer [redacted] ("[redacted]"), then one of [redacted]'s fellow officers and one of his Facebook friends, posted a video that appeared to depict a roadside explosion in Afghanistan in which members or agents of the Taliban or another extremist organization were killed in an attempt to conceal an explosive

device.[1] Along with the video, [redacted] posted the following statement: "ok folks when utilizing an artillery round as a roadside bomb in order to fulfill your desire for jihad, You must not . . . I repeat you must not tamp down the ground over the round." Now-retired Former-Sergeant [redacted] ("[redacted]"), then a Sergeant with the Department, replied to [redacted]'s post stating, "Dude Inshallah . . . Uh we had an IED go off on some 'volunteers' God is great!" In reply, [redacted] posted, "Does that mean they don't get their 40 virgins? Maybe like 20 who just lost their virginity."[2]

In Sergeant [redacted]'s Internal Affairs interview, he told investigators that he had family members serving in the US military and noted that roadside bombs were killing US service personnel in Afghanistan. (JX 7 at p. 39.) He stated:

> When I watched the video and saw the extremist blowing themselves up, "my emotions got the best of me, so I responded to that. I made an ill-advised joke at the expense of these extremists, never [intending] to disparage an entire group of people. It was really just focused on people trying to kill US military in my mind and ended up killing themselves instead. That was the purpose of my comment, to make light of these extremist individuals, not a whole entire group. (*Id*.)

In 2016, [redacted], feeling a lot of stress due to his assignment in the Department's sexual assault unit and other reasons, decided to take a break from social media. He found that the decision had a positive effect on him, and he "pretty much chose at that time [that he] was never going to go back on social media." (RT 149-150.) He went on Facebook to delete his account but ultimately chose to "inactivate" or "deactivate" it instead. He chose this option after considering Facebook's notification that deleting his account would cause him to lose posted pictures, videos, etc. He testified that he considered his inactive Facebook account "a storage place." (RT 150.) [redacted] did not expect his post to be visible to the public, and it did not become public until June 2020.

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[1] Joint Exhibit 7 contains a screen shot of the posted video, as well as [redacted], [redacted] and [redacted]'s posts. (JX 7 at p.38.) The record does not contain the video itself.

[2] As discussed below, the Appellant argues that Sergeant [redacted] likely saw [redacted]'s post and did not report it at the time. As a factual matter, there is no evidence that [redacted] saw or responded to [redacted]'s post.

On June 26, 2020, an anonymous blogger, writing under the pseudonym "Charlie Paulsen" published an article on Medium.com entitled "*Racism and Hate behind the Blue Wall: Exposing Secret Law Enforcement Facebook Groups*." The article included screen shots of posts made by several active and retired members of the SJPD who were part of a private Facebook group called "10-7ODSJ." (Joint Stipulated Facts ("JSF"), No. 25, at p. 6.) (The term "10-7" is police jargon for "off duty.") The article contained screen shots of [redacted], [redacted] and [redacted]'s November 2010 posts. Other local news outlets reported the story, including the Metro Silicon Valley News, SanJoseInside.com and the San Jose Mercury News. The 10-7ODSJ Facebook group was deleted following the publication of the Medium.com article. Sergeant [redacted] likewise deleted his account at that time.

[redacted] told investigators that he did not believe he had been a member of the 10-7ODSJ group. He said it was possible that he had joined the group, but that that he had no specific memory of being part of it or having group discussions on that platform. (*Id*. at No. 32 at p. 8.) The Department was unable to determine whether [redacted] was a member of 10-7ODSJ and, consequently, it did not allege that he was.[3] (RT 178-79.)

On July 1, 2020, the Department received an email from a San Jose resident demanding that the police officers linked to 10-7ODSJ be fired. Among other investigations, the Department opened an administrative investigation into whether [redacted]'s Facebook post constituted Conduct Unbecoming an Officer ("CUBO") or violated the Department's Biased-Based Policing Policy.

The Department's Internal Affairs investigator asked [redacted] a number of questions about his possible membership in 10-7ODSJ and his November 2010 post. [redacted] was asked about his intent in making the comment. As described above, [redacted] stated that comments were directed towards Taliban fighters or their agents who were targeting US service personnel and that he did not intend to disparage any religion or group of people. [redacted] added:

> I have a bachelor's degree in criminal justice and being an officer is something I always wanted to do, specifically in San Jose. The major reason was because of

[3] [redacted] testified at hearing that a representative of the San Jose Police Officer's Association told him that the 10-7ODSJ group formed in 2012, i.e., after his November 2010 post. This testimony is, of course, hearsay and cannot, by itself, form the basis of a finding at arbitration.

> the department's diversity. I grew up here in San Jose and Southern California and have always been around diversity. My wife is Hispanic, I have a cousin who is black, and my sister is currently dating a Muslim man. Diversity in my family and upbringing was just normal. I have friends of every race and religious background, and we used to talk about the differences. This little snippet in time that this post shows does not reflect me as a person at all. It's one bit of something I wrote that I wish I never wrote. It was a long time ago. I think about how I have grown not only as an officer but as a human being, as a man, husband, a father. It doesn't seem like the same person who wrote that today. I think about the training I have gone through with this department: racial profiling, bias-based policing, fair and impartial policing, twenty-first century policing, and the IPA report has educated me and improved me as a person. As an officer, the only thing that matters is criminal activity. I embarrassed myself, my family, and my department. I hope this doesn't reflect poorly on me overall, and people get to see me and know me for who I really am, not from this small snippet of time. (JSDF No. 47 at p. 10.)

In a similar vein, Department Investigators asked if [redacted] if his post reflected poorly on himself as an officer or on the Police Department. [redacted] responded:

> [W]hen I first read this; I was certainly embarrassed for myself. This is not the person who I am, the way it was being portrayed, or the way it might have been taken. So, I was embarrassed. I was embarrassed for my family that they were going to see this. I was embarrassed for the police department, and police in general. I wish I never posted it. This is how I feel now, and this post was ten years ago. The situation is extremely different now, and if you look at it in the context of what was happening overseas at the time, and how I was interpreting it with my feelings with my family being in the military. I think it's a little unfair to look at it now and say it's disparaging now. I think you should look at it at the time for what it was. I know it was in poor taste to say it, but it was just banter between myself and another person (Mr. [redacted]) not intending it to be something people saw from an officer perspective or a Department perspective. It was supposed to be just myself and a friend who saw it. (JSF No. 45 at pp. 9-10.)

The Department's investigatory and disciplinary process requires a number of steps. The matter was initially investigated by Sergeant [redacted] ("[redacted]") of the Internal Affairs Unit. [redacted] concluded that the charges of CUBO and Biased-Based Policing be returned to [redacted]'s Chain of Command for Findings and Recommendations. (JX 7 at p. 41 of 69.)

The matter was, in turn, handed over to [redacted]'s supervisor, Lieutenant [redacted] ("[redacted]"), for Findings and Recommendations. [redacted] recommended that the Department find him "Exonerated" on the Bias-Based Policing charge, noting that she found "no evidence to indicate [that] Sergeant [redacted] engaged in bias-based policing," or that he was "biased towards

another race while performing as a San Jose Police Officer." (JX 7 at 15 of 29.) Neither then-Police Chief [redacted] nor any members of command staff charged with reviewing the Internal Affairs investigation disagreed with that conclusion.

With regard the CUBO charge, [redacted] concluded that it was "Not Sustained," based on: (a) [redacted]'s tenure in the Department and his promotion to the rank of sergeant; (b) his past positive contributions to the Department, including several letters of commendation praising his professionalism; and (c) his lack of prior discipline and lack of any evidence of "any pattern of concerning behavior."[4] (*Id*. a p. 16 of 69.)

The matter was then reviewed by Captain [redacted] ("[redacted]"). [redacted] acknowledged [redacted]' generally sound analysis but disagreed with her conclusion regarding the CUBO charge. [redacted] wrote, "All things considered, Sergeant [redacted] (then Officer [redacted]) had a responsibility to conduct himself in a way that does not adversely reflect upon the Department." (*Id*. at p. 8 of 69.) [redacted] sustained the CUBO charge and, by way of penalty, recommended a Documented Oral Counseling. (*Id*. at p. 9 of 69.)

Deputy Chief [redacted] ("[redacted]") likewise sustained the CUBO charge and recommended that the matter be considered by the Department's Discipline Review Board ("DRB") to determine the level of discipline. (*See* JX 7 at p. 7 0f 69, 4th entry down.) (Per Duty Manual Section C 1724, a DRB is used whenever the potential disciplinary action is likely to be greater than a letter of reprimand.)

The DRB met on August 26, 2020, and, on August 27, Lt. [redacted], Commander of the Internal Affairs Unit, sent a Memorandum to Chief [redacted] stating that, "Based on information received at this hearing, the review of Personnel and Internal Affairs files as well as reviewing again the circumstances of this case, Chief [redacted] recommended the following

[4] Lt. [redacted] also found that any discipline against [redacted] at this time violated a Statute of Limitation provision in the SJPD Duty Manual. Duty Manual section C 1736, which incorporates Government Code section 3304, prohibits the Department from moving forward on punitive action when it fails to complete its investigation into the alleged misconduct within one year of the discovery of the misconduct "by a person authorized to initiate an investigation of the alleged act, omission, or other misconduct." This issue is discussed below at pp. 12-13.)

discipline: Sergeant [redacted] #[redacted] – One hundred sixty (160) hour suspension." (JX 7 at 6 of 69.)

On December 17, 2020, the Department served [redacted] with a Notice of Discipline for the 160-hour suspension. [redacted] served the suspension beginning on December 27th, and the present grievance followed.

DISCUSSION AND AWARD

a. Overview

The City bears the burden of demonstrating that cause exists for discipline based on a preponderance of the evidence.[5]

The City argues that Sergeant [redacted]'s November 2010 post constitutes CUBO and provides cause for its 160-hour suspension of [redacted]. The Notice of Intended Discipline cites violations of San Jose Municipal Code section 3.04.1370(B) (Misconduct) and (E) (Failure to Observe Applicable Rules and Regulations), as well as SJPD Duty Manual section C 1404, Conduct Unbecoming an Officer. (JX 8.) The City argues that [redacted] violated Duty Manual Section C1404 because his post adversely reflected on the Department, even though it did not surface for 10 years. The City argues that the Department's September 1, 2009 Order Re Use of Social Networking Sites ("9/1/2009 Order") was either in effect in November 2010 or, in the alternative, it at least put [redacted] on notice that privacy of social media posts should not be assumed and that social media posts can lead to charges of CUBO.[6] The City also argues that, should the Arbitrator determine that the Department had evidence to support its conclusion that [redacted]'s conduct constituted CUBO, the MOA prevents him from overturning the *level* of discipline unless he finds that it is arbitrary, capricious, or a patent abuse of discretion. (City's Closing Brief at pp. 13-14.)

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[5] Barring extrinsic evidence such as bargaining history, the terms "cause" and "just cause" are synonymous. (*See* Elkouri and Elkouri, *How Arbitration Works*, 2003 6th ed., at pp. 931-32, ("[I]t is common to include the right to suspend or discharge for 'just cause,' 'justifiable cause,' 'proper cause,' 'obvious cause,' or quite commonly simply for cause.' There is no significant difference between these various phrases.") *quoting Worthington Corp,* 24 LA 1, 6-7 (1955).) Such terms will be used interchangeably herein.

[6] As discussed below, the parties have differing views as to whether the Department's 9/1/2009 Order was in effect in November of 2010.

Appellant makes three main arguments. First, Appellant argues that the Department violated Duty Manual Section C 1736 and Government Code section 3304 by taking punitive action against [redacted] more than a year after his conduct was discovered by then-Sgt. [redacted] – whom Appellant describes as "a person authorized to start an investigation into the conduct." Second, Appellant argues that [redacted]'s conduct did not constitute CUBO because: (a) his post was a single incident occurring 10 years earlier; and (b) a "reasonable person" would conclude that the post was an attempt at "gallows humor" directed at enemies of the United States. Lastly, Appellant argues that, in any case, the Department's 160-hour suspension is excessive and is not supported by just cause.

b. Statute of Limitations

As described above, Departmental Duty Manual Section C 1736 (Statute of Limitations for Investigating Complaints) prohibits the Department from moving forward on punitive action when it fails to complete its investigation into alleged misconduct within one year of discovery of the misconduct "by a person authorized to start an investigation into the conduct." Appellant argues that then-Sergeant [redacted] – one of the officers who commented on [redacted]'s original Facebook post: (a) knew of [redacted]'s post, (b) had a duty to report any misconduct; and (c) did not do so. In other words, [redacted]'s alleged knowledge of [redacted]'s post constituted the point at which the alleged misconduct was discovered by a person "authorized to start an investigation," thus starting the one-year clock. A careful examination of the facts reveals the limits of this argument.

As discussed in detail above, in the Statement of Facts, on November 20, 2010, [redacted]'s fellow officer [redacted] posted the video that apparently depicted the explosion of a roadside explosive device. [redacted] replied to [redacted]'s post, and [redacted] thereafter posted his comment. (*See* JX 7 at pp. 32-33 of 69 (making clear that [redacted]'s post preceded [redacted]'s); *see also* JX 7 at p. 65 of 69 (screen shot of the posts).)

The main problem with Appellant's argument is that Appellant's post came *after* [redacted]'s and there is no evidence that [redacted] actually read [redacted]'s comment. Without such evidence, the Arbitrator cannot conclude that [redacted]'s comment was "discovered" by Sgt. [redacted]. Had the facts been different, the Arbitrator might have been compelled to determine whether, under Duty Manual C 1736, the one-year statute of limitations period begins to run when the officer who

"discovers" the alleged misconduct is arguably a participant in the same misconduct. Given the facts presented here, that issue need not be resolved.

c. Conduct Unbecoming an Officer

1. Section C 1404

The Department's Duty Manual sets forth the standard for Conduct Unbecoming an Officer is some detail. Section C 1404 provides:

> An officer's conduct, either on or off duty, which adversely reflects upon the Department is deemed to be conduct unbecoming an officer. Each case of misconduct will be examined to determine if the act was such that a reasonable person would find that such conduct was unbecoming an officer. The Chief of Police or an authorized representative will evaluate the conduct in question. This evaluation will include as criteria the nature of the violation. In addition, the following criteria may be considered:
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> - The member's tenure with the Department.
> - The severity of the member's past violations.
> - The nature and effectiveness of prior corrective action.
> - The member's past conduct which was beneficial to the Department.
> - The member's past conduct which did not result in disciplinary measures.
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> (JX 6 at pp. 1-2.)

In the sections that follow, the Arbitrator will evaluate the criteria contained in C 1404.

2. Discredit to the Department

The first sentence of Section C 1404 provides a threshold question: Did Sergeant [redacted]'s Facebook post adversely reflect upon the Department? The answer is clearly yes. [redacted] acknowledged as much in his Internal Affairs investigatory interview. When asked if he believed that his post reflected poorly on himself and the Department, he stated:

> [W]hen I first read this; I was certainly embarrassed for myself. This is not the person who I am, the way it was being portrayed, or the way it might have been taken. So, I was embarrassed. I was embarrassed for my family that they were going to see this. I was embarrassed for the police department, and police in general. I wish I never posted it. (JX 7 at pp. 33-34 of 69.)

Although there are several factors that mitigate [redacted]'s conduct in this matter, there is no escaping the fact that the June 2020 disclosure of [redacted]'s November 2020 Facebook post,

along with several others, brought discredit to the Department. The Medium.com article revealed several posts from retired and current SJPD officers that harshly disparaged Islamic dress and culture, as well as the Black Lives Matter movement in general, and protesters who participated in demonstrations following the death of George Floyd, in particular. The article revealed five posts from 2020 on these subjects, as well as the three 2010 posts by [redacted], [redacted] and [redacted]. It must be noted that the three 2010 posts were far less inflammatory than some of the 2020 posts, the 2010 posts. That said, the 2010 posts, for better or worse, fit into the narrative advanced by the article's author, namely, that current and retired SJPD officers harbor racist and Islamophobic views. The Medium.com article was picked up by at least three local news outlets: the Metro Silicon Valley News, SanJoseInside.com and the San Jose Mercury News.

The three 2010 posts consisted of the following:

Former-Officer [redacted]:

> ok folks when utilizing an artillery round as a roadside bomb in order to fulfill your desire for jihad, You must not . . . I repeat you must not tamp down the ground over the round.

Former-Sergeant [redacted]:

> Dude Inshallah ... Uh we had an IED go off on some 'volunteers' God is great!

Sergeant [redacted]:

> Does that mean they don't get their 40 virgins? Maybe like 20 who just lost their virginity.

On one level, all three comments ridiculed the situation in which one or more enemies of the US military died trying to install an explosive device designed to kill US soldiers. If limited to that context alone, the post would most likely not have run afoul of Department policy.

Unfortunately, the posts went further, referring to elements of Islam, including jihad and the rewards for those who are or were engaged in jihad. [redacted]'s post directly posited that those shown in the video were setting the explosive device "in order to fulfill [their] desire for jihad."[7]

[7] "The term *jihad* [means] 'to exert strength and effort, to use all means in order to accomplish a task. In its expanded sense, it can be fighting the enemies of Islam, as well as adhering to religious teachings..." (*See* Wikipedia (https://en.wikipedia.org/wiki/Jihad).)

[redacted] began his post with a reference to "Inshallah," – which means "If Allah wills it." – and ended it with "God is Great!"[8] [redacted], for his part, referenced the idea that fighters who die in the service of jihad will be rewarded in the next life with servants and virgins.[9] Thus, at some level, all three officers injected elements of Islam into their posts. There is little doubt that posts ridiculing any element of the Islamic religion would be considered disrespectful at best and prejudiced and stereotypical at worst.

Thus, while [redacted] testified convincingly that he did not intend any disrespect towards the Islamic religion or its adherents, his comments (joking or otherwise) about enemies of the US getting, or not getting, "their 40 virgins" was no doubt offensive to many and brought discredit to the Department.

3. Objective Standard

Section C 1404 next requires that "[e]ach case of misconduct will be examined to determine if the act was such that a reasonable person would find that such conduct was unbecoming an officer."[10] On the one hand, some may see [redacted]'s post as a relatively minor lapse of judgement during what [redacted] believed was a essentially a private conversion. ([redacted] described the post as an ill-advised attempt at humor at the expense of terrorist attempting to kill or injure US soldiers.) Lt. [redacted], the first supervisor to make findings and recommendations on the matter, concluded that his post was a form of "gallows humor," which she noted is defined as "humor in the face of or about very unpleasant, serious, or painful circumstances." She also noted that police officers may turn to gallows humor in response to the terrible things they often see in the performance of their duties. (JX 7 at p. 14 of 69.) Those who

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[8] *See* definition/translation of "Inshallah" in Lexico.com (https://www.lexico.com/en/definition/inshallah). (*See also* IslamWiki discussing the phrase "God is Great" – a common saying in Arabic-speaking countries. (https://www.wikiislam.net/wiki/Allahu_Akbar_(God_is_Greater).)

[9] The Arbitrator is aware that there are debates by religious scholars about the accuracy of translations of various passages of the Quran and quotes from the Prophet Muhammed on the subjects of jihad and the rewards those engaged in jihad, as well as debates about how to interpret such texts. It is not necessary for the Arbitrator to describe, let alone resolve such debates.

[10] Legal scholars have long offered critiques of the reasonable person standard, most recently from the perspective of cultural and racial bias. The thrust of these critiques is that legal actors (i.e., judges, arbitrators, etc.) tend to approach questions of what is objectively reasonable from their own cultural perspectives. *See e.g.*, *Cultural Cognition and the Reasonable Person*, Donald Braman, 14 Lewis & Clark L. Rev. 1455 (2010) (https://law.lclark.edu/live/files/7236-lcb144art7bramanpdf). The Arbitrator will attempt to evaluate this case as neutrally as possible, knowing that implicit biases can never be ruled out.

view [redacted]'s post in such a light would argue that a reasonable person would *not* view his post as constituting CUBO.

On the other hand, others would argue that [redacted]'s post, read in the context of the posts to which [redacted] was responding, reveals an attempt to ridicule not only the extremists who were targeting US soldiers, but also the religion of Islam by highlighting the perceived connection between the extremists' actions and Islam. To the extent that the posts expressly or implicitly link the apparent deaths of extremists to Islam, such posts are offensive. Those who view [redacted]'s post from this point of view would certainly argue that a reasonable person would find that [redacted]'s post constituted CUBO.

After considering all the facts discussed above, the Arbitrator finds that a reasonable person would conclude that [redacted]'s post constitutes CUBO. In reaching this conclusion, the Arbitrator acknowledges that many factors cut against this conclusion, including the fact that [redacted] believed that his post was private, and that it occurred long before it was made public. Those factors do not negate the fact that his post was objectively disrespectful and unprofessional. As Chief [redacted] testified, the fact that an officer's disrespectful or offensive comment was motivated by an attempt at humor does not excuse or minimize the impact of an offensive comment. (RT 30-31.) All participants to this arbitration would agree that the Department and its officers owe the public fair and impartial treatment under the law. Depending on the particular facts of any case, statements by an officer that undermine the Department's ability to deliver on the promise of fair and impartial treatment can constitute CUBO, and such is the case here.

4. Additional Criteria

Section C 1404 lists five factors that *may* be considered in determining whether specific conduct constitutes CUBO: (a) the officer's tenure in the department, (b) the severity of any past violations, (c) the effectiveness of any prior corrective actions, (d) past conduct that was beneficial to the Department, and (e) past conduct that did not result in disciplinary measures.

These additional factors can be summed up as an evaluation of the Appellant's past service to the department. In 2010, then-Officer [redacted] was in his third year as a San Jose Police Officer. In 2019, he was promoted to the rank of sergeant and now has over 14 years of experience with the Department. It is undisputed that [redacted] had not received any prior

discipline. In addition, since the time of his Facebook post, he has received mandatory training in "Biased Based Policing: Remaining Fair and Impartial," and he studied the "21st Century Policing Report" as part of his preparation for the sergeant's examination – a publication that also addresses issues of implicit bias, etc.

In his 14-year tenure with the Department, [redacted] has made a number of beneficial contributions to the Department, such as serving as a Field Training Officer, acting as a detective in the Department's Sexual Assault Investigation Unit, participating in a number of community policing events, and receiving several letters of commendation from San Jose residents. In short, as noted by Lt. [redacted], [redacted] has "evolved in maturity level over the past decade." (JX 7 at p. 15 of 69.) Lastly, nothing in the record suggests that Sergeant [redacted] has used poor judgement in any other communications either on-duty or off.

In attempting to apply the factors discussed immediately above to the CUBO question, the Arbitrator notes that Section C 1404 provides that the Chief of Police (and presumably decision-makers such as arbitrators) *may* consider the additional factors in deciding whether certain conduct constitutes CUBO. While [redacted]'s tenure with the Department has been quite positive overall, in the Arbitrator's opinion, such considerations should neither lessen nor negate the impact of [redacted]'s Facebook post on the Department. The plain language of Section C 1404 gives the decision-maker the authority to consider an officer's tenure, etc., when determining whether alleged misconduct constitutes CUBO. However, it does not require a decision-maker to do so. Here, Appellant's generally positive tenure with the Department should not serve to negate the fact that Appellant's post brought discredit to the Department in violation of Section C 1404. Based on the unique facts presented here, the Arbitrator finds that the Section C 1404's additional criteria are best considered in determining the appropriate penalty.

Based on all the factors above, the Arbitrator finds that [redacted]'s 2010 post constitutes Conduct Unbecoming an Officer under Section C 1404.

d. Arbitral Authority

The City argues that if the Arbitrator finds evidence to support the Department's conclusion that discipline is warranted, he must uphold the penalty imposed by the Department unless he finds the penalty arbitrary, capricious or a patent abuse of discretion. (*See* City's

Closing Brief at pp. 13-14.) In support of its argument, the City cites section 25.5.11 of the parties' MOA, which provides:

> The parties agree that the arbitrator shall not add to, subtract from, change or modify any provision of this agreement and shall be authorized only to apply existing provisions of this Agreement to the specific facts involved and the interpret only applicable provisions of this Agreement. (JX 3 at p. 12 of 19.)

The City also likens the power of an arbitrator to that of a reviewing court in reviewing administrative orders in a mandamus proceeding where courts are generally required to uphold such orders unless the court finds the administrative order to be "arbitrary, capricious or a patent abuse of discretion." (City's Closing Brief at p.14.) This argument echoes an historical argument that arbitrators should not conduct *de novo* reviews of the facts underlying grievances, instead, limiting their authority to judging the reasonableness of management's conduct in investigating the underlying facts and processing any particular grievance.[11] Under that rubric, arbitrators were to uphold discipline absent arbitrary or capricious conduct on the part of the employer.

The Arbitrator is not persuaded by the City's argument. The MOA provides in section 25.8.1 that, "Employees in the bargaining unit shall only be disciplined for cause." (JX 3 at p. 13 of 19.) The parties have, therefore, bargained for a "cause" or "just cause" standard – a standard that a substantial majority of arbitrators find requires *de novo* hearings (i.e., receiving testimony, documentary evidence, and the like) and a duty to directly evaluate whether the penalty imposed by the employer is justified by and is commensurate with the employee's misconduct. According to Arbitrator Norm Brand, "[T]here is a general consensus among arbitrators that just cause requires any penalty imposed by reasonable in view of the nature of the offense." (Norman Brand, *Discipline and Discharge in Arbitration*, BNA Books, 1989, at p. 61.) Elkouri and Elkouri concur, noting, "The oft-included language denying the arbitrator the power to '[a]dd or subtract from or modify any of the terms of' the agreement – the langauge the City

[11] This argument stemmed from the view of many arbitrators, years ago, that the employer's investigation was, in effect, the employee's "day in court." Under that view, the role of the arbitrator, therefore, was to essentially act as an appellate court, essentially putting the *employer's* actions on trial to "discover whether the employer's 'trial' and treatment of the employee was proper." (*See "Arbitral Discretion: The Test of Just Cause,"* John Dunsford (Proceedings of the 42nd Annual Meeting of NAA, 23 (BNA Books 1990) at p. 32.) This view is now a minority view, at best.)

relies on here – does not preclude arbitral discretion to reduce the penalty imposed." (Elkouri and Elkouri, *How Arbitration Works,* 6th ed. 2003 at p. 1235.)

In short, the Arbitrator must reject the City's assertion that an arbitrator must uphold a disciplinary penalty unless he or she finds the penalty to be arbitrary, capricious or a patent abuse of discretion.

e. Penalty

In the present case, the Department issued [redacted] a 160-hour suspension for his November 2010 Facebook post based on a finding that the post constituted Conduct Unbecoming an Officer. Appellant argues that such a suspension is excessive. In support of this assertion, Appellant cites a document used to train Internal Affairs personnel on what types of conduct should lead to what types and level of discipline. Although the document was not introduced into the record, one witness testified that, per that document, a 160-hour suspension was recommended for misconduct such as driving a police vehicle while intoxicated, or participating in "out of policy" acts which lead to an officer involved shooting. (RT 132.) The City did not dispute this testimony. Sergeant [redacted]'s single 2010 post does not compare to those acts of misconduct in terms of their severity.

Interestingly, different SJPD supervisors had different recommendations regarding penalty. Department policy calls for the accused officer's supervisors to make findings and recommendations as to whether the complaint of misconduct is sustained and, if so, what penalty would be appropriate. This process takes place after the Internal Affairs investigation is complete.

The first supervisor to review the matter was Lt. [redacted]. [redacted] cited a number of mitigating factors in concluding that [redacted]'s 2010 post did *not* constitute CUBO. (As discussed above, Section C 1404 *permits* decision-makers to consider certain mitigating factors in that analysis but does not require it.) Because she found the allegation of Bias-Based Policing to be exonerated and the allegation of CUBO to be "not sustained," [redacted] recommended no discipline. (JX 7 at p. 17 of 69.)

The second supervisor to make findings and recommendation was Captain [redacted]. Cpt. [redacted] disagreed with Lt. [redacted], sustaining the CUBO charge and stating that [redacted] "had a responsibility to conduct himself in a way that does not adversely reflect upon

the Department." (JX 7 at p. 8 of 69.) As for penalty, Cpt. [redacted] recommended a Documented Oral Counseling.

Following [redacted]'s findings and recommendations, the matter was reviewed by a Disciplinary Review Panel which included the supervisors in [redacted]'s chain of command, including the Chief of Police – at that time, Chief [redacted]. The record does not reveal the extent or nature of the deliberations, however, the document confirming the supposed findings of the DRP is curious. The two-sentence memo from Lieutenant [redacted], Internal Affairs Unit, to Chief [redacted] states that upon review of [redacted]'s Personnel File and the Department's Internal Affairs files, "as well as reviewing again the circumstances of this case, [redacted] recommended" a 160-hour suspension. (JX 7 at 6 of 69, emphasis added.) The wording suggests that the 160-hour suspension was the recommendation of Chief [redacted]; not necessarily the DRP as a whole. That said, under Departmental rules, "The Chief of Police is not bound to the finding or recommendation of a subordinate but may, at his discretion, make a new and separate finding as to appropriate departmental action." (Duty Manual Section C 1727, JX 6 at p. 15 of 35.)

Although he was not involved in the original decision to discipline [redacted], Current Chief [redacted] defended the 160-hour penalty on the grounds that: (a) police officers must be held to a higher standard; (b) [redacted]'s post tarnished the reputation of the Department; and (c) other officers received similar discipline for similar conduct. (RT 27-28.)[12]

Under City rules, the final decision to discipline rests with the City Manager. (RT 90-91.) Former-City Manager [redacted] concurred with Chief [redacted]'s proposed 160-hour suspension; however, he retired before the discipline was finalized. The discipline was issued under the auspices of the City Manager's Office, albeit after [redacted] had retired. [redacted], Assistant Director Employee Relations, testified that she spoke to [redacted] about the suspension and that [redacted] supported it in large part because of the complaints from the public about the City's response to the posts revealed in the Medium.com article, as well as the general concern that the

[12] It is difficult to evaluate Chief [redacted]'s last point, as the record did not reveal other officers' misconduct and what level of discipline each officer received.

article could lead to the sense that community lacked confidence in the Department. (RT 93-94.) Neither former-Chief [redacted] nor former City Manager [redacted] testified at hearing.

In its Closing Brief, the City raises two salient points in term of penalty.

First, it argues that [redacted] knew, or should have known, of the September 1, 2009 Order Re: Use of Social Networking Sites ("9/1/2009 Order"). Among other things, that Order made officers aware that: (a) information posted on social media sites "may be considered part of the public domain," (b) that "privacy of such information should not be assumed"; and (c) on- or off-duty posts could trigger CUBO concerns. (JX 2 at p. 1)

Unfortunately, the 9/1/2009 Order raises more questions than it answers. The biggest question is whether it was in effect on November 20, 2010. On March 5, 2021, the Department issued a new Order regarding social media called, "Duty Manual Additions: Online Presence." ("3/5/2021 Order"). (Appellant's Exhibit B.) In the first paragraph of that Order, Acting Chief [redacted] referred to the 9/1/2009 Order and concluded that it had expired under the terms of Duty Manual section A 2304 (Temporary Orders), as it had not been incorporated into the Duty Manual within one-year of issuance. The City argues that the 9/1/2009 Order was still in effect in November 2010 pursuant to a *different* Duty Manual section, Section E 1107. That section is confusing at best, and even Chief [redacted] admitted on the stand that there appeared to be uncertainty among the highest levels of the Department as to whether the 9/1/2009 remained in effect in November 2010. (RT 48-49.) At the end of the day, the Arbitrator finds that the Administration's own statement in its 3/5/2021 Order specifically stating that the 9/1/2009 Order expired 12 months after issuance bars the Department from now asserting that the 9/1/2009 Order was in effect in November 2010.

The City further argues that even if the 9/1/2009 Order had expired, that Order at least put [redacted] on notice that officers should not assume the privacy of social media posts and that such posts could lead to CUBO allegations. Appellant counters that: (a) he has no recollection of receiving the 9/1/2009 Order; and (b) the Department's practice of distributing new orders to officers via email did (and apparently still does) not require that officers acknowledge receipt of new orders. The City, in turn, counters that officers have a duty to familiarize themselves with all orders.

The Arbitrator sees no compelling reason to resolve these two issues. The Department did not charge [redacted] with violating the 9/1/2009 Order and the Department's Notice of Intended Discipline neither relies on nor mentions the 9/1/2009 Order.[13] The weight of the evidence in this case convinces the Arbitrator that the 9/1/2009 Order had expired prior to November 2010, at least for the purpose of this arbitration. Beyond that, the case does not turn on whether [redacted] actually received that order via email or whether he was duty-bound to seek it out. This case is about whether Appellant's 2010 post constituted CUBO, and if so, what is the appropriate remedy.

Second, the City argues that [redacted] did not take sufficient responsibility for his actions. It argues that [redacted]'s expressions of embarrassment for himself, his family and the Department was not the same as accepting responsibility for the original post. While the City's point carries some weight, the Arbitrator must reject it as a basis for upholding the 160-hour suspension. The Arbitrator is convinced that [redacted]'s experience of having his private post exposed in the media, being embarrassed by it, having to consider how he would explain it to his family and friends, being placed on administrative leave, etc., is sufficient to ensure that he will not repeat his 2010 condcut.[14]

f. Mitigating Factors

We return now to other factors that the Arbitrator must consider in evaluating the issue of penalty. Those factors are, as follows:

1. [redacted]'s otherwise exemplary tenure of service

[redacted] joined the Department as a Police officer on December 31, 2006, after completing the Police Academy. He worked as a Field Training Officer and then as a member of the STAR team, which is a severe traffic accident response team. He later went into the Department's

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[13] The parties also stipulated that [redacted] did not violate the admonitions found on page two of the 9/1/2009 Order. (RT 70.)

[14] In addition, Chief [redacted] testified that training developed by the Islamic Network Group regarding how cartoons, humor and language can be harmful to the Islamic community is currently given to Department recruits and command staff. [redacted] testified that he is trying to expand that training Department-wide. (This training was not available to [redacted] when he was a recruit.) Although [redacted] has been trained in racial profiling, bias-based policing and fair and impartial policing, one might expect training on how speech can affect the Islamic community in particular to give all SFPD officers, including [redacted], additional insight into how even joking comments can affect that community.

Sexual Assault Investigation Unit. The Department promoted him to the rank of sergeant in 2019, where he has worked in Patrol supervising six patrol officers. He also participated in several community policing events, and received a number of letters of commendation from San Jose residents. As of the date of the arbitration hearing, [redacted] has been in the Department for over 14 years.

During those 14 years, [redacted] had maintained an exemplary disciplinary record, having received no discipline. In short, with the exception of the November 2010 post, the record reflects that [redacted] has contributed greatly to the Department and has no past disciplinary record.

2. The charges are based on a single instance of misconduct that has not been repeated in the intervening years.

It is undisputed that the record reveals only one instance of Sergeant [redacted] making any posts on social media (or in any other forum) of the nature of his November 2010 post. While that post was one such post too many, the situation would be different had he engaged in a series of such posts or demonstrated a pattern of making disparaging remarks. Nothing in the record suggests [redacted] made *any* such comments in the years between his November 2010 post and now. This suggests that [redacted]'s post was a one-time lapse in judgment – one that can be remedied with corrective action much less severe than a 160-hour suspension.

3. [redacted] testified credibly that he did not intent to disparage Muslims or the Islamic Religion

As discussed at length above, [redacted] testified credibly that he did not intend to disrespect or ridicule the Islamic faith or those who practice it. He stated that the target of what he termed as an ill-advised joke was the extremists who were targeting US soldiers. (He explained to investigators that his comments were "really just focused on people that were trying to kill US military in my mind and ended up killing themselves instead. That was the purpose of my comment, to make light of these extremist individuals, not a whole entire group." (JX 7 at p. 33 of 69.) He also explained that he has family in the military, and that his family is multi-racial. (*Id.* at 34; RT 155.)

Although the Arbitrator has concluded that Appellant's post was offensive and constituted CUBO, [redacted]'s testimony that he did not intend to offend the Islamic religion or Muslims as a group was credible and suggests that a lengthy suspension will not be needed to correct his behavior.

4. Since the time of his post, [redacted] has received training on Biased-Based Policing, and the like.

Between 2010 and 2020, the SJPD, like other departments across the country, took steps to train its officers about implicit bias and systematic racism. In 2015, [redacted] attended the Department's mandatory training class called "Bias Based Policing: Remaining Fair and Impartial" – training developed in response to "evolving views about implicit bias in police officers and concern about perceived systematic racism." (JX 7 at 15 of 69.) He also studied a document called the 21st Century Policing Report that deals with these issues. As noted above, the Chief of Police is taking steps to train all officers on matters specifically related to the Islamic community. There is every reason to believe that these trainings have been (and will continue to be) effective in correcting [redacted]'s conduct.

5. Conclusion Re Penalty

Based on the above, the Arbitrator concludes that the appropriate remedy is a Documented Oral Counseling. This result is consistent with the findings and recommendation of the Lt. [redacted] and Cpt. [redacted], the first two supervisors to make recommendations to the Chief once Internal Affairs had completed its investigation. Both supervisors are respected members of the Department.

Lt. [redacted] analyzed the IA investigation in some detail and found the CUBO charge to be "not sustained." Based on that conclusion, she did not recommend any disciplinary action. Cpt. [redacted], like the Arbitrator, sustained the CUBO charge and recommended a Documented Oral Counseling as the penalty. While she did not explain her reasoning for this recommendation in detail, she noted that: (a) [redacted]'s statement was concerning to the Department and its standards; and (b) the Department did not have a social media policy in effect in November 2010, and the Department should implement a policy that "clearly defines undesirable behavior and actions." (JX 7 at p. 8 of 69.) Hopefully, the Department's 3/5/2021 Order meets those recommendations.

While the Department has a duty to investigate and potentially take corrective action regarding social media posts that raise questions about the Department's ability to provide fair and impartial policing, in this case, the Arbitrator finds that a Documented Oral Counseling is sufficient to ensure that Sergeant [redacted]'s future conduct will be well within Department policy.

Order and Award

For the reasons discussed above:

1. The City of San Jose has demonstrated that Appellant, Sergeant [redacted], violated Duty Manual Section C 1404 (Conduct Unbecoming an Officer) as a result of his November 20, 2010, Facebook post.

2. The City of San Jose failed to demonstrate on this record that it had cause to issue a 160-hour suspension for Sergeant [redacted]'s conduct.

3. After full consideration of the unique facts of this case, the Arbitrator finds that the appropriate remedy for [redacted]'s 2010 post is a Documented Oral Counseling.

4. Appellant shall be made whole for all loss of pay and benefits resulting from the reduction of the 160-hour suspension to a Documented Oral Counseling.

5. The parties have agreed that the Arbitrator shall retain jurisdiction in the event a remedy is imposed. Thus, the Arbitrator will retain jurisdiction for a period of 60-days for the sole purpose of resolving any issues that may arise with respect to the implementation of the remedy imposed here. If a party requests assistance within that time period, the Arbitrator's jurisdiction will extend until such timely-raised issues are resolved.

6. The grievance is GRANTED.

Martin Gran, Esq., Arbitrator
Date: March 22, 2022