

Arbitration between:

Federation of Public Employees
Union,

and

Broward County, Florida
Employer,

regarding the discharge of Maintenance Worker K

FMCS Case No. 059551

BEFORE: PAUL GREENBERG, Arbitrator

Appearances:

For Broward County, Florida:

David B. Stern, Esq., *Assistant County Attorney, Ft. Lauderdale, FL*

For the Federation of Public Employees:

Libby Herrera-Navarrete, Esq., *Phillips, Richard & Rind, P.A., Miami, FL*

DECISION AND AWARD

In this dispute, the Federation of Public Employees (Union) challenges a February 2005, decision of Broward County (County or Employer) to discharge Maintenance Worker II K (Grievant) for alleged workplace violence. Specifically, Grievant was charged with forcefully grabbing a park caretaker by the shoulders or upper arms during an incident on January 22, 2005, and also threatening to harm her dog.

BACKGROUND

General environment

Grievant began his employment with the Broward County Parks and Recreation Division, Community Services Department in July 2001. His assigned work location was Deerfield Island Park in northeast Broward County. The Park is an island accessible only by boat, with park staff occasionally shuttling employees and visitors across the Intracoastal Waterway from a dock in Sullivan Park nearby.

Deerfield Island Park is operated as a nature preserve, and also is used for overnight sleep-over camping experiences by groups such as the Boy Scouts. The Park is normally open from Wednesday through Sunday, and County employees who work at Deerfield Island normally do not

work Monday and Tuesday. Camping groups often arrive on Friday and depart Sunday.

Officer H is a law enforcement officer with the Florida Fish and Wildlife Conservation Commission (FFWCC), and had held this position with FFWCC for approximately four years at the time of the events that gave rise to Grievant's discharge. She was not an employee of Broward County, but she held the position of Resident Caretaker of Deerfield Island Park under a contractual agreement with the County. Under the agreement, Officer H resided in the caretaker's house on the Island at no cost in exchange for patrolling the Island on a daily basis. Officer H performed her regular work duties for FFWCC at remote locations away from Deerfield Island Park, and then would return to the Island's caretaker's residence after her normal workday and perform her patrol duty during the evening hours. Officer H took up residence at Deerfield Island as the caretaker in July 2003.

The only supervisory employee at the Park is the Park Naturalist, a position held by Patti Hillebert in January 2005. Hillebert was very new to the Park Naturalist position, having started working for the Parks and Recreation Division in late December 2004. She previously had worked as a teacher. Hillebert supervised two County employees – Grievant and Michael Williams, a Groundskeeper – and was the “point of contact” between the County and the caretaker, Officer H. Although Officer H was not an employee of the County, she reported to Hillebert in connection with her caretaker duties. Functionally, Officer H related to Hillebert and Grievant as a co-worker. Williams began working for the County as a Groundskeeper January 9, 2005, and therefore was a very new hire at the time of the alleged incident.

To understand the events and evidence at issue in this case, it is necessary to describe the physical layout of the dock, office, and maintenance facilities at Deerfield Island Park. The main public entry point to the Park is a docking area/marina on the south side of the island. About 150' north of the marina is a 1-story building sitting on a slight rise. The building faces the marina. It is about 45' in width, and is subdivided into two portions. The west portion of the building houses the Park Naturalist's Office, which normally is open during working hours and accessible to the public. The Park Naturalist's Office has a prominent “Office” sign above it. The eastern portion of the structure is the caretaker's residence, which has a separate entrance and a front yard area demarcated by a gate and low hedges. A small sign posted on the building next to the caretaker's residence door says “Private Residence Closed to Public.” The doorways to the Office and the caretaker's residence both are on the south side of the building, facing the marina. The caretaker's residence door is in the middle of the structure, and the door to the Naturalist's Office is about 15' further west.

East of the Office/caretaker's residence building, and slightly behind it, are a tool shed and a small maintenance yard for the storage of motorized equipment, fuel, etc. These facilities are marked with a highway-type “Do Not Enter” sign, clearly indicating the facilities are restricted to Park employees and off-limits to the general public.

Relationships among the staff and “the dog issue”

At the time of the incident, Grievant was the longest-serving employee on Deerfield Island, having worked at the Park for 3-1/2 years. Officer H had served as the caretaker for 1-1/2 years. Hillebert had been in charge for less than a month, and Williams was in a training phase with only 2 weeks experience.

Witnesses uniformly testified that Grievant and Officer H enjoyed a good and friendly working relationship. Grievant trained Officer H how to operate the boats used to ferry visitors to the Island. He performed tasks or errands for Officer H that were outside his job description, and there were discussions of Officer H babysitting Grievant’s children. On some occasions they had lunch together. Grievant made a cake for Officer H at Christmas and a pie for Thanksgiving. He met her family and boyfriend when they visited Officer H at the Park. The friendship between Grievant and Officer H was relaxed enough that friendly, non-sexual physical contact between the pair was not uncommon. To the extent there was friction between Officer H and Grievant, the primary cause was Officer H’s dog, Jethro.

Because the Park functions as a nature preserve, domestic animals are not allowed on the Island. Soon after becoming caretaker, Officer H acquired Jethro, a 70-pound mixed-breed dog which Officer H described as being part Bull Mastiff or Belgian Malinois. Because she was alone on the Island at night, Officer H valued Jethro both as a companion and as additional personal security. Officer H’s agreement with the County allowed her to keep a dog on the Island, but stipulated “Pets will not be allowed on the Premises unless secured by a leash or other means.” Notwithstanding this provision, the dog often was allowed to roam off its leash and unsupervised, and was prone to dig holes and defecate outside the caretaker’s private yard.

It is unclear whether this violation of Officer H’s agreement with the County was an issue for the Park Naturalist, but the dog’s activities created problems for Grievant, who had primary responsibility for maintaining the entire Island as a public park. A prior caretaker similarly had a dog that was not always leashed, and which therefore defecated outside the private grounds of the residence. For Grievant, who was not fond of pets under any circumstances, Jethro’s off-leash conduct was a significant irritant and a source of some conflict between himself and Officer H because it fell to him to clean up dog feces outside the caretaker’s private yard, and also to backfill holes which the dog dug. Grievant recounted incidents in which he was sprayed with dog feces while he operated a commercial-size weed-eater to trim grass near trees.

According to Grievant, he complained about Officer H’s failure to control Jethro to a succession of Park Naturalists assigned to Deerfield Island during the period he worked with Officer H, each of whom promised to work with Officer H to address the problem. Apparently the Park Naturalists followed through, because Officer H acknowledged having conversations with each of them about the dog issue. Grievant also complained directly to Officer H, and sometimes threatened to report that she was not controlling her pet as required by her agreement with the County. However, it appears Officer H did not take effective steps to curb the dog’s activity.

Hillebert, Grievant and Williams were present on the Island during regular working hours on Saturday, January 22, 2005. A Boy Scout group also was present, having spent Friday night on the Island. Early that morning, Grievant and Williams had found a large hole dug by Jethro in a sandy area in the maintenance yard. Williams described the hole as 2' wide and 18" deep, and both Grievant and Williams suggested the hole was large enough to create a risk of tipping the motorized cart used by the maintenance crew, and therefore was safety hazard. Rather than simply filling in the hole, Grievant left the hole "as is" and planned to show it to Officer H when she returned to the Park that afternoon after completing her duty shift at her FFWCC job.

Around 4:00 pm, Grievant and Williams piloted the pontoon boat to Sullivan Park, picked up Officer H and returned with her to Deerfield Island. According to Williams, Grievant told Officer H that he wanted to show her "something" near the maintenance shed when they returned to the Island. Several of the Boy Scouts who were overnighing on the Island were playing sports in the grassy area between the marina and the Office/caretaker residence building.

The eyewitnesses – notably Officer H and Grievant, but also Williams – offer very different accounts of what transpired next upon reaching Deerfield Island Park.

Officer H's account of the incident

According to Officer H, upon her return to the Island she entered the caretaker's residence, took off her uniform shirt and gun belt, and walked the dog. She then decided to bathe the dog in the front yard of her residence. As she was finishing with bathing the dog, Grievant entered the yard and stated "I need to show you something." Officer H states she was holding the dog and trying to put its collar on. Officer H asked Grievant what he needed to show her, and Grievant merely repeated that he needed to show her something. She told Grievant that if he needed to tell her something, he should simply tell her then and there; however, Grievant repeated that Officer H should come with him to another location. Grievant was standing some distance from Officer H during this exchange, about 7 or 8 feet away.

Officer H testified she told Grievant she had just gotten off work and did not have time for games. Because she was frustrated with him, "I turned to my residence with the leash in my right hand and trying to hold onto the dog and walking to my residence in the front door." Tr. 29. According to Officer H, Grievant "came over and grabbed me between the elbow and shoulder and turned me into his body" by "grabbing both my right and left arm" and pushing "towards the ground . . . in a downward motion, but towards him." T. 31. She described herself as shocked by the experience, and kicked him off her. Officer H testified Grievant then grabbed the leash from her hand and began walking toward the maintenance area.

Officer H reports she followed Grievant to the maintenance area, where Grievant pointed to a hole which she describes as shallow. In a heated conversation replete with expletives by both parties, Grievant told Officer H she had to backfill the hole. Officer H told Grievant he needed to

return the leash. Grievant complained about the dog running loose on the Island. When Officer H demanded the return of her leash, Grievant finally directed her to a picnic table in the maintenance area where the leash was lying. At some point, Grievant commented that someday he was going to hang the dog. The shouting and cursing continued as Officer H walked away and reentered the caretaker's residence, slamming the door.

Park Naturalist Hillebert, who was sitting in the Office with the door open, heard the last phase of the shouting match between Officer H and Grievant and heard Officer H slam the door to the caretaker residence. Several minutes later, Hillebert spoke with Officer H at the residence and received Officer H's oral account of what had transpired.

Officer H testified she called her supervisor with FFWCC that evening and mentioned the incident. Because Officer H had reported the incident to Broward County staff (*i.e.*, Hillebert), she did not file an incident report with FFWCC. That evening she also noticed a bruise on her arm, which she attributed to the grabbing incident. She described the bruise to her father the next morning (Sunday). Officer H's father is a retired law enforcement officer (Drug Enforcement Administration) who lives in Pensacola. He immediately traveled to Ft. Lauderdale to be with Officer H, arriving sometime late on Sunday. Officer H's father took photographs of the bruised arm.

On Sunday evening, Officer H typed-up a written description of the incident and forwarded it via fax to Assistant Superintendent Cheryl Cayer of the Parks and Recreation Division. This written account had been requested by Hillebert.

At the hearing, Officer H conceded she was concerned at the time of the incident that her dog might be taken away from her because of the violations of her contract with the County. In addition, she acknowledged that prior to January 22, 2005, there had been no earlier incidents of inappropriate physical contact by Grievant.

Grievant's and Williams' accounts of the incident

According to Grievant, when he, Officer H and Williams arrived back on Deerfield Island he told Officer H that he wanted to show her something. Officer H did not object, but told Grievant she wanted to go to the house to drop off her groceries. Williams testified this exchange actually occurred while the three were in the pontoon boat. According to Williams, Grievant then walked toward the maintenance area and Officer H walked to the house, while Williams parked the boat. Williams stated Officer H promised to meet Grievant after dropping off her belongings.

After parking the boat, Williams also went up the hill toward the Office/caretaker's residence building. According to Williams, when he (Williams) reached the top of the hill he saw Grievant nearing the hedges at the east corner of the house where Grievant expected to meet Officer H. Williams continued past the Office/caretaker's residence building toward the maintenance area and the hole. Although this was about 30' - 40' from the Office/caretaker's residence, Williams states

he saw and heard the entire interaction between Grievant and Officer H.

Grievant states Officer H came out of the house, and he (Grievant) was standing on the perimeter of her property – apparently, near the hedge line. Officer H had removed her uniform shirt and gun at this point. He again said he wanted to show her something, and she walked toward him. He said “Let me see your leash,” and held out his hand and motioned. When asked by counsel why he asked for the leash, Grievant testified he wanted the leash so he could later joke about hanging the dog, *i.e.*, the leash was to be used as a stage prop. Grievant states Officer H voluntarily handed him the leash. He says Officer H made a playful kicking motion toward him.

Soon afterward, Officer H asked Grievant whether he intended to show her a hole, objecting that if this were the case, she really did not have time for such an activity. Grievant acknowledged the “something” he wanted to show Officer H was a hole. As he explained at the arbitration hearing, he had told Officer H on other occasions that he had backfilled holes dug by Jethro. He had wanted to resolve the issue “person-to-person” and had hoped not to escalate the conflict to a higher supervisory level, but this approach had not worked.

Officer H became angry and started screaming at him. However, she followed him to the hole and backfilled it, kicking in the sand with her work boots. In Grievant’s words, Officer H was “getting louder, and louder and louder.” His reaction was to walk away and resume his job, because it was late in the day and it was necessary to clean the public bathrooms before Grievant, Williams and Hillebert left for the night.

Williams’s account of the event is more detailed than Grievant’s, and only slightly different. As noted, he reports observing the initial contact between Grievant and Officer H from the maintenance yard 30’ - 40’ feet away, and he testifies he had a clear view of them throughout the incident. According to Williams, Grievant gestured for Officer H to hand him the leash and she complied voluntarily. There was no touching or grabbing. Grievant and Officer H walked to the maintenance area together. Grievant explained the safety problems associated with the holes made by the dog, but Officer H was not very interested. Officer H reached for the leash, and Grievant joked about someday hanging the dog. Officer H continued reaching for the leash and Grievant told her she would have to backfill the hole first. Officer H complied grudgingly.

According to Williams, the situation escalated when Grievant commented that he did not want to “write up” Officer H’s failure to control the dog because he did not want to create trouble for her. According to Williams:

When [Grievant] said that, like she completely lost it. She was like, “Write me up?” . . . “You don’t know who you’re messing with. You know, you don’t want to play with me . . .” And that’s when the screaming started. [Grievant] was like, “I don’t want to get you in trouble. I’m just asking you to take care of this dog and keep him from running around on the island. He’s not supposed to run around

on the island.” So she kept screaming. She kept screaming.

Tr. 337. Officer H walked away toward the residence. Williams stated she continued screaming, and the further she walked, the louder she was getting. Like Grievant, her language was laced with profanities.

Significantly, in contrast with Officer H’s account, neither Grievant nor Williams make any mention of seeing Officer H bathing the dog, nor do they report the dog being present with Officer H in front of the caretaker’s residence at the moment when Grievant approached Officer H and asked for the leash.

After the shouting match between Officer H and Grievant at the maintenance yard, Grievant and Williams went to get supplies so they could clean the bathrooms. They were approached a few minutes later by Hillebert, asking what had happened.

Hillebert’s inquiry into the event

Hillebert did not personally observe any of the events in front of the caretaker’s residence or at the maintenance area. However, Hillebert heard Officer H yell something at Grievant as she returned to the residence, and also heard her slam the residence door. She left the Office and first went to see Grievant and Williams, asking what had happened. Grievant acknowledged confronting Officer H about letting the dog run off the leash and dig holes, and also acknowledged making the joking comment about wanting to hang the dog. Hillebert advised Grievant it was not his responsibility to reprimand Officer H, the caretaker. If he had issues with Officer H he should approach Hillebert herself, and Hillebert would address the problem.

Hillebert then spoke with Officer H in the residence. At the hearing, she described Officer H’s demeanor as “just frazzled and very upset,” and she was crying. Tr. 160. Officer H reported Grievant had approached her and asked her to “come see something,” and Grievant subsequently had grabbed her. *Id.* Officer H said Grievant had taken the leash from her and they had gone to the hole at the maintenance yard. Hillebert advised Officer H that both Officer H and Grievant had behaved inappropriately, including the shouting in front of Park guests (*i.e.*, the Boy Scouts), and these kinds of issues should be addressed through her.

Hillebert subsequently reported the incident to both her first and second-level supervisors, who instructed her to obtain written statements from the participants. These statements were generated the next day (Sunday), and they are included in the record. Grievant’s statement is extremely brief:

On a number of occasions I have asked [Officer H] please don’t let the dog run loose in my assigned work areas. Why? Because the dog defecates on the lawn and it’s usually next to a tree, as well as digging holes in the maintenance areas.

So on 1/22/05 about 4:00 I asked [Officer H] to come take a look at something. It was another large hole at maintenance.

Employer Exhibit (EX) K (minor edits to improve clarity). Williams provided a longer statement consistent with his testimony at the arbitration, described *supra*:

As I view the situation [Grievant] asked [Officer H] to come take a look at a hole her dog dug in the maintenance area. [Officer H] came and looked at it and . . . blew it off as not a big deal. [Grievant] tried explaining to her that with the ATV it's dangerous to have holes around [the] island (might cause ATV to flip). Both parties were still cordial at this point. [Grievant] mentioned to her that she should keep the dog in her yard and not let it run free on the island to avoid other problems such as the dog using the bathroom in public access areas. I guess that's about when [Officer H] started getting upset with the conversation. [Grievant] told her he didn't want to write it up because it was minor but she can't have the dog running loose, then said if he catches it he'd hang it – To me it was a joke but [Officer H] didn't take it that way. She told [Grievant] not to threaten her dog and to not disrespect her. (I don't feel at any time either party was disrespectful). After that I went into the [toolshed nearby] and [Grievant] shortly thereafter followed me in. I don't know what she was saying but I still heard [Officer H] kind of yelling for a few minutes after we were in the shed. A couple of minutes later Patti [Hillebert] came and asked what happened.

EX L.

Officer H's incident report (written the day after the event, January 23) is slightly different from her testimony at the hearing. She writes she had finished bathing the dog when Grievant appeared. Grievant approached her and insisted he wanted to show her "something." When Officer H objected that she did not have time for games, she turned away from Grievant and started to walk away with the leash in her hand. She writes that Grievant "grabbed me from behind around my shoulders." She demanded to be released, and kicked Grievant in the stomach when he refused to do so. Officer H then writes that Grievant grabbed the leash and he ran toward the maintenance area. After the profanity-laced argument at the maintenance area, Officer H writes she returned to her residence, with Grievant shouting out comments after her. Her written report concludes "At this point, I feel threatened by not only the physical violence but as well [by] the verbal abuse." EX I.

Hillebert transmitted the written statements of Grievant and Williams to her supervisor, Assistant Superintendent Cayer, along with a cover memo of her own describing her brief conversations with the employees. Officer H forwarded her statement directly to Cayer. Hillebert did not interview either Grievant or Williams further to learn more about their version of the events,

or to clarify the inconsistencies between their accounts and the information provided by Officer H.

At the trial, Hillebert commented that she was surprised by the incident, because prior to January 22 Grievant and Officer H “seemed to get along fine.” Tr. 176.

Disciplinary procedures initiated against Grievant

The County moved quickly to separate Grievant and Officer H. On January 25, 2006, Assistant Superintendent Cayer issued a memorandum to Grievant changing his work assignment to Tradewinds Park. The notice also advised Grievant that a pre-disciplinary meeting would be held January 27 at the Park and Recreation Division’s administrative offices to discuss, *inter alia*, “a potential alleged work place violence situation involving yourself and [Officer H].”

The pre-disciplinary meeting was convened, with Grievant in attendance along with his Union representative, Will Vargas.¹ Neither Officer H, Williams nor Hillebert participated in the session, although it is apparent from documents in the record that the management representatives were familiar with the incident reports and statements that had been forwarded to Cayer January 23. *See* Joint Exhibit (JX) 3. At the pre-disciplinary meeting Grievant admitted to having a verbal altercation with Officer H and acknowledged making the comment about hanging the dog, but denied grabbing Officer H and denied being kicked by Officer H.

The Union requested a disciplinary meeting, which was convened February 25, 2005. At this session, the County gave Grievant an Employee Notice, BC111, informing him he was being terminated effective immediately for multiple infractions:

Based on the written statements and information presented at the pre-disciplinary meeting, it was determined that [Grievant’s] actions were in violation of Broward County’s Opposition to Workplace Violence Policy. Further, [Grievant] displayed inappropriate and disrespectful behavior towards [Officer H], used poor judgment, poor public contact, poor communications, and failed to follow the County’s policy regarding workplace violence. In addition, on January 22, 2005, [Grievant] failed to follow the chain of command to report his concerns regarding work performance issues to his supervisor. Instead, [Grievant] approached [Officer H] in a confrontational manner, engaged in a verbal and physical altercation, and made a threatening remark directed to [Officer H’s] pet. [Grievant’s] actions are unacceptable and contrary to the professional and businesslike manner expected of all County employees. Therefore, for his actions, the Parks and Recreation Division has no recourse but to terminate

¹ Neither Grievant nor Vargas could recall the January 27 meeting. However, based on other testimony and documentation, I am persuaded they were in attendance.

[Grievant] from his position of Maintenance Worker II with the Parks and Recreation Division, effective immediately.

JX 3.²

The Union grieved Grievant's termination on or about February 28, contending Grievant was subjected to excessive discipline and unjustly terminated.

A Step 2 grievance hearing was held March 21, 2005, at the County Governmental Center. Neither Grievant nor Union rep Vargas were present. The County attempted to reach Vargas by phone, but was not successful and proceeded with the Step 2 hearing, which included a presentation by Officer H. The County affirmed its earlier decision. JX 4.

Williams resigned his position with the County April 14, 2005, and moved to New Jersey. He was called by the Union as a witness at the arbitration hearing, but was never contacted or interviewed by the County about the incident subsequent to Hillebert's initial inquiry on January 22 and 23.

A Step 3 meeting was convened May 20, 2005, with Director of Aviation Tom Jargiello serving as the County Administrator's Designee. Grievant and Vargas attended the meeting. Officer H and her father also participated. After reviewing the procedural history of the grievance and noting the relationships of the parties to the County, the Administrator's designee summarized the information before him:

The County's action of terminating the Grievant's employment is a result of a confrontation between the Grievant and the Caretaker at approximately 4:20 pm on Saturday, January 22, 2005, at the Premises (Caretaker's residence) on Deerfield Island Park. The confrontation arose from the Grievant's observation of damage to County property by the Caretaker's pet.

² Neither Officer H nor Williams participated in the pre-disciplinary meeting, but their written statements were considered. In her written statement, Officer H alleged the incident of forceful grabbing occurred. Appearing in person at the pre-disciplinary meeting, Grievant once again admitted to arguing with Officer H and making the comment about hanging the dog, but he denied any grabbing occurred.

Confronted with Officer H's written statement alleging the grabbing incident and Grievant's in-person denial that any such event occurred, the deciding officials apparently concluded Officer H's written account was more credible than Grievant's in-person denial.

Williams's written statement of January 23 does not address the allegation of forceful grabbing; even though he still was a County employee during this period, it appears no one ever followed-up further to ask Williams what he might have seen.

A written description of the incident is contained in the “Description of Incident” attached hereto and incorporated herein. Testimony was taken at the May 20, 2005 hearing from a number of individuals including [Officer H], representatives of the County and representatives of the Grievant and the statements of the Caretaker coincide with the written information as referenced in the attachments.

As corroboration to the Caretaker’s averments, she presented photographs of a bruise on her right arm, which she alleged were (*sic*) caused when the Grievant grabbed her arm during the January 22 incident at the Premises. The Caretaker’s father orally stated that he took the photograph in question, that it was taken contemporaneously to the alleged incident between the caretaker and the Grievant and that it accurately depicts the bruise on the Caretaker’s right arm. The Grievant presented a written statement by Michael Williams, Groundskeeper, *that he did not observe a physical confrontation between the Caretaker and the Grievant.* Mr. Williams did not appear at this hearing and the undersigned was informed that Mr. Williams has left employment with Broward and his whereabouts were unknown.

A reading of Mr. Williams’ statement regarding the confrontation between the Caretaker and the Grievant contains averments by Mr. Williams that he observed the interaction between the Caretaker and the Grievant at the Maintenance Building area. The alleged physical confrontation between the Caretaker and the Grievant occurred at the Premises (Caretaker’s residence), prior to both parties moving to the Maintenance Building area.

JX 5 (emphasis added).³ Based on the record before him, Jargiello found Grievant had physically confronted Officer H on January 22, noting the physical nature of the interaction was corroborated by the photographs of Officer H’s bruised arm. He viewed this as a serious infraction of the County’s Opposition to Workplace Violence Policy, meriting severe discipline. He noted Grievant was aware the proper course for articulating concerns with the performance of other employees would be a report to his supervisor. Jargiello denied the grievance, sustaining the termination. *Id.*

³ It is true that Williams’ written statement does not describe any physical confrontation between Grievant and Officer H in the yard of the caretaker’s residence, and it appears County officials therefore assumed he was silent on this issue because he was unable to observe the interaction between Grievant and Officer H. This assumption by County officials may have been erroneous. At the arbitration hearing, Williams testified forcefully that he observed the full encounter between Grievant and Officer H at the residence, and his written statement did describe a physical altercation between them *because no such altercation occurred.*

This arbitration followed.

ISSUES PRESENTED

At the outset of the hearing, the parties stipulated the following issue was to be decided:

Whether the County discharged Grievant for just cause? If not, what shall be the remedy?

In addition, in its post-hearing brief the Union argued the discipline should be reversed as untimely because it was not implemented by the County within time limits mandated by the collective bargaining agreement.

**RELEVANT PROVISIONS OF THE LABOR AGREEMENT
AND COUNTY POLICIES**

Article 3 Management Rights

It is understood that the County has the right to operate the various Divisions of County Government. In order to accomplish the mission of Broward County Divisions of the County Government, management will necessarily accomplish the following, subject to the provisions of this Agreement:

- A. discipline, demote, suspend, or discharge an employee or class of employees for just cause;

* * *

- K. the County has the right to formulate, change, or modify reasonable Division rules, regulations, and procedures related to operations, except that no rule, regulation or procedure shall be formulated, changed, or modified in a manner contrary to the provisions of this Agreement.

Article 4 Employee Rights

Section 3. . . . All disciplinary actions must be issued to the employee or the union no more than thirty (30) calendar days after the incident, or after the date on which management became aware of an incident, or reasonably should have become aware, which constitutes cause for discipline. In the event that a pre-disciplinary meeting is re-scheduled at the request of the Union or employee, the time frames for issuing any discipline will be automatically extended the same number of days, which resulted in the delay, to allow for re-scheduling of the pre-disciplinary meeting.

Broward County's Opposition to Workplace Violence (2004)

It is the County's policy to maintain a workplace free from violence or the threat of violence by any employee, customer, vendor, or members of the general public. . . . Every employee is expected to understand this policy, report acts or threats of violence, and cooperate with County officials in policy enforcement.

* * * *

Additional Guidelines for Directors and Supervisors

Appropriate actions include . . .

- 4) Once the immediate situation is controlled, the Critical Incident Coordinator, in cooperation with the Director, law enforcement or others as needed, will conduct an investigation into the incident. The investigation shall include interviews with all parties involved and any witnesses, as well as the obtaining of written statements

County Responsibilities

All alleged violations of this policy will be investigated promptly and effectively by the Critical Incident Coordinator and others designated by the Coordinator to participate and assist. The written investigation report will establish whether or not this policy or other policies have been violated and establish accountability. In accordance with the County's disciplinary policies, appropriate action will be taken to sanction an employee determined to be in violation of this policy up to and including termination, even following a first offense. The County may immediately suspend such an employee, with or without pay, pending disciplinary action, depending on the circumstances.

POSITIONS OF THE PARTIES

A. The Union's position.

Timeliness of the County's decision to discharge Grievant under the collective bargaining agreement: The County was aware of the Deerfield Island Park incident on January 22, when Hillebert learned of the incident and began her investigation. More-senior County officials knew of the incident the next day, January 23. However, disciplinary action was not taken until February 27, 2005, about 36 days later. The County's action was outside the 30-day time limit for imposing discipline mandated by the labor agreement, and thus untimely.

Whether Grievant was discharged for just cause: As attested by Grievant and confirmed by eyewitness Williams, the alleged incident of grabbing simply did not occur. The County's investigation of the incident was ineffective, with the on-site supervisor failing to conduct a thorough investigation as contemplated by the County's Workplace Violence Policy. To the extent the County is relying on the photograph purporting to show Officer H's bruised arm, the photograph was not in the County's possession at the time the discharge was ordered and therefore should not be a factor when determining whether the County had "just cause" for its action; moreover, the Union expresses doubts regarding the origin of the photo and its significance.

B. The Employer's position.

Timeliness of the County's decision to discharge Grievant under the collective bargaining agreement: At the beginning of the hearing, the Union stipulated the grievance was timely and properly before the arbitrator. If the Union intended to raise a procedural challenge to the County's disciplinary action, it should have been raised at that time. Moreover, the Union did not argue that the County's action violated procedural requirements earlier in the grievance process, nor was this argument raised at the arbitration hearing; the claim is advanced for the first time in the Union's post-hearing brief. Raising this argument after the close of the record denies the County due process, because the County was not placed on notice that this was an issue and therefore did not have an opportunity to present witnesses and evidence to show its action was timely under the collective bargaining agreement. The Union argument that the decision to discharge Grievant was untimely therefore should be rejected.

Whether Grievant was discharged for just cause: The evidence supports the County's conclusion that Grievant grabbed Officer H in an effort to force her to accompany him to the maintenance area, and Grievant has admitted to making threats to harm Officer H's dog. These acts violated the County's Opposition to Workplace Violence Policy, and are sufficient cause to support discharge. Further, Grievant violated the chain of command and otherwise engaged in inappropriate conduct. The testimony of Grievant and Williams is inconsistent and their claim that no forceful grabbing occurred should not be credited.

DISCUSSION

A. Whether the Union properly has raised a procedural objection to the timeliness of the County's discipline of Grievant? If so, whether the County violated the procedural time limitations of the collective bargaining agreement when it discharged Grievant?

Under Article 4, Section 3 of the collective bargaining agreement, *supra*, the County has agreed it will take disciplinary action against employees within 30 days after County officials become aware of improper activity by bargaining unit employees, unless the initial predisciplinary meeting has been postponed at the Union's request. The interaction between Grievant and Officer H occurred January 22, and was immediately known to the Park Naturalist, Hillebert. Senior County officials were aware of the event by the next day, January 23. However, the decision to discharge Grievant was not communicated to him until February 27, which was 36 days after the incident occurred and 35 days after senior officials were alerted to the situation. In its post-hearing brief, the Union argues the County was untimely in imposing discipline.

The Union grieved Grievant's discharge on or about February 28, 2005. A Step 2 meeting took place March 29, 2005, which neither Grievant nor his union representative attended. A Step 3 meeting was held May 20, 2005, with both Grievant and Mr. Vargas in attendance. The initial grievance in this matter did not allege that the County's discharge action was untimely, nor is there any evidence suggesting the timeliness of management's action was raised during at the Step 2 or Step 3 stages of the grievance process. Similarly, at the outset of the arbitration hearing this Arbitrator asked the parties whether the grievance was properly before him, and both parties stipulated that it was. At no time during two days of hearings was this question raised, including the Union's opening statement. The issue appears for the first time in the Union's post-hearing brief.

In opposing the Union's belated claim that the original discharge decision was untimely, the County argues that raising the issue post-hearing operates to deny it due process and offers the following, essentially an "offer of proof":

Had the Union raised the issue in a timely manner the County would have presented evidence that the Grievant's disciplinary meeting was scheduled on February 11, 2005, for February 18, 2005 from 2:00-3:00 p.m. with Gayle Preston, the Superintendent for the North District of the Parks and Recreation Division, within 30 days of the Division being made aware of the incident. The County would have called Nohora Medkiff, Human Resources Analyst, to testify that she spoke with Will Vargas on February 14, 2005, who told Nohora that he was unable to meet on February 18, 2005, and that the meeting was rescheduled at his request for February 25, 2005. The County could have introduced her contemporaneous notes of that conversation as further proof. "The foregoing thirty (30) day time frame shall not apply when mutually waived by the parties or when

the incident involves a possible felony or work-related misdemeanor crime.” Joint Ex. 1 Art 4 Section 3, ¶2. The County would have established that the time frame for issuing discipline was mutually waived at the request of the Union Business Representative.

Reply Brief of Broward County at 5-6 (citations to attachments omitted).

By itself, the Union’s stipulation at the hearing that the matter properly was before the Arbitrator effectively waived any subsequently claim regarding the timeliness of management’s discharge decision. However, the County’s offer of proof illustrates very clearly why the Union’s effort to raise the timeliness issue post-hearing also must be denied on policy grounds. Basic due process considerations mandate that by the time of the arbitration hearing, it is incumbent upon the parties to have identified clearly the issues that are being tried. This is an issue of basic fairness, both to union and employer parties. Arbitrators rightly have rejected efforts by parties to raise issues of timeliness for the first time during the post-hearing briefing process. *Super Market Service Corp.*, 89 LA (BNA) 538 (DiLauro 1987); *U.S. Dep’t of the Treasury*, 109 LA (BNA) 209 (Hockenberry 1997). Similarly, I deny the Union’s post-hearing request to reverse the discharge based on a timeliness theory.

B. Whether the County discharged Grievant for just cause? If not, what shall be the remedy?

1. Burden and quantum of proof.

In labor arbitrations involving adverse actions, employers normally shoulder the burden of proof in situations where – as here – “just cause” is a prerequisite for imposing discipline. *See* Labor Agreement Article III(A), *supra*.

In most civil disputes, the quantum of proof is the “preponderance of the evidence” standard. The Union argues, however, that a higher “clear and convincing evidence” standard should be applied to any disciplinary case involving discharge, citing *Eaton Corp.*, 116 LA 1584 (Daniel 2002) and *Professional Med Team, Inc.*, 111 L.A. 457 (Daniel 1998).

Given the severity of the discharge sanction, it is this Arbitrator’s view that the evidence in a discharge case merits a very high level of scrutiny. However, unlike Arbitrator Daniel, I do not believe *all* incidences of discharge *automatically* should be subjected to an elevated standard of proof:

Discharge unquestionably is a significant disciplinary sanction, and there are a few arbitrators who take the view that employers must produce an elevated standard of proof (such as “beyond a reasonable doubt” or “clear and convincing evidence”) to sustain any discharge simply because of the severity and finality of the penalty, a sanction

that some arbitrators characterize as “economic capital punishment.” *City of Cleveland, Ohio*, 108 LA 912 (Skulina 1997); *see also Professional Med Team, Inc.*, 111 LA 457 (Daniel 1998); *Greene County Dep’t of Human Services*, 109 LA 1160 (Sergent 1997); *Drummond Co.*, 106 LA 250 (Sergent 1996); *Grand Rapids Area Transit Authority*, 107 LA 1132 (Daniel 1996). More commonly, however, arbitrators tie the quantum of evidence to the nature of the charge. For standard disciplinary and discharge actions, arbitrators commonly will sustain the employer’s action if the “preponderance of the evidence” (the standard of proof in most civil litigation) supports the employer’s case. *E.g.*, *Fernald Environmental Restoration Management Co.*, 104 LA 596 (Cocalis 1995); *Rittman Nursing and Rehabilitation Center*, 113 LA 284 (Kelman 1999). Frequently, however, arbitrators will require employers to prove their case under an elevated standard if the charge against the employee alleges employee activity that might be punishable under criminal law, or where the charge otherwise involves a failure of morals or conduct that is socially stigmatizing. *E.g.*, *Vista Chemical Co.*, 104 LA 818 (Nicholas 1995) (employee discharged for alleged sexual harassment); *Yellow Freight Systems, Inc.*, 106 LA 1062 (Briggs 1996) (employee accused of dishonesty); *Georgia-Pacific Corp. Building Products Division*, 106 LA 470 (Hooper 1996) (employee accused of bringing marijuana to worksite); *Chicago Transit Authority*, 110 LA 403 (Wolff 1997) (conductor accused of assaulting passenger).

Sweet Sue Kitchens/Sara Lee Foods, 120 L.A. 54 (Greenberg 2004). In *Sweet Sue Kitchens*, the grievant was discharged for violating the company’s attendance policy; although the grievance in that case was granted and the employee reinstated, the employer’s decision was evaluated under a “preponderance of the evidence” standard.

In this Arbitrator’s view, the workplace violence charge leveled against Grievant falls within the class of cases where the “preponderance of the evidence” standard is insufficient and a higher standard of proof is appropriate. Without doubt, workplace violence is a very serious issue. The County rightly is concerned with maintaining a workplace that is safe for its employees and the public, and is to be commended for adopting its Opposition to Workplace Violence Policy and implementing a vigorous policy of training and enforcement. The corollary concern, however, is that accusing an employee of engaging in workplace violence, and then ordering his discharge, also is a very serious matter. A finding that an employee has engaged in workplace violence will not only affect the employee’s current employment with the County, but has the serious potential for adversely affecting an individual’s employability in many other settings. Before terminating an employee for engaging in workplace violence, it is reasonable to expect an employer to have very solid evidence that the misconduct actually occurred. When evaluating a discharge decision in a

workplace violence case, therefore, it is this Arbitrator's view that an elevated level of proof by the Employer is merited – specifically, proof by “clear and convincing evidence.”

Although the workplace violence charge against Grievant was the centerpiece of the arbitration hearing, it is not the only basis cited by the County in its discharge decision. In addition, the County found Grievant “displayed inappropriate and disrespectful behavior toward Officer [H], used poor judgment, poor public contact, poor communications . . . [and] failed to follow the chain of command.” JX 3. These misconduct allegations do not involve a “failure of morals or conduct that is socially stigmatizing,” *supra*, and therefore it is this Arbitrator's view that the County's disciplinary action based on these latter allegations should be evaluated under the traditional “preponderance of the evidence” standard.

2. The conflicting accounts of the incident and the credibility of the witnesses.

The testimony of the various County and the Union witnesses presented inconsistencies of varying degrees of significance. In their post-hearing briefs, both parties hone-in on possible inconsistencies in the testimony of the other's witnesses. Although some of these details are small and not directly related to the core question (*i.e.*, whether an incident of forceful grabbing occurred), the conflicts in the accounts can be important if they implicate the overall truthfulness and/or accuracy of the witness's testimony.

Initially, this Arbitrator felt the decision in the case would turn simply upon which version of events was more credible. However, the evidence suggests the testimony of *both* key witnesses (Grievant and Officer H) is not fully reliable as it relates to the “forceful grabbing” allegation.

The initial sequence of events upon arriving at the Park, and the accuracy of the witnesses's narratives – Officer H testified she returned to Deerfield Island around 4:00 pm with Grievant and Williams, and went to her house and removed her uniform shirt and gun. She was washing her dog when Grievant entered her yard and demanded that she come with him to the maintenance yard to “show her something.” This conversation took place in front of her house – presumably near the front door – and therefore in a location that Officer H testified would not be visible from the maintenance yard where Williams apparently was standing. When Grievant refused to tell her what the “something” was, she turned away from him, still struggling to hold the unleashed wet dog. Grievant then grabbed her by the shoulders and turned her toward him, attempting to force her to accompany him toward the maintenance yard. She kicked Grievant in the stomach to free herself. Grievant grabbed the leash from Officer H and walked toward the maintenance yard⁴; Officer H followed him to retrieve the leash and the argument at the maintenance yard ensued.

In his testimony, Grievant described returning to the Island with Officer H and Williams. During the boat ride, Grievant alerted Officer H to the fact that he wanted to show her something

⁴ In her written statement of January 23, 2005, Officer H says Grievant “ran” toward the maintenance yard after grabbing her leash. EX I.

once they arrived at the Island. Officer H returned to her house to drop off groceries and dress down. Grievant approached the caretaker's house and waited near the perimeter of the yard. Based on the photographs, I conclude this location at the corner of the front yard would be visible from the maintenance yard area, while a person standing at the door to the caretaker's residence most likely would not be visible from the maintenance yard. Grievant testified Officer H came out of the house holding her leash. He asked for the leash using a "bring it to me" hand motion; Officer H willingly gave the leash to him, but made a joking kick toward him as they headed toward the maintenance yard. There was no dog present throughout this exchange. The interaction was relatively civil until they approached the maintenance yard, at which time Grievant told Officer H she needed to backfill the hole and take control of her pet, commenting in a joking manner that he might hang the dog. When he told Officer H that he did not want to write up a report that she was not controlling her pet (as required by her contract with the County), Officer H lost self control and began shouting at him.

Williams testified he witnessed and heard the entire interaction between Grievant and Officer H from the maintenance yard, a distance of 30' - 40'. In Williams's account, after arriving at the Island, Officer H entered the house to drop off her groceries and still was in full uniform when she returned to the front yard. She was not washing the dog and there was no wet dog in the yard when Grievant asked Officer H to follow him toward the maintenance yard. Officer H came willingly, and – consistent with Grievant's account – the exchange degenerated only when Grievant made a comment that he might need to write up the incident and report the on-going problems concerning Jethro to County management. In Williams's account, Officer H "loses it" at this point, and began screaming that Grievant should not "mess with" her and he should not "play with" her.

Grievant and Officer H were in immediate proximity to each other throughout the key moments of the encounter and plainly observed personally all of the relevant events. Officer H testified Williams could not have seen the alleged grabbing incident from the maintenance yard area, while Williams claimed he witnessed and heard the entire interaction.

Puzzling through these conflicting accounts has been a challenge for this Arbitrator, because I found each of the witnesses to be credible from the standpoint of demeanor. Each testified with apparent conviction, and for the most part their presentations at the hearing were internally consistent, *i.e.*, they did not alter their account or contradict themselves over the course of vigorous direct and cross examination. Yet the accounts seem so clearly inconsistent in certain details that they seem irreconcilable, leading both advocates to suggest expressly or implicitly that their opponent's witness or witnesses were not fully truthful in their testimony. Was Officer H in uniform, or partially out of uniform? Did Grievant forcefully grab Officer H and take her leash, or was there no grabbing and Officer H voluntarily gave the leash to Grievant? Was there a wet dog present, or not? Did Grievant run to the maintenance yard with Officer H's leash, with Officer H following after (as described in her January 23, 2005, written report), or did they walk to the hole together?

Having conducted a very close review of the record, I believe some of the confusion arises because the witnesses compressed the time line and omitted events. For example, the narrative

provided by both Grievant and Williams describes their arrival at Deerfield Island via pontoon boat with Officer H, then jumps to Grievant's appearing at the yard of the caretaker's residence, without any intervening activity. Similarly, Officer H's narrative takes her directly from the boat to the residence; in her testimony at the hearing, she is then in the process of washing Jethro in the yard when Grievant appears.

The testimony of Hillebert, whom I found entirely credible, proves very helpful in straightening out some of these inconsistencies. Hillebert testified she was outside the Office and personally saw Officer H bathing the dog in the yard of the residence, holding the dog by its collar. Grievant was not present in the yard at this point. Hillebert returned to the Office while Officer H finished washing the dog and dried him off. According to Hillebert, Officer H then brought Jethro into the Office and left the dog in Hillebert's care, telling Hillebert she was going back to get the dog's leash. Tr. 182-183. Hillebert did not have any further knowledge of Officer H's actions until she heard Officer H's yelling about 10 minutes later and the slamming of the door to the residence.

Based on this helpful piece of testimony, it is possible to straighten out the most glaring inconsistency – the whereabouts of the dog – and bring some order to the chain of events. Grievant, Williams and Officer H returned to the Island in the boat. Officer H returned to the caretaker's house. It is likely Officer H removed her gun and took off her uniform shirt, because it is certain she spent a brief time bathing the dog. The whereabouts of Grievant and Williams during this period is unclear, but presumably they were in the tool shed/maintenance yard area and not in a position to see the front door of the caretaker's residence when the dog bathing activity was taking place.

Hillebert's testimony clearly suggests Officer H was incorrect when she testified Grievant entered the yard of the caretaker's residence while she was bathing the dog. Instead, Officer H finished bathing the dog *before* Grievant appeared at the residence, inasmuch as Hillebert testified Officer H (1) entered the Office with the wet dog before the alleged grabbing incident occurred, (2) left the dog in Hillebert's care, and then (3) returned to the area of the residence just a few feet away to retrieve the dog's leash, not to be seen by Hillebert again until after Officer H returned from the maintenance yard several minutes later, shouting at Grievant and slamming the door. This sequence of events – relying on the testimony of the Park Naturalist, Hillebert – is consistent with Grievant's and Williams's account that no dog was present in front of the caretaker's residence during the key interaction between Grievant and Williams. I do not suggest here that Officer H's inaccurate testimony on this issue was intentionally false, but it adds some element of doubt concerning the accuracy of her recollection of events.

Shifts in Officer H's description of the alleged physical encounter – Both in her incident report of January 23 and her testimony at hearing, Officer H states Grievant grabbed her by the shoulders, refused to release her (until she kicked him), and then grabbed the leash and departed toward the maintenance yard. This is how she described the incident in the statement she forwarded to Assistant Superintendent Cayer the day after the event:

[I] had just washed my dog in the front yard of my residence when I

was approached by [Grievant]. He walked in to my front yard and said, "I need to show you something." I smiled and replied "What do you want to show me." In a stern voice he said, "I need to show you something." . . . [Officer H insisted Grievant tell her what he needed to show her, and he refused to tell her]. At that time, I turned and started to walk away with the dog leash in my right hand. **As I walked away, [Grievant] then grabbed me from behind by my shoulders. I told him to "get off." Refusing to release me, I defended myself by kicking him in the stomach.** With force he grabbed the leash out of my right hand. After several requests to return the leash to me, he refused. **He then ran towards the maintenance shed with my dog leash in his hand.**

EX I (emphasis added). She concludes the report by stating "at this point, I feel threatened by not only the physical violence but as well as the verbal abuse."

Officer H's written account of January 23 is not the sole written description of the event *as perceived by Officer H*. The record also includes Hillebert's incident report in which she relates what she learned from Grievant, Williams and Officer H on January 22. Hillebert's recounting of Officer H's version of events, gathered the prior day, describes a confrontation that was less dramatic.

Keeping in mind that Hillebert did not personally witness the event in front of the house and therefore was merely reporting what she had been told by Officer H the day before, Hillebert wrote:

The dog came into the office with me [Hillebert] and [Officer H] went to go get the leash. [Officer H] said when she went to get her dog's leash [Grievant] came into her yard and said that they needed to talk. **He then put his hands around her shoulders and a small scuffle occurred. She said she kneed him in the stomach.** At this time, she said, he took the leash from her. **She said he was backing up and smacking the leash on his hand.** She asked for the leash and he said "uh-uh, show you something." She asked for the leash firmly again, and [Grievant] pointed [to] the hole and said "You need to fill this . . . hole up."

EX M (emphasis added). Hillebert's testimony at the hearing was almost identical to her January 23, 2005, written account (Officer H had reported Grievant "had put his hands on [Officer H's] shoulders and that they kind of scuffled and she kneed him and kicked him in the stomach." Tr. 161).

There are worrisome shifts in facts and emphasis between Hillebert's description of the event (based on her conversation with Officer H immediately after the incident) and Officer H's written

description the next day. In some respects, Hillebert's report of Officer H's account must be regarded as the fresher and more spontaneous of the two narratives. Hillebert – reporting what she heard from Officer H on January 22 – states Officer H told her Grievant “put his hands around her shoulders and a small scuffle occurred.” Grievant then “took” the leash from Officer H and walked backward toward the maintenance yard, with Officer H following. In contrast, Officer H's written account of the incident, created the next day, paints a far darker picture of Grievant, saying he “grabbed her from behind by my shoulders” and refused to release her, prompting her to “defend” herself by “kicking him in the stomach.” She also writes Grievant “grabbed” the leash from her hand and “ran” toward the maintenance shed – a description somewhat inconsistent with the description she had provided to Hillebert just the day before.

In this Arbitrator's view, it appears Officer H's account of the incident shifted between her conversation with Hillebert on January 22 and her written report of January 23. Hillebert met with Officer H in the caretaker's residence just minutes after the incident, and left with an understanding (based on Officer H's account) that Grievant had put his hands around Officer H's shoulders and there had been a small scuffle. Nothing in Hillebert's written account suggests a great concern at the time with the physical encounter or that any “physical violence” occurred, instead focusing on the verbal altercation that occurred moments later at the maintenance yard. Yet the words Officer H uses the next day in her written narrative are far more physical and animated, with Officer H describing Grievant as “grabbing” her by the shoulders, grabbing the leash “with force,” and “running” to the maintenance yard.

The reasons for the apparent shift in Officer H's description of events between her conversation with Hillebert on January 22 and her January 23 written incident report and her later testimony at the hearing are unclear. It is entirely possible her ability to describe the incident accurately to Hillebert during the minutes immediately after the shouting match was impaired by the emotions raised during the argument, and that her later accounts are more accurate. But the change in emphasis just as easily can be interpreted as an effort to embellish the incident of alleged physical contact as a form of retribution against Grievant, who had threatened to report Officer H's failure to control her dog's behavior and her failure to conform to the requirements of her contract with the County. Like the inaccuracy of her testimony relating to the dog bathing, *supra*, I cannot conclude this shift in her description of the event is evidence that Officer H's account is intentionally false, but it too raises concerns about the accuracy of her recollection.

Grievant's claim that “nothing happened” – With regard to Grievant's recurrent claim that “nothing happened” *viz.* physical contact with Officer H in front of the caretaker's residence, I agree with the County that this claim must be viewed with skepticism. Grievant admits Officer H made a “playful kick” toward him as part of their interaction. In this Arbitrator's experience, it would be very odd for a person – spontaneously and unprovoked – to make a “playful kick” toward a co-worker or friend, because I view this type of physical move as reactive to some kind of physical engagement. I think it is far more likely the kick was a response to some physical contact which Grievant had initiated. Contrary to Grievant's claim that “nothing happened,” I agree with the County that Grievant's admission that the “playful kick” occurred suggests *something* in the nature

of a physical encounter happened in front of the caretaker's residence, although it does not necessarily mean that such an encounter – if it occurred at all – was aggressive.

3. Findings of Fact.

I make the following findings about the events that transpired at Deerfield Island Park on January 22.

Officer H and Grievant had worked together on Deerfield Island for more than 18 months as part of a team that included no more than two other employees (the Park Naturalist and the Groundskeeper). In light of the relative isolation of the Island and the small number of staff, their relationship was friendlier than would be typical among co-workers in most work environments. It was not uncommon for Officer H and Grievant to have friendly, non-sexual physical contact.

Officer H did not consistently control her pet, Jethro, as required by her contract with the County. The failure to keep the dog leashed created a nuisance and hazard for Grievant in performing his work, because the dog defecated in public areas of the Island and dug holes. Grievant had complained on multiple occasions about the situation to his superiors and directly to Officer H, but Officer H did not fully control her dog and the problems continued. resolved.

On January 22, Grievant and Williams discovered a substantial hole had been dug by the dog at the maintenance yard. Unlike prior holes that Grievant filled-in during his work day, Grievant did not backfill this hole because he wanted to confront Officer H with the problem.

Officer H returned to the Island around 4:00 pm on January 22. She was shuttled to the Island by Grievant and Williams. Upon returning to the Island, she went to the caretaker's residence and took off her gunbelt and uniform shirt. She brought the dog outside the house and bathed him briefly in the front yard. Grievant and Williams were elsewhere during this period, perhaps in the tool shed/maintenance yard area; in any event, it is unclear what they were doing.

After bathing the dog, Officer H brought the dog to the Office a few feet away. She left the dog in Hillebert's care and returned toward the caretaker's residence to retrieve the leash. A large number of Boy Scouts were present in the area between the Office/caretaker's residence and the marina at this time. While Officer H was in the front yard of her residence retrieving the leash, Grievant entered the yard and asked her to accompany him to the maintenance yard so he could show her "something." Grievant and Officer H had a physical encounter of some sort while in the yard of the caretaker's residence (addressed in part B.4.a, *infra*).

Sometime during the interaction between Officer H and Grievant, Grievant acquired control of the leash. Both Grievant and Officer H then traveled to the maintenance yard; although there is dispute whether they walked together in a relatively friendly manner or whether Grievant ran to the yard and thereby forced Officer H to follow so she could obtain the leash, it is undisputed they both arrived at the yard and surveyed the hole, at which point Grievant initiated a discussion of the dog's

behavior. By this time, the dog had left the Office on its own initiative and was running around the tool shed/maintenance yard area. Grievant admits he made a comment about someday hanging the dog (addressed in part B.4.b, *infra.*).

During the course of the conversation at the maintenance yard, Grievant told Officer H she needed to control the dog and he did not want to “write up” the incident because it was minor. I find it was this suggestion – that Grievant might someday formally complain about Officer H’s failure to control the dog – that catapulted the event into a higher emotional plane.⁵

I credit Williams’s statement that Officer H “lost it” at this point, inasmuch as the discussion of the dog hole taking place at the maintenance yard was substantially complete, the hole was filled in (at least in part), and Grievant was no longer holding the leash – yet Officer H proceeded to shout at Grievant even while she returned to the caretaker’s residence and slammed the door. Further, I credit Williams’s testimony that Officer H threatened Grievant, warning him that “You don’t know who you’re messing with. . . you don’t want to play with me.” Tr. 337. This comment is consistent with the mindset of a person who would still be angry and shouting even as she walked about 40’ back to her residence, as confirmed by Hillebert. Officer H’s actions and comments strongly suggest she may have harbored a desire to seek retribution against Grievant.

4. Whether the County has shown by clear and convincing evidence that Grievant violated the Opposition to Workplace Violence Policy.

The charge that Grievant engaged in workplace violence in violation of the County policy relates to two separate elements – the alleged incident of forceful grabbing, and the comment about hanging Officer H’s dog. Because one element is contested while the other is admitted, I address them separately.

⁵ Ironically, I believe Grievant genuinely believed he was doing his friend and co-worker Officer H a favor by speaking with her directly about the problem rather than complaining to higher management, but Officer H did not take his comments in this spirit.

Grievant’s testimony that he confronted Officer H directly because he was hoping to avoid creating problems for Officer H by “writing up” the incident is supported by Williams’s contemporaneous January 23 written statement. In recounting the verbal altercation at the maintenance yard, Williams reported Grievant “told her [Officer H] he didn’t want to write it up because it was minor but she can’t have the dog running loose.” EX L.

As documented in Hillebert’s contemporaneous incident report, Grievant independently offered Hillebert precisely the same explanation for his actions immediately after Officer H returned to the caretaker’s residence and slammed the door, prompting Hillebert’s initial inquiry. According to Hillebert, Grievant acknowledged going to Officer H to complain about the unleashed dog. When Hillebert advised Grievant this was not his responsibility, “His excuse for going to her was that he did not want her to get in trouble for the dog and be documented,” *i.e.*, “written up.” EX M.

a. *The alleged forceful grabbing incident.*

The Employer argues Grievant approached Officer H and grabbed her forcefully in an effort to control her freedom of movement and compel her to go toward the maintenance yard. Has the Employer produced clear and convincing evidence demonstrating this occurred?

The direct evidence in support of the County's position primarily consists of Officer H's January 23 statement describing the incident as "forceful grabbing," her testimony at trial and the photographs taken by Officer H's father purporting to showing bruises on her arm resulting from the encounter. Opposing this evidence is the testimony of Grievant and an eyewitness, Williams, who both state no physical contact occurred. The Union also challenges the reliability of the photographs, raising questions about when the photographs actually were taken and arguing the bruises shown are inconsistent with the physical contact Officer H described. As part of the mix, there also is Hillebert's January 23 statement in which she characterizes the incident as a "small scuffle," based on her conversation with Officer H. There also is conflicting testimony about precisely where the alleged incident took place, with Officer H testifying Grievant entered the yard of the caretaker's residence and therefore was not in view of Williams, and both Grievant and Williams testifying the conversation took place at the corner of the yard and therefore was fully visible to Williams, as he claims.

Based on this mix of evidence, I cannot conclude the County has proven by clear and convincing evidence that the incident of forceful grabbing occurred, as alleged by Officer H. Several factors drive me to this conclusion.

I note first that both Grievant and Officer H had motive to color their version of events. Grievant's motivation, like most grievants targeted for discipline or discharge, is clear: placing his actions in the most favorable light might mitigate the penalty. *Meridian Medical Technologies*, 115 LA 1564, 1571 (King 2001). However, the facts show Officer H *also* had motive to provide a story that placed *Grievant* in an unfavorable light. Officer H's failure to regulate her pet's behavior clearly violated her contract with the County, and both Grievant and his supervisors had repeatedly warned her orally on this issue. During the incident at the maintenance yard, Grievant threatened to escalate his complaint about Officer H's failure to control Jethro by "writing it up" and submitting it up the chain of command. Based on Williams's written account, which I have fully credited on this score (and which is supported by Grievant's contemporaneous statement to Hillebert), it was Grievant's threat to file a written report about Officer H's conduct that ultimately lifted the argument at the maintenance yard to a higher energy level – not any physical contact between Grievant and Officer H that may have taken place in front of the caretaker's residence, and not Grievant's comment that he might someday "hang the dog."

Second, even assuming that some physical contact occurred between Grievant and Officer H in front of the residence, substantial circumstantial evidence causes me to doubt that Grievant engaged in the kind of aggressive and forceful physical behavior described by Officer H:

- Up until the incident, the relationship between Grievant and Officer H had been a close co-worker-type relationship, essentially akin to a friendship. There is nothing in the record indicating Grievant was prone to aggressive behavior of any kind. Although it is clear he felt frustration with Officer H because of her failure to control her dog's behavior, there is no evidence suggesting Grievant would engage in violent behavior to address this concern.
- The incident as described by Officer H took place in open daylight in front of Boy Scouts playing sports on the lawn between the Office/caretaker's residence and the marina. There is no indication any of the Scouts observed activity that prompted them to be concerned and file a report with troop leaders or the Park Naturalist.
- Hillebert, the Park Naturalist, was sitting just a few feet away in the Office, with the front door open. Officer H had just been in the Office and knew Hillebert was only steps away, but Officer H did not shout or call out for help. Although Officer H may have been surprised by any physical contact that may have occurred, I do not believe she felt threatened by it nor did she feel harmed by it.
- Although Grievant is considerably larger physically than Hillebert, Hillebert is a trained law enforcement officer. If she had felt seriously threatened by the physical contact she described in her testimony and felt a need to defend herself by inflicting pain upon him or subduing him, I believe she was capable of doing so. She did not. A mere kicking gesture by Officer H was sufficient to end the physical interaction because the two were friends and did not desire to harm each other.
- After separating herself from Grievant, Officer H did not retreat to her residence for safety or go to the Office to seek the assistance of Hillebert or others. Instead, she followed Grievant to the maintenance area. If she truly felt she had been assaulted, as described in her testimony, I believe it is unlikely she would have followed Grievant away from the caretaker's residence rather than seek the assistance of Hillebert.
- Even after the shouting match at the maintenance yard concluded, Officer H did not go the Office to report what had happened. Instead, she returned to the residence and closed (slammed) the door. She never sought out Hillebert to report the event, even though several minutes elapsed while Hillebert left the Office and spoke with Grievant and Williams to find out why Officer H had been screaming and had slammed the door. Indeed, if Hillebert had not heard the shouting and sought out the employees to find out the cause of the ruckus, it is unclear Officer H ever would have complained about the alleged physical contact.
- As noted *supra*, Hillebert's incident report, recounting the information she received from Officer H immediately after the incident, does not suggest the physical

interaction between Grievant and Officer H was violent.

Apart from Officer H's testimony describing the event as an incident of forceful grabbing, the sole direct evidence corroborating her version of events is the photographs showing bruises on her arm. Although the Union questions the origin of the photographs and whether the photos were in the possession of the County at the time discipline was imposed, I am satisfied the photos are genuine and were considered by management officials during the course of their deliberations. However, even the combination of Officer H's testimony coupled with the photographs are insufficient to overcome my doubts that Grievant engaged in the aggressive, forceful grabbing that has been alleged.

It is the County that shoulders the burden of proving Grievant violated the County's Opposition to Violence in the Workplace Policy, and – as discussed *supra* – to establish this violation by clear and convincing evidence. In this case, the primary direct evidence supporting the County's charge is Officer H's testimony and the photographs of her arm. In opposition, there is the testimony of Grievant and Williams who declare that no grabbing took place, and that Officer H's angry behavior on January 22 primarily was sparked by Grievant's threat to report her failure to control the dog to County managers – a concern which goes unmentioned in Officer H's January 23 written report to Cayer.

Even though I do not credit fully Grievant's claim that "nothing" happened in front of the caretaker's residence (as discussed *supra*), and while I am unsure Williams is correct when he claims to have witnessed the entire incident without interruption, nonetheless the errors and inconsistencies in Officer H's testimony preclude me from finding the County has proven its case by clear and convincing evidence. To the contrary, the evidence is decidedly unclear in this case and dependent upon testimony that I view as compromised.

In a case such as this, doubt redounds to the benefit of the party which does not have the burden of proof. I therefore conclude the County has not proven by clear and convincing evidence that Grievant committed the alleged act of forceful grabbing in violation of the County's Opposition to Workplace Violence Policy.

b. The alleged threat to harm the dog.

Grievant admits having made a comment about hanging the dog, even explaining that his reason for requesting Jethro's leash was to use it as a stage prop. Officer H testified she felt threatened by the remark.

Although case law governing federal employee discipline is not controlling in this Broward County arbitration, the legal principles advanced by the courts in evaluating possible verbal threats nonetheless can be instructive. In federal employment cases, the Federal Circuit has held that threatening language should be evaluated using "the connotation which a reasonable person would give to the words," *i.e.*, an objective standard. *Meehan v. United States Postal Serv.*, 718 F.2d 1069,

1075 (Fed. Cir. 1983).

Viewing the record as a whole, I do not believe a reasonable person would conclude Grievant actually threatened to harm Jethro:

- There is nothing in the record to suggest Grievant is prone to committing violent acts.
- Grievant testified he was not fond of pets, but he occasionally assisted Officer H by allowing Jethro out of the house for bathroom breaks and would return Officer H's cat to the caretaker residence.
- Although Grievant repeatedly expressed frustration with the problem of the dog defecating and digging holes, there is no indication he ever reacted with hostility toward the animal. Instead, it is clear Grievant recognized that the problem was not with the dog, but with its owner. Grievant previously had complained to his supervisors and Officer H, seeking assurance Officer H would comply with the terms of her agreement with the County and control her pet.

I credit Grievant's explanation that the comment about "hanging" the dog was offered in a joking manner. In this regard, I note that Grievant volunteered the information that he had made the "hanging" comment to Hillebert when she first approached him immediately after Officer H returned to the residence.

Although the comment may have been tasteless and ill-advised, in context I do not believe the record in this case would allow a reasonable person to conclude Grievant actually threatened to harm Officer H's dog.

5. Whether the County has shown by a preponderance of the evidence that Grievant displayed inappropriate and disrespectful behavior, used poor judgment, poor public contact, poor communications and failed to follow the chain of command.

During his testimony, Grievant acknowledged taking the initiative in bringing Officer H to the maintenance yard and confronting her with the hole dug by her pet. In addition, he acknowledged engaging in a heated, loud, profanity-laced conversation with Officer H about the dog. Although the maintenance yard is an area nominally closed to the public, it is adjacent to public areas of the Park where many young persons were present.

Because Grievant has admitted generally to the conduct underlying this aspect of the County's charge, I find the County has met its burden of proof and has demonstrated Grievant displayed inappropriate and disrespectful behavior, used poor judgment, engaged in poor public contact and poor communications, and failed to follow the chain of command. However, I do not believe discharge is an appropriate sanction for these violations, and instead find the penalty should be reduced to suspension without pay for a period of 30 days.

CONCLUSION

I find the County has not proven Grievant violated its Opposition to Workplace Violence Policy, but the County has proven Grievant engaged in other misconduct warranting discipline. The grievance therefore is sustained in part, and denied in part.

Grievant's discharge shall be reduced to a 30-day suspension without pay. He shall be reinstated to his former position and awarded back pay and benefits, less the wages he would have earned during the period of the 30-day suspension and also less any interim earnings and unemployment benefits he has received. References to the discharge action and the alleged violations of the County's Opposition to Workplace Violence Policy shall be removed from Grievant's permanent personnel file.

Paul Greenberg

December 5, 2006