From:	Boss Frederick
To:	Kemple Toni C
Cc:	Gilman Kristen; Slauson Michael
Subject:	Fwd: 041922 Education Information for Commission on Statewide Law Enforcement Standards of Conduct and Discipline
Date:	Wednesday, April 27, 2022 11:05:02 AM
Attachments:	102419 PDX CSB Rodrigues copy.pdf

For the agenda

Begin forwarded message:

From: Mark Makler <mark.code3law@gmail.com>
Date: April 19, 2022 at 7:34:33 PM CDT
To: Boss Frederick <fred.boss@doj.state.or.us>
Subject: 041922 Education Information for Commission on Statewide Law Enforcement Standards of Conduct and Discipline

Fred:

As the LESC begins our deep dive into standards of conduct and procedure and process so as to follow the charge of HB 2930 (now codified as ORS 243.812), as a LESC Commissioner, I share this decision because I believe this decision will be informative and helpful for each LESC Commissioner to get exposed to and see the actual use and application of a discipline matrix. And the attached decision actually applied the "former" PPB Discipline matrix that was discussed by the LESC Commissioners today in our LESC meeting (041921).

So, attached is the decision by City of Portland Civil Service Board Hearings Officer Luella Nelson (who has also arbitrated numerous public safety discipline matters across the US). Hearings Officer Nelson was the City contracted CSB Hearings Officer for this case that involved an individual BIPOC PPB officer (Captain Derek Rodrigues).

Captain Rodrigues was NOT in a Union and the PPB discipline matrix was applied to Captain Rodrigues' actions and Captain Rodrigues challenged the application of the discipline matrix through the Civil Service process.

Hearings Officer Nelson's decision in this case demonstrates the deep dive necessary in "fuzzy-subjective" areas, such as determinations of violations of sexual harassment policies and the application of presumptive standards and the application of mitigating and aggravating factors.

STAY HEALTHY and Regards,

LESC Commissioner Mark Makler

****

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IN PROCEEDINGS BEFORE THE CITY OF PORTLAND, CIVIL SERVICE BOARD

CAPTAIN DEREK RODRIGUES, an Individual, Appellant, and CITY OF PORTLAND POLICE BUREAU, Respondent. RE: Appeal of Suspension #2017-005	HEARINGS OFFICER'S REPORT AND RECOMMENDATION (Luella E. Nelson, Hearings Officer) October 23, 2019 Portland, OR

This matter arises pursuant to Section 3.15 of the Administrative Rules of the City of Portland, Human Resources (Employment), herein referred to as the "HRAR." LUELLA E. NELSON was selected to serve as Hearings Officer for the CITY OF PORTLAND CIVIL SERVICE BOARD ("Board").

APPEARANCES:

On behalf of the Appellant:

Mark J. Makler, Esq.
Code 3 Law LLP
515 NW Saltzman Road #811
Portland, OR 97229

On behalf of the Respondent:

Lory J. Kraut, Esq.
Deputy City Attorney
City of Portland
1221 SW 4th Avenue, Suite 430
Portland, OR 97204

RELEVANT PORTLAND POLICE BUREAU DIRECTIVES

Directive 0330.00 – Internal Affairs, Complaint Intake and Processing

...

2. Complaint Intake:

2.1 ... Bureau members receiving complaints should attempt to resolve complaints about minor rule violations or quality of service at the time they are made; otherwise the complaint will be referred to IPR [Independent Police Review Division]. ...

...

2.3 ... The Professional Standards Division Captain or designee will consult with representatives of the Office of the City Attorney, Bureau of Human Resources, and IPR when investigating allegations related to Human Resources Administrative Rule 2.02, Directive 310.20, Retaliation Prohibited, Directive 344.00, Compliance with Human Resources Administrative Rules, or any other City Administrative Rule or Bureau directive the Professional Standards Division Captain or designee deems necessary. ...

...

12. Unlawful Employment Practices, Discrimination Complaints, Equal Employment Opportunities:

12.1 Complaints by members alleging unlawful employment practices will be processed according to the City of Portland's Human Resource Administrative Rule 2.02, Prohibition Against Workplace Harassment, Discrimination, and Retaliation and Directive 344.00, Compliance with Human Resources Administrative Rules.

RELEVANT HRAR PROVISIONS

2.02 PROHIBITION AGAINST WORKPLACE HARASSMENT, DISCRIMINATION AND RETALIATION

Workplace Harassment, Discrimination and Retaliation prohibited

It is the City's policy to prohibit workplace harassment, discrimination and retaliation on the basis of protected status. Protected status includes race, religion, gender, marital status, familial status, national origin, age, mental or physical disability (as defined by the Americans with Disabilities Act and state law), sexual orientation, gender identity, source of income, protected veterans' status or other protected status under applicable law.

The City of Portland is committed to creating a respectful and professional work environment that is free of harassment, discrimination, and retaliation and that promotes employment opportunities.

Workplace harassment, discrimination, and retaliation manifests in the workplace in two primary ways:

1. In forms of harassment, discrimination, and retaliation that violate state and federal laws; and

2. In forms of inappropriate conduct that may not violate law, but which violate this City rule because the conduct is not conducive to creating a respectful and professional work environment for employees.

This rule covers both types of behavior. The intent of this rule is to prohibit conduct that is unlawful and also to prohibit and stop other inappropriate conduct based on protected status before it rises to the level of unlawful discrimination, harassment, and retaliation.

Employees are expected to talk with their supervisor, other managers, the Human Resources Business Partner (HRBP) assigned to their bureau, Bureau of Human Resources (BHR) staff or the Bureau of Human Resources

Employment and Outreach Office in the [sic] if they experience harassment, discrimination, and/or retaliation regardless of its origin. Supervisors or managers receiving such complaints shall take appropriate corrective action to stop the harassment, discrimination and retaliation.

Harassment, discrimination, and retaliation are prohibited in the workplace or in any work-related setting outside the workplace. Every employee shares the responsibility for bringing to the City's attention conduct that interferes with providing a work environment free of harassment, discrimination, and retaliation.

Who is Covered by this Rule?

This Rule covers all elected officials, employees, interns (paid or unpaid), volunteers and applicants for employment with the City of Portland, as well as contractors providing services to the City of Portland such as outside vendors or consultants. Contractors providing a service to the City should be notified of this rule.

Definitions

The definitions in this rule are designed to be consistent with the City's goal of creating a respectful and professional work environment. Therefore, these definitions not only define unlawful conduct but also define inappropriate conduct prohibited by this City policy.

Harassment: Inappropriate verbal or physical conduct, which may include conduct that is derogatory or shows hostility towards an individual, related to the individual's protected status. The intent or consent of the persons engaging in the inappropriate conduct, or whether the person toward whom the inappropriate conduct is directed is aware of it, does not matter.

...

Discrimination: Unequal or different treatment of an individual in any personnel action on the basis of protected status.

...

Examples of Prohibited Inappropriate Conduct

This list of prohibited inappropriate conduct is meant to give some examples of inappropriate behavior and is not a complete list of conduct prohibited by this rule.

Verbal or Physical Conduct

1. Use of epithets, innuendos, names, comments, foul language or slurs regarding an individual's protected status, either in written or oral form.

...

Manager/Supervisor Expectations

Managers and supervisors shall enforce this rule and maintain a productive, respectful, and professional workplace. Managers and supervisors must take immediate action to stop and prevent discrimination, harassment, or retaliation where they know or have reason to know that it is occurring. Tacit approval of harassment, discrimination, other inappropriate conduct, and/or retaliation by, for example, laughing and treating a situation as a joke, failing to take action or advising an employee not to complain, is prohibited.

...

If a manager or supervisor receives a complaint from a City employee, an applicant, a member of the public or a contractor about harassment, discrimination, other inappropriate conduct, or retaliation in a City worksite or if a manager or supervisor observes or becomes aware of discrimination, harassment, other inappropriate conduct or retaliation in a City worksite, they shall contact the Human Resources Business Partner or Site Team Manager as

soon as possible, but no later than two working days after receiving the complaint or becoming aware of the discrimination, harassment or retaliation.

Managers and supervisors are expected to contact human resources personnel even if the person making the complaint requested that it be kept confidential or if the person toward whom the inappropriate conduct was directed is not aware of it. Managers and supervisors should inform an individual making a complaint that strict confidentiality may not be feasible.

Any supervisor or manager who is aware of harassment, discrimination, other inappropriate conduct, and/or retaliation or and [sic] condones it by action or inaction will be subject to disciplinary action.

...

Internal Complaint Process

Any individual who feels they have been the recipient of prohibited discrimination, harassment, retaliation and/or other conduct prohibited by this rule is encouraged to notify the responsible person(s) of the inappropriateness of their conduct.

Who to Contact
A current City employee is encouraged to discuss such concerns with their immediate supervisor. This will provide the supervisor with an opportunity to review the concerns of the individual. If the employee does not feel comfortable discussing the concerns with their immediate supervisor, the employee should contact:

- their supervisor's manager; or
- their bureau director; or
- Bureau of Human Resources staff; or
- the Bureau of Human Resources Employment and Outreach Office (formerly the Diversity, Outreach and Employment Resources Office and the City Diversity Development/Affirmative Action Office).

...

Investigation

Bureaus investigating a complaint should follow the procedure outlined in Attachment A. (The attachment is a procedure only and is not part of the binding Human Resources Administrative Rule).

When appropriate, the individual who receives the complaint may discuss options for informally resolving the complaint with the complainant.

All complaints must be thoroughly and promptly investigated. The individual making the complaint and the accused shall be notified of the results of the investigation and whether action will be taken. Retaliation will not be tolerated.

Immediate action may be required in situations where prohibited harassment, retaliation, or discrimination has occurred

....

3.15 CIVIL SERVICE BOARD

Filing of an Appeal

Appeals must be filed in accordance with this Administrative Rule. Appeals shall not be considered filed until received by the Board Administrator.

...

Appeals from Suspensions, Demotions and Discharges

Subject to these rules on Hearings and Appeals, the Board shall review actions of disciplinary suspension, demotion or discharge of a permanent, non-probationary employee, where the employee alleges that the disciplinary suspension, demotion or discharge was for a political or religious reason, was not for cause or was not made in good faith for the purpose of improving the public service. Unless otherwise provided by a collective bargaining agreement, any permanent, non-probationary employee in the classified service who is subject to a disciplinary suspension, demotion or discharge shall have the right to appeal the action to the Board.

...

Use of Hearings Officers

The Board shall be empowered to refer an appeal to a Hearings Officer who will conduct the appeal process in accordance with this Rule. ...

...

Except where expressly otherwise provided in these rules, all provisions of these rules pertaining to the duties and authority of the Board in the conduct of appeals hearings shall be fully applicable to the Hearings Officer.

Burden of Proof in Appeal Hearings

In a hearing on an appeal from a suspension, demotion or discharge, the appointing authority or designee shall have the burden of proof and the burden of going forward with the evidence. The party who has the burden of proof shall present its case first.

Standard of CSB Review in Expedited and Formal Hearings

Disciplinary Cases. In such hearings, the Board will apply the "reasonable employer" standard to determine first whether the employee's conduct warranted discipline, and second, if so, whether the discipline imposed for the offense was objectively reasonable.

...

The Standards of Review are set out in Appendix A to these rules.

Post Hearing Procedures

Board Decisions. Decisions of the Board shall in all cases be based solely on the record made at the hearing and on applicable law and other legal authorities, relevant to the dispute. ...

...

Recommended Order of the Hearings Officer. In matters referred to a Hearings Officer, a Recommended Order shall be served on the parties and filed with the Board within the time periods specified in the section above on post hearing procedures. Where applicable, the Recommended Order shall include Rulings on Motions and Evidentiary Matters, Findings of Fact and Conclusions of Law.

Board Decisions on Recommended Orders. Board review of Recommended Orders is limited to the hearing record and applicable law. The Board may adopt a Recommended Order by voice vote. If the Board rejects or requires modification of the Recommended Order, the Board shall base its final decision upon a review of the hearing record and shall issue a written decision within thirty (30) days of its determination to reject or modify the hearings officer's received order.

...

Post Hearing Remedies

...

Appeals from Suspensions, Demotions and Discharges. If the Board finds that the discipline was warranted, the Board shall confirm the action taken. If the Board finds that some discipline was warranted but that the discipline imposed was too severe, the Board may reduce or otherwise modify the discipline to a level it deems appropriate for the offense and reinstate the employee with or without back pay upon such terms and conditions that

the Board may establish. If the Board finds that no discipline was warranted, the Board shall reinstate the employee with back pay and with those fringe benefits which were lost as a result of the discipline. Deductions for unemployment compensation and other interim income received shall be ordered as determined by the Board.

APPENDIX A

I. The Standard of Review

The following is a discussion of the "standard of review" which will apply to Civil Service Board (Board). Included is a review of the State Personnel Law which the Charter language in question is based upon, and of the Employment Relations Board decisions which the Board will be able to rely upon in performing its appellate function.

...

3. Disciplinary Action Appeals

City Charter Section 4-401(2) provides the duties of the Board shall be to review suspension, demotion or discharge of permanent employees in the classified service when employees allege discipline was not for cause. If an employee's allegations are found to be correct, reinstatement may be ordered under terms and conditions as may be deemed appropriate by the Board.

Since the case of Sherris v. City of Portland, supra, the Civil Service Board has endeavored to determine whether the discipline imposed was "for cause." The Board is edified by the approach of the Employment Relations Board in reviewing disciplinary appeals in the State's "merit system." The ERB applies the "no reasonable employer" standard. In Oregon School Employees Association v. Klamath County School District, 9 PECBR 8832 (August, 1986), the ERB said the following about the "no reasonable employer" standard.

> "***In judging discipline cases under the State Personnel Relations Law, this Board applies a 'no reasonable employer' standard, as explicated by the Court in Brown v. Oregon College of Education, 53 Or App. 251 (1981). We also have applied that standard in cases under the Public Employee Collective Bargaining Act (PECBA) to modify discipline and to reverse a discharge. We believe that the reasonable employer's standard comprehends the generally-accepted elements used by arbitrators or others in making just cause determinations. Consequently, when confronted with (1)(g) complaints concerning 'for cause' discipline questions, this Board will use the reasonable employer standard to determine: first, whether the employee's conduct warranted discipline, and second, if so, whether the discipline imposed for the offense was objectively reasonable." Brown, supra, 52 Or App. at 260 (page 8850) (emphasis added)

Quoting from the Brown case, the ERB gave the following overview of the "no reasonable employer" standard:

> "There is no explicit and comprehensive recipe that describes the traits of the reasonable employer. The ingredients must be discerned, and sometimes inferred, from a variety of sources. The Oregon Legislature, courts and this Board have enunciated some of the traits possessed by the reasonable employer; for example, it:
>
> "Does not take action based on political, religious or racial reasons, or because of sex, marital status, or age;
>
> "Disciplines in good faith and for cause;
>
> "Does not impose sanctions disproportionate to the offense or discipline for inconsequential offenses;
>
> "Considers the employee's length of service and prior service record, warns employees about what conduct is improper and generally is consistent in applying disciplinary sanctions;
>
> "Takes disciplinary action in a timely manner;

"Gives an employee who is being dismissed notification of the charges against him and of the kinds of sanctions being considered, and at least an informal opportunity to refute the charges to someone authorized to make or effectively recommend the final decision;

"Bears the burden of proving all elements necessary to justify the discipline exacted; and

"Adopts and enforces reasonable regulations governing the work and conduct of its employees and imposes appropriate forms of discipline where it has good cause.

"My own experience in the field of employment relations and a review of some literature in the field lead me to conclude that the reasonable employer also incorporates other traits. For example, it:

"Makes a fair and objective investigation before administering discipline, except in extraordinary circumstances; obtains substantial evidence before imposing sanctions; uses progressive discipline, except where the offense charged is gross or the employee's behavior probably will not be improved through such measures; and does not, through its own actions, exacerbate disciplinary problems." Brown at 8-9; footnotes omitted. (Pages 8851 and 8852)

As ERB's decision above quoted indicates, the principles of "progressive discipline" have relevance in the "no reasonable employer" standard. On this score, a significant case is Oregon School Employee's Association, Chapter 89 v. Rainer School District 13, ERB Case No. UP–85-85 (appeal to Court of Appeals pending), wherein the ERB said the following about "progressive discipline":

"Complainant argues that Gamble's termination was not justified because the District failed to use progressive discipline. The Contract does not specify what progressive discipline steps, if any, are required. This Board has previously held that the 'reasonable employer' used progressive discipline 'except where the offense charged is gross or the employee's behavior probably will not be improved through such measures.' But the concept of progressive or corrective discipline as a component of just cause, does not require an employer to follow some lock-step progression of disciplinary measures before it may legitimately discharge an employee. Where a contract is silent concerning any requirement for specific disciplinary steps, the progressive discipline component of just cause may be satisfied by corrective measures that put the employee on notice that further misconduct may result in the discipline ultimately imposed and that give the employee a reasonable opportunity to modify his behavior. Gamble was warned in writing that his chronic tardiness could lead to dismissal ('gravest consequences'). The changes in his hours of work and the time clock requirement, although not normally regarded as disciplinary measures, were imposed by the supervisor in an attempt to correct the tardiness problem. We find that the warnings given to Gamble and the opportunity provided him to correct his behavior were sufficient to comply with the contractual just cause requirement." (Pages 25-26).

CONCLUSION

Whereas the appellate jurisdiction and authority of the Board will be limited in classification and examination matters, the Board's authority in disciplinary cases will remain substantial. Since the "no reasonable employer" standard embodies the principles of "just cause," there is a body of ERB decisions, and decisions by arbitrators nation-wide, court decisions concerning employee discipline and arbitral treatises on employee discipline such as Elkouri and Elkouri's How Arbitration Works, 4th edition, which are appropriate for the Civil Service Board to refer to when reviewing discipline cases.

....

PROCEDURAL HISTORY

At all pertinent times, Appellant was Captain of the Portland Police Bureau ("PPB") Professional Standards Division ("PSD"), which is responsible for Internal Affairs ("IA") investigations of alleged

misconduct by PPB personnel. He was notified on June 6, 2017,[1] that the PPB would suspend him for two days (16 hours) on a charge that he violated Directive 330.00 – Internal Affairs, Complaint Intake and Processing. Specifically, the allegation was that he "did not report allegations of possible misconduct related to statements made by Elle Weatheroy to Pam Mattys about a protected class."

Appellant filed this appeal on November 21. As the appeal letter is lengthy, it will not be quoted here; it is in evidence as Board Exhibit 1. At a meeting on September 18, 2018, the Board voted to refer the matter to a Hearings Officer. I was selected to serve as the Hearings Officer.

On March 10, 2019, in an email, I granted Respondent's Request for a Protective Order regarding certain exhibits relating to the conduct of Appellant and other PPB personnel; I also granted Appellant's Request for a Public Hearing. I followed up that email with a formal written ruling on March 16, 2019.

Hearing was held on April 16-18, 2019, in Portland, Oregon. The parties had the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue the issues in dispute. At hearing, Appellant withdrew Paragraph Y of the appeal. The hearing was transcribed, and the transcript was received on or about June 12, 2019. Both parties filed post-hearing briefs on or about September 3, 2019.

In the interim, on April 25, 2019, I denied Respondent's Motion to Strike Paragraph J of the appeal.

THE EVIDENCE

The principal participants in the events at issue were:

* Appellant, Captain of the Professional Standards Division, a sworn position. He reported directly to then-Chief Larry O'Dea. Appellant's grandparents moved to Hawaii from Puerto Rico; he grew up in Hawaii and identifies as Hawaiian.
* Pamela Mattys, then an Administrative Assistant ("AA") in the office of then-Chief Larry O'Dea, reporting to Assistant Chief ("AC") Kevin Modica. The AA position is non-sworn. Mattys identifies as Hawaiian; her husband identifies as Caucasian.
* Elle Weatheroy, then a Principal Management Analyst holding a non-sworn position of Manager of Equity and Diversity, to whom Mattys provided administrative support. Weatheroy reported directly to Chief Larry O'Dea. Weatheroy identifies as African American.
* Kevin Modica, who was then Assistant Chief of Police ("AC"), a sworn position.

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[1] Except as otherwise indicated, all dates refer to 2017.

* Larry O'Dea, who was then Chief of Police, a sworn position.

* Mary Strayhan-Preston, a Business Partner in the Bureau of Human Resources ("BHR"), who was assigned to the PPB at the time of the events at issue.

* Terri Smith, who worked as a Business Partner in BHR for a little over a year, was assigned to the PPB at the time of the events at issue.

* HR Business Partner Vincent Woods, who was Smith's supervisor at the time of the events at issue.

THE ALLEGED STATEMENT AT ISSUE

This case involves Appellant's response when Mattys told him about a question allegedly asked by Weatheroy to Mattys in a one-on-one meeting. According to Mattys, in the fall of 2015, Weatheroy asked her "out of the blue" why she married a white man. Mattys was caught off guard, but described how she came to marry her husband. She testified that Weatheroy had previously made other racially-tinged comments,[2] and that this question really bothered her because of the earlier comments, which she considered wrong for a person in Weatheroy's position to be making.

MATTYS' REPORTS OF THE ALLEGED QUESTION

According to Mattys, multiple PPB personnel complained repeatedly about Weatheroy's tardiness, disrespect, and failure to show up on time for meetings. She recalled that Chief O'Dea asked her to speak to Weatheroy about her tardiness. Mattys testified she told Modica about Weatheroy's comments, including the question about why she married a white man, but that nothing was done. She also recalled talking to Mary Strayhan-Preston, and later to Terri Smith, about Weatheroy's alleged racially-tinged comments, but again nothing was done. She testified that none of the persons to whom she complained about Weatheroy's comments told her there had been any rule violation or suggested that she file a report.

Woods testified that Smith never told him she had received a report of the alleged comments prior to Mattys' May 3, 2016, letter. Strayhan-Preston testified that the first she heard of these comments was when Chief O'Dea brought Mattys' May 3, 2016, letter to the BHR office.

Mattys testified she met with Chief O'Dea on March 8, 2016, and described multiple problems with Weatheroy. She had prepared a written list of the challenges working with Weatheroy, but recalled that Chief

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[2] Mattys testified that, after she had lunch with several co-workers, Weatheroy asked her how she could stand to eat lunch with white women. According to Mattys, after the PPB responded to an assault on an employee by requiring visitors to be escorted upstairs, Weatheroy commented the PPB probably did not want "black folks roaming the halls." Those alleged statements are not at issue here.

O'Dea showed little interest in her complaints and did not look at the list. Later, after Weatheroy was 20 minutes late to an important meeting, Mattys complained to Modica and told him she was "done with" supporting Weatheroy administratively, making a "cut" hand gesture across her throat. The next day, Weatheroy came to her, admonished her for her complaint to Modica, and said she could not be "done with" Weatheroy. This prompted Mattys to deliver a letter to Chief O'Dea on May 3, 2016; she attached the list she had provided earlier. The letter reiterated her prior complaints about Weatheroy. The letter and attached list included Weatheroy's question about marrying a white man, among multiple alleged comments. The letter asked to no longer be assigned to provide administrative support for Weatheroy and stated that Mattys was considering filing a formal complaint against Weatheroy.

Appellant and Mattys have known one another since 2009. At the time of the events at issue, they had lunch together as often as every other week. Mattys testified that these lunches were purely social; if she had needed to talk to Appellant about something work-related, she would have gone to his office. Mattys often talked about her frustrations with Weatheroy during these lunches. At one such lunch – which she recalled occurred at some point after she reported Weatheroy's question to Modica, and possibly to Strayhan-Preston and Smith – Mattys mentioned to Grievant that Weatheroy had asked her why she married a white man; her recollection was that she did not mention the other alleged racially-tinged comments. Appellant responded by asking about the context; Mattys said she did not know. Appellant suggested that she ask Weatheroy what she meant with that question.

Mattys testified she was not seeking to file a complaint about Weatheroy with Appellant in telling him about Weatheroy's question. Rather, this was one of several conversations where she talked about her trouble getting along with Weatheroy. She testified she did not realize at the time that the question was a violation of HRAR 2.02 or PPB policy. She did not recall whether she told Appellant that day that she had already reported the question to Modica, but testified that she may have told him that. Mattys recalled that she wrote her May 3, 2016, letter to Chief O'Dea some months after this lunch.

Appellant testified that he knew Weatheroy and her brothers, and had served on a City-wide equity committee where she was a non-voting member. The two of them had a lot of conversations about race and the Hawaiian culture over the years. When Mattys told him about Weatheroy's question, he recalled chuckling because he and Weatheroy had just had a conversation about his wife and children a week earlier. Weatheroy had noticed a picture of his family, and asked if his children were Hawaiian. He described to her the ethnic

mix in Hawaiians and in his own family. He testified that, without this context, Weatheroy's question to Mattys coming "out of the blue" would have been concerning and he would have dived in deeper. As it was, he suggested that Mattys seek some context for the question. He testified that, given what he knew, the question did not "ring a 2.02 bell" that he needed to report it. He was aware that Mattys was sensitive. In his view, Mattys was unhappy and frustrated by the overall poor working relationship with Weatheroy. He did not believe she was angry specifically about the question. In his view, he had to determine if what Mattys reported was a legitimate report of a HRAR 2.02 violation in context.

Former Modica testified that he became aware of the alleged question when Mattys filed a complaint with Chief O'Dea. Before that, she had come to him and said she had "had it" with Weatheroy, felt disrespected, and things had been said. He recalled asking her what she wanted him to do, and describing some possible actions. She responded no, that she was working on some things. He did not report a possible HRAR 2.02 complaint, but did go to Chief O'Dea and tell him there were problems between Mattys and Weatheroy. In his view, Mattys and Weatheroy talked about things that were common topics of conversation among people of color.

Modica testified he first heard of Weatheroy's question from the IA investigators. When he heard it, he considered the question to be a collegial conversation about what it was like to be a person of color. He testified he may have been influenced by his knowledge that Weatheroy was pregnant and that the child's father was not African American. He believed Weatheroy could have been seeking clarity from another person of color who could offer perspective. In context, he did not consider it to be a possible HRAR 2.02 violation.

Commander Michael Leloff testified that Mattys came to him while he was filling in for Modica. She was visibly upset about Weatheroy and reported two statements, including the question about marrying a white man. He recalled that she told him she had filed a complaint with Chief O'Dea, who was not doing anything to correct the behavior. He testified he told her to file a complaint against both Weatheroy and Chief O'Dea, and that he checked later and learned she had done so. He testified he talked to Smith, who talked to Woods, about the comments Mattys had described; Smith reported back that they all agreed that it was not appropriate but probably was not a violation of HRAR 2.02 in context. He did not think this involved "courageous conversations" because Mattys was mad about it.

THE INVESTIGATION

Mattys' letter to Chief O'Dea was treated as a formal complaint, and both BHR and PPB initiated an investigation. 27 witnesses were interviewed, including all of the persons identified by Mattys during the investigation as persons she had told about Weatheroy's question about marrying a white man. Appellant was not mentioned in any of the interviews, other than his own, as someone to whom Mattys had reported the question. The following will briefly recap pertinent parts of the interviews rather than quote them exhaustively.

Mattys was interviewed three times during the investigation. She did not mention in any of those interviews that she had told Appellant of Weatheroy's question about marrying a white man. In her first interview, she stated that she had reported Weatheroy's question to Modica and to a co-worker, Kandi Marks. She stated that both were appalled, but either offered any advice. She added that she later discussed the remarks with her "admin team," Diane Haman and Nicole Wrigley, and that they also offered no advice. She stated that she later told Modica about the other objectionable alleged comments, which were more recent. Mattys said that Modica asked if she wanted him to share the information with the Chief, and that she told him she was not ready to share it.

In her second interview, Mattys was asked who knew about Weatheroy's statements. She named Marks and Chief O'Dea, and said she thought she talked to Smith and Strayhan-Preston. She also mentioned having spoken to Leloff while he was filling in for Modica, perhaps a couple of weeks before she wrote her letter to Chief O'Dea. She recalled that Leloff advised her to open an investigation over inappropriate remarks, and that she expressed hesitation because of family ties within the PPB.

In Mattys' third interview, the only discussion of the alleged question revolved around Mattys' reports to Chief O'Dea and Modica. She reported that Chief O'Dea asked about the context of the question, specifically whether it was related to Weatheroy's equity and diversity interests, and that she rejected that idea. She stated that Chief O'Dea asked what her response was; he acknowledged her answer but did not say much. She described going on to tell him abut other remarks, and said he just shook his head without engaging during that meeting. She reported that Chief O'Dea never got back to her about her complaint. She stated that she was not seeking to have an investigation opened; she simply wanted him to remove her as Weatheroy's support person. She reported that she escalated to HR and wrote her letter after hearing nothing and seeing the same behavior. She stated that she reported Weatheroy's comments to Modica in the fall of 2015. Specifically as to the question about marrying a white man, she reported that Modica just shook his head. She stated that she

spoke with him on a number of occasions, and he finally asked if she wanted him to "tell the two star" (referring to O'Dea); she responded she wanted to be the one to approach O'Dea.

Appellant became a subject of the investigation after he was interviewed as a witness on June 28, 2016. In that interview, he was asked about the various comments reported by Mattys, and stated that Mattys had told him that Weatheroy had asked her why she married a white man, but had not told him about the other comments. He told the investigators that he and Weatheroy had talked about racial issues multiple times, and that he did not know the context of the question to Mattys. He stated that he told Mattys she should ask Weatheroy what she meant by that question, and explained that he and Weatheroy had had conversations about misconceptions about people from Hawaii being Hawaiian. His recollection was that the last time he and Mattys had talked about Weatheroy was over a year before the interview. He stated that he did not follow up because it was never brought up again; he did not follow up with Weatheroy because he did not think it was his place to do that. He stated that he did not think the question was a clear policy violation that was reportable; Mattys' report of it was an expression of frustration from a friend.

Appellant was interviewed a second time after becoming a subject of the investigation, on November 10, 2016. He described Mattys' report and his response, and said he did not believe the reported question was a violation of HRAR 2.02. He noted that the City was encouraging "difficult conversations on race" and suggested it was appropriate to seek clarification of statements that were not blatantly racist. In his view, more information was needed about the question. He described Mattys as "disgusted" and "frustrated" rather than "offended." He reiterated the need for someone who made a questionable statement to have an opportunity to respond. Later, he explained that he was not at lunch "putting my captain's hat on," and acknowledged he may have erred in where he drew the line between being supportive of a friend and his duties as the IA Captain. He suggested that, in context, more information was needed before the question became reportable.

Strayhan-Preston stated in the investigation that she first learned of the alleged question when she saw Mattys' letter. Smith stated that Mattys had told her in passing of that question and one other comment at least two months before June 2016. She did not recall whether she asked at that time whether Mattys had reported it or suggested she should report it. Smith recalled that Leloff later mentioned the same comments in mid-April 2016 while he was acting in Modica's place. She stated that Leloff's understanding was that Mattys had already reported it to the Chief. Smith stated that Mattys also came to her on May 2 (the day before she

presented her letter to Chief O'Dea), discussed the comments, and said she had reported them but that nothing had been done.

Modica told investigators that Mattys had talked about problems with Weatheroy multiple times; when he asked if there was a hostile work environment, she said it was not, and that she would take care of it and let him know. He recalled Mattys telling him in the spring of 2016 about Weatheroy's question about marrying a white man. He explained that the team was encouraged to have "courageous and frank conversations," and that he gave the "benefit of the doubt." He believed he asked Mattys if anyone else was present. He realized that Mattys felt insulted. As the spring wore on and tensions mounted, he let Chief O'Dea know of the problems. He did not recall Mattys reporting the other comments. He informed the investigators that he and Mattys had "some very frank conversations about race" and their experiences in the PPB. He was uncertain whether the question, as reported, would be a violation of HRAR 2.02, because the PPB "encourages conversations of this nature." He stated that he did not consider reaching out to BHR about the question. He recalled mentioning it to Leloff, who replied he was already aware of it. He stated that he did not consider Weatheroy's question to be a question about a protected class.

In his second interview, Modica was asked again whether Weatheroy's question was a HRAR 2.02 violation. He again expressed uncertainty because he was not in the room and did not know the context. He stated that, if an employee came to him with such a statement and said she was offended, he would treat it appropriately, but that Mattys had not "red flagged" it. He stated that she said she was offended, but that it had more to do with the broader relationship with Weatheroy; he did not interpret her report to be that it was a racist statement.

Chief O'Dea told the investigators that Mattys had complained multiple times about her relationship with Weatheroy, but that the dynamics shifted with her letter. He stated that the March meeting with Mattys involved similar complaints to those in the past. He told the investigators that May 3 was the first time he was made aware of comments about protected classes. He stated that, after going through the alleged comments with Mattys then, he informed her that he was initiating the complaint process.

Marks told investigators that Mattys had told her about Weatheroy's question around October 2015. She told the investigators she was surprised, and may have asked what the context was. She stated that Mattys told her about other statements later, during 2016. She reported that Mattys had a meeting with the Chief in March and initially seemed satisfied, but became dissatisfied when there were no changes in behavior.

Wrigley told investigators that Mattys had mentioned all of the comments attributed to Weatheroy in her letter. She stated that Mattys told co-workers that she had met with the Chief in the spring about that, in March or April; later, Mattys told co-workers that she was giving the Chief a letter.

Former BHR Business Partner James Fairchild, who was assigned to the Fire Bureau, was initially loaned to PPB to assist in the investigation. Fairchild had previously been involved in developing and revising HRAR 2.02, and had taught it many times at the non-manager/supervisor level. A dispute exists regarding how Fairchild ceased to part of the investigation while it was still ongoing. According to Fairchild, after he disagreed with the other two investigators, he was no longer part of the investigation. In particular, after several interviews, including that of Modica, he voiced the opinion that Modica and Weatheroy had not violated HRAR 2.02, although Weatheroy may have violated another, less serious HRAR provision, and that Mattys' credibility was questionable. He also emailed Commissioner Saltzman on July 17 to express his view that the City owed Modica an apology and state that he was "no longer invited to participate" in the investigation after expressing his opinion that Modica had not violated the HRAR. He retired effective August 1.

Retired Assistant Director of HR David Rhys testified he oversaw the investigators, including Fairchild. He testified that Fairchild was the sole HR representative for the Fire Bureau, and that due to the size of that Bureau he became less available for the investigation.

The last interview in the investigation was conducted on February 14. AC Mathew Wagenknecht prepared the RU Manager's Review and Findings memo on April 10. In it he sustained identical allegations regarding Appellant, Modica, and Chief O'Dea, i.e., that each

> did not report allegations of possible misconduct related to statements made by Elle Weatheroy to Pam Mattys about a protected class. (CONDUCT) (Directive 330.00 – Internal Affairs, Complaint Intake and Processing)

Other allegations were also sustained as to Modica and Chief O'Dea. By that time, Chief O'Dea had retired, on June 30, 2016. Modica retired effective July 1.

In discussing Appellant's role, Wagenknecht noted that Appellant could tell that Weatheroy's comment had upset Mattys, and that he did not report it to anyone but "now realizes he should have." He concluded:

> Understanding that Captain Rodrigues did not know the context of the conversation, but knowing that Ms. Mattys was upset by the remark and that the remark had racial overtones to it, as the Professional Standards Division Captain he had an obligation to look further into the incident. I find the allegation that Captain Derek Rodrigues did not report possible misconduct related to statements made by Ms. Weatheroy to Ms. Mattys to be sustained.

After reviewing the proposed findings on the investigation, Rachel Mortimer, Assistant Program Manager of the Independent Police Review Division, prepared a memo to the other reviewers expressing "deep concerns about this and about investigations and potential discipline being applied consistently." She noted "bigger questions about equity work and bureau culture." She continued,

> While the Investigative report reaches 40 pages, it is important for anyone reviewing this to note that this pulls only a small amount of information from the extensive interviews. In reading the transcripts, I particularly noted how many other people, even those in supervisory positions as well as a BHR business partner, heard the initial one or two statements and did not consider them to be 2.02 level statements. Another aspect of the investigation that isn't captured in the report is the question of credibility that was put to each witness regarding the complainant and subject of this investigation. Whoever is assigned to do the findings in this case should be given the time to thoroughly read and consider all of the transcripts and material in this case.

Later, in concurring with the findings prior to their transmission to the Police Review Board ("PRB"), Mortimer again raised her concerns with the investigation, although she ultimately concurred in the proposed findings. Her stated concerns were:

> I believe the City of Portland has a potential conflict between several internal policies. In particular, the application of HRAR 2.02, which includes both sexual harassment and discrimination based on protected classes, appears to be in conflict with the messaging coming from the Office of Equity. In this case, HRAR 2.02 appears to be interpreted by the Bureau of Human Resources to apply when race is mentioned and someone is offended. This is potentially in conflict with City training advising that employees look at their work and their Bureaus, checking institutional racism through an Equity Lens, which is defined as "a critical thinking approach to undoing institutional and structural racism, which evaluates burdens, benefits, and outcomes to underserved communities." ... In this particular case, I am concerned that the interpretation by BHR is having an adverse impact on employees who belong to communities of color.

THE POLICE REVIEW BOARD REVIEW AND DECISION

A sustained violation of the seriousness involved here is required to be reviewed by a PRB, consisting of five voting members and four advisory members. The possible PRB findings on any allegation are unfounded; exonerated; not sustained; or sustained.

The PRB met on May 11 to review this case. PRB members had a full copy of the investigative file, consisting of 614 pages, of which 40 were Investigator Heather Holmgren's report and summary of the investigation. Appellant was provided a redacted copy of the investigative file. Most of the pages he received were partly or fully redacted, including the substantive portions of the transcripts of all of the interviews other than Appellant's interview, as well as the vast bulk of Holmgren's analysis of the evidence. One part that was partly redacted was a statement, on page 4 of Holmgren's report, that

> During the course of the investigation, Ms. MATTYS informed the HR Business Partners and myself that she reported some of the statements by Ms. WEATHEROY to Chief's Office staff members, including Chief O'DEA, Assistant Chief Kevin MODICA and Professional Standards Division Captain Derek RODRIGUES.

While that sentence is supported by the investigative file materials as to O'Dea and Modica, I found no documentation in the 614-page investigative file that Mattys told the investigators that she had reported Weatheroy's statement to Appellant; the only information to that effect is from Appellant's interview.

Chris Davis, who was one of the voting members of the PRB, testified that it is not unusual to redact portions of investigative files that do not relate to the subject employee. He acknowledged the tension between the due process right to be able to answer allegations, on the one hand, and other involved employees' right not to have their IA file and personal information shared with others. He has seen similar levels of redactions in other cases. Because Appellant was not the "main event" of this investigation, it was not surprising to him to see massive redactions when shown them at hearing before me. He was unaware of those redactions at the time of the PRB meeting.

Appellant's attorney, Mark Makler, attended the PRB meeting and presented a response to the investigation. The summary of that presentation in the PRB meeting notes, Respondent Exhbit 27, is several single-spaced pages. In pertinent part, Makler informed the PRB that he had only a redacted version of the investigative file and discussed the impact on the ability to offer the context of the discussion between Mattys and Appellant. He spoke at length about concerns with the investigation, including the failure to interview Mattys about her conversation with Appellant. He also spoke at length about potentially conflicting policies regarding discussions about race, citing Mortimer's memo.

During a discussion of the training on the reporting obligation, the PRB meeting notes include the following comments from Woods:

> [Woods] explained that incidents directed to BHR under Directive 330.00 are reviewed in light of HRAR 2.02 to determine if further investigation is required. This is done in conjunction with IA. If BHR determines the incident does not vilate HRAR 2.02, BHR steps out and other processes take over. He explailned that Directive 330.00 was written to encourage reporting over non-reporting. He said managers are clearly asked to report incidents even if they are unsure whether it violates HRAR 2.02 so BHR can determine the appropriate course of action.

All five PRB members recommended a finding of "sustained" on the allegation against Appellant, with the following explanation:

> Members of the Police Review Board unanimously recommended a Sustained finding .... They said Capt. Rodrigues learned Ms. Mattys was upset about comments related to race

> made by Ms. Weatheroy during a casual lunch, but given his position as Captain of the Professional Standards Division he had an additional requirement to report when becoming aware of possible misconduct and should have been aware of this responsibility. One member said the statement may not have constituted a violation of HRAR 2.02, but Captain Rodrigues still had a duty to report it as a potential violation and did not. Another said it was a technical violation and Capt. Rodrigues acted with no ill intent. Two members said Capt. Rodrigues could have followed up with Ms. Mattys after learning of the possible misconduct, but he did not follow up or report.

In addressing the corrective action, four PRB members believed the allegation fell under Category E, "Conduct that involves misuse of authority, unethical behavior, or an act that could result in an adverse impact on officer or public safety or to the professionalism of the PPB." The presumptive discipline was a one-week suspension; mitigated offenses called for a two-day suspension. Mortimer believed the allegation fell under Category B, "Conduct that has or may have a negative impact on operations or professional image of PPB; or that negatively impacts relationships with other officers, agencies or the public," for the same reasons she had expressed in the discussion of the discipline for Modica, whose conduct was considered in the same PRB meeting. In that discussion, Mortimer had said that she "did not think it was unreasonable that A/C Modica did not catch this incident as a potential HRAR 2.02 violation. She also said she personally did not feel the question violates HRAR 2.02." She disputed whether this was a "classic" case of a supervisor failing to take action. The presumptive level of discipline for a Category B violation would have been a letter of reprimand; the mitigated level of discipline would have been command counseling.

The PRB members discussed possible conflicts between HRAR 2.02 and the Office of Equity's encouragement of "courageous conversations," and the possibility of different perspectives on Weatheroy's alleged question by Modica and Appellant as persons of color. The PRB recommended:

> The Bureau of Human Resources, Office of Equity and Human Rights and Portland Police Bureau should collaborate to develop guidance to implement the City's policies on equity and diversity while enabling courageous conversations about race and racial equity to increase clarity and understanding with the goal of a respectful workplace free of discrimination and harassment.

In an email dated June 20, the PPB sent Appellant a Disposition of Administrative Investigation Memo. On June 23, Makler emailed the PPB requesting "a complete electronic and/or hard copies of any and all materials and evidence and information in the possession of the PPB and or PPB agents associated with case 2016-B-0011." Makler also requested

> the information and materials associated with AC Modica and also with Manager Weatheroy from case 2016-B-0011 – as it is our position that information and evidence obtained in the investigations related to Modica and/or Weatheroy from case 2016-B-0011 has a direct and significant impact on defenses and exculpatory information related to Captain Rodrigues'

> actions and communications with Pam M. In fact, as I indicated in an earlier email, the City's failure and refusal to provide exculpatory information associated with AC Modica's and Manager Weatheroy's involvement in case 2016-B-0011, and the involvement of PPB HR Manager Vincent Woods detrimentally impacted the ability of Captain Rodrigues to present a full picture and information to the PRB, and in my legal opinion, violated Captain Rodrigues' due process rights and opportunities for discourse with the PRB that would have had an impact on the decision making of the PRB in relation to Captain Rodrigues.

Chief Deputy City Attorney Mark Amberg replied on July 7, with a copy of a proposed disciplinary letter that is not in evidence. He informed Makler that he and his client could review or receive a copy of "the portions of the file that pertain to allegations involving Captain Rodrigues." He further informed him, however, that "only those portions of the file that pertain to the allegations involving Captain Rodrigues will be provided." He stated that "The parts of the file that involve other individuals and don't relate to the allegations against Captain Rodrigues won't be provided." That same day, Makler informed the PPB that the proposed disciplinary letter, although dated June 19, had not been received until July 5. He requested an extension of time to respond and/or schedule a due process meeting until July 31.

THE PROPOSED DISCIPLINE

The proposed disciplinary letter in evidence is dated July 25, and was signed by then-Chief Marshman that day, and by Mayor Ted Wheeler on August 7. It proposed a two-day (20-hour) suspension without pay. It informed Appellant of his right to respond orally or in writing. Appellant signed for receipt on August 14.

Chief Marshman testified that raising race, gender, or other protected status was not necessarily reportable, depending on the context. However, in this case, he was aware that Mattys was deeply offended by Weatheroy's question and other comments, because she had also complained to him; he did not recall whether that complaint occurred before or after this particular investigation because there were several investigations involving Weatheroy. He testified he notified Woods when Mattys approached him. He found it hard to believe that Appellant was unaware that Mattys was offended. He testified he was considering Appellant's case side by side with sustained allegations against Modica arising out this situation. He testified that context was important in deciding Appellant's case. Marshman testified that he was unaware that Appellant had only a redacted investigative file to prepare his defense. He considered multiple mitigating factors in reducing the discipline one step on the discipline matrix.

SCHEDULING OF THE DUE PROCESS MEETING

In a July 10 email, Attorney Makler informed Chief Deputy City Attorney Mark Amberg that Appellant was requesting a pre-determination meeting (also referred to as a due process meeting). Amberg forward the

request to Coordinator Christopher Paille in the Professional Standards Unit and instructed Makler to deal directly with Paille. On July 12, Makler requested dates at the end of July or beginning of August. Paille responded the same day with four suggested dates in August. Later that day, Paille informed Makler by email that the earliest two of the four suggested dates were no longer available. Makler responded later that day with an email requesting that the meeting be scheduled for August 10, one of the two remaining available dates. On August 7, the August 10 meeting was cancelled due to a conflicting meeting with Mayor Ted Wheeler.

In an August 15 email, Attorney Makler again requested a due process meeting. Marshman was retiring effective August 26, and incoming Chief Danielle Outlaw was scheduled to assume office on October 1. In the interim, Captain Chris Uehara was acting as Chief. Makler asked, "who is the non-involved impartial discipline decision maker that we are going to meet with? Or, shall we schedule this meeting after Chief Outlaw begins at PPB." He also requested a non-redacted copy of the investigative file and materials. Deputy City Attorney Derily Bechthold responded on August 16 that she had been out sick and was catching up, and would respond as soono as she could. On August 18, Bechthold emailed that her office "will work with you to schedule an acceptable time with Acting Captain Uehara" and asked him to inform her of dates that would work for him. As to the requested unredacted file, she replied

> If the information that was redacted is not relevant to the present case and involves other employees it is our practice not to disclose that information which is consistent with our obligations under public records law. However, I will conduct a review of the record to ensure you and Captain Rodrigues have the information you need to properly prepare.

In an August 20 email, Makler requested the information as soon as possible. He offered to come to the office to pick it up or provide a flash drive so the materials could be provided electronically. He also requested materials related to an unrelated second investigation that it not at issue here, as well as information that had been released to the media. After further email exchanges in which Makler informed Bechthold that he had a redacted file but needed the unredacted file, on August 30, Bechthold emailed Makler that "The complete PRB file and all of Captain Rodrigues' transcripts are on a flash drive for you at the front desk...."

It is undisputed that PPB produced the complete unredacted investigative file for the first time for the hearing before me. Mattys testified that she provided Makler and his investigator with a copy of her interview transcripts and the determination from the investigation of what was sustained and what was not, at a time that she estimated was perhaps a year and a half before the hearing in this matter.

In a September 6 email to Bechthold, Makler noted the difficulty PPB had experienced in finding an appropriate decision-maker for the due process meeting; expressed a desire to conclude the pending matters "in an expeditious and timely manner;" stated that, in the 18 months the matters had been pending, Appellant had been passed over for promotion because of the pending matters; and requested that the meeting be scheduled with Mayor Wheeler, noting that the Mayor "is ultimately the decision-maker as to any discipline...."

In a September 13 email, Bechthold informed Makler that Assistant Chief Robert King would conduct the due process meeting, and offered September 13, 14, 18, and 19 for that purpose. One minute later, Bechthold withdrew the offer of those dates and offered September 20, 21, 25, and 26. Makler responded that the only option that worked for him was September 19, and asked to hold September 19 while he checked availability. No reply to that request is in evidence.

In a September 14 email, Makler informed Bechthold that he was unavailable on September 19 because of a pending matter with another police department. He further informed her that he was "out of the state/country until September 30, 2017." He suggested October 5, 6, 10, or 11 as dates for the due process meeting. Bechthold responded on September 18, asking if he had any flexibility in his schedule before he left. Makler responded on September 19 that he was "not available now (today) until after I return from overseas trip." He said he would return on September 30, and again suggested the October dates. Bechthold responded on September 20 that the due process meetings were scheduled for September 22 with King. She added,

> If there is another time you can make work this week, please let me know and we will work with you. If you make arrangement for another attorney to cover for you, please let me know that as well.

Makler responded the same day that the proposed dates were "totally unacceptable" and added, "I am out of the country visiting my daughter at her University in England until September 30." He reminded her that he had previously advised her of the conflict and "specifically asked that you accord me professional courtesy and work with me as to my schedule." He reiterated the dates in October when he was available. He added:

> There is NOT another attorney that can cover these due process meetings for Captain Rodrigues especially given the voluminous amount of information that has been generated during the waiting time for this investigation for more almost 18 months.

Bechthold responded on the same day:

> I did my best to accommodate your schedule as a courtesy – as a non-represented employee, Captain Rodrigues has no right to representation at the due process meetings and this matter must move forward.

Makler responded the same day as follows:

> Your statement that Captain Rodrigues has no right to representation is inconsistent and not the law. In both pending matters the City has proposed to deprive Captain Rodrigues of property rights and has proposed to detrimentally and economically impact Captain Rodrigues by suspending him without pay. Both the 5th and 14th Amendment related to Due Process are impacted for Captain Rodrigues. In addition, your statement is inconsistent with the practice and process that the City uses in relation to Command Level Officers and their opportunity to be heard and present information throughout the investigative process, including the interviews of my client, the PRB meetings related to my client, the Due Process meetings related to my client and any subsequent appeals and/or litigation related to actions taken by the City.
>
> To the best of my knowledge, all other command officers, Captains and ACs and Civilian Managers that have been involved in these matters have had legal representation throughout the course of these investigations, including at their Due Process meetings. I know this because I have spoken to several other attorneys involved in representation of involved PPB members. My presence at the Due Process meetings for Captain Rodrigues has been know [sic] to you and ACA Mark Amberg for many months – and it has been many months that we have been waiting for the City.
>
> Now, from my perspective, conveniently, when you learn that I am completely unavailable, you not only do not afford me professional courtesy, you deliberately schedule the meetings when I am unable to assist my client from England.
>
> I respectfully request that you and the City accommodate my schedule and allow me to provide my client legal representation and schedule with me so that I can be present to assist my client at the due process meetings related to his pending matters.

Bechthold responded the same day:

> Captain Rodrigues is welcome to bring legal counsel with him to the due process meetings. If he needs additional time to secure counsel, we can defer the due process meetings until next week but we cannot go out any further. If Captain Rodrigues would like to move the due process meetings to next week to accommodate the schedule of another attorney, please let me know by noon tomorrow so I can make arrangements.

Makler forwarded this email string to City Attorney Tracy Reeve, requesting that Respondent "afford me professional courtesy as I have requested." He noted the property interests at stake, as well as the amount of information and multiple personnel involved, and stated that "it is not realistic for any other legal counsel to handle these matters." Reeve responded, in pertinent part:

> ... We always endeavor to afford professional courtesies to other attorneys where possible to do so while also meeting our client's needs. I understand from Ms. Bechthold that she has repeatedly attempted to find dates that work for your schedule which also meet the City's timeliness needs. Unfortunately, that has apparently not been possible given that you are unavailable for a three week period during which PPB intends to complete the due process meetings for Captain Rodrigues.
> ....

On September 21, attorney Daniel Snyder, who was representing Appellant in a tort claim matter, sent a letter to Reeve recounting the concerns raised in the email string over scheduling the due process meeting. He reminded Reeve of the Oregon State Bar Statement of Professionalism. He informed her, inter alia, that he would not be representing Appellant in the due process meeting. No evidence exists that he is a labor lawyer.

According to King, the timing of the due process meeting was affected by Outlaw's pending assumption of her position as Chief. He recalled that Outlaw had directed Acting Chief Uehara to resolving pending discipline cases, including this one, before Outlaw assumed the position. However, King did not know whether all the pending cases were resolved before Outlaw assumed office.

Marshman testified that he had never heard that Outlaw directed PPB to complete all outstanding discipline cases before she took office. He did not know what authority she would have to give that direction unless she asked the Mayor to make that happen.

CONDUCT OF THE DUE PROCESS MEETING

Appellant attended the beginning of the due process meeting alone, with no written response. He presented a brief statement, as follows:

> Due to the City's insistence that I appear here today, for the City's unilaterally-scheduled due process meeting, and from my perspective as the involved member in both of these investigations,[3] I want the record to be clear that the City deliberately scheduled my due process meetings so as to deprive me of my selected legal counsel being present here today. Thank you.

He left after presenting this statement.

King sustained the allegation based on the investigative file and other materials he had reviewed before the meeting. In his view, Weatheroy's alleged statement had a nexus to a protected class. He testified that he considered Appellant's IA position and experience. He considered the possibility that there was not a violation; however, he concluded that Appellant's friendship with Mattys did not obviate the need to report her complaint. He found multiple mitigating circumstances and no aggravating circumstances, and concluded that a 2-day suspension was warranted. He testified that, as the decision maker, he had the authority to impose discipline outside the discipline guide, or to send the matter back for further investigation.

King testified that he was unaware at the time of the due process meeting that Appellant had received only a redacted copy of the investigative file. He testified that knowing that would have influenced his decision on what Appellant could or could not say at the meeting. When he was a police union representative, he had not been provided an IA file with such extensive redactions. Even in cases involving multiple PPB personnel, he had seen most or all of the material, even other witnesses' statements. In his experience, members were entitled to review only the information that was pertinent to them. He was unable to answer whether the level

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[3] A second unrelated investigation, not at issue here, was also pending final determination.

of redactions in this case was appropriate. For example, while he did not believe Appellant would have had the right to review the information regarding Weatheroy, he struggled to answer whether Appellant was entitled to review the information about Chief O'Dea. He had reviewed the portions of the investigative file that involved other personnel, and testified that every page was important to review. He testified it would be difficult to prepare for the due process meeting without having all the information available.

King testified that he had hoped Appellant would present more information about what happened. Most of his due process meetings cover three topics: what the employee learned from it; how the employee feels about it, such as regrets; and whether the employee feels the proposed discipline is fair. Sometimes employees dispute the facts. While he viewed Appellant's lack of participation "neutrally," he testified that the level of discipline could have been impacted had Appellant participated.

King initially testified that he was aware that Makler had intended to attend the meeting but was out of the country. He knew of no reason why the meeting could not have been postponed until Makler's return. He did not specifically recall that Makler was proposing dates that would follow Outlaw's arrival. In his view, Makler's absence did not change his conclusions. He later testified that he was aware that Appellant wanted his attorney to be present, and acknowledged that having legal counsel present could have affected the level of discipline. Even with an exhaustive investigative file, in his view, the due process meeting is critical in arriving at a final fair conclusion. He testified that counsel could have written a statement on Appellant's behalf.

King testified that he would have expected IA to interview Mattys about her lunchtime conversation with Appellant. However, given Appellant's description of the conversation in his own interview, he concluded it was unnecessary to interview Mattys.

"COURAGEOUS CONVERSATIONS"

The term "courageous conversations was raised at various points in this case. No official definition of the term appears on this record, but it appears to be a policy encouraging City employees to discuss diversity issues with one another in a respectful manner.

According to Wagenknecht, courageous conversations have to be conducted thoughtfully between willing participants. He testified that courageous conversations were discussed in diversity training, but those trainings did not address how such conversations should be initiated or conducted.

According to King, Respondent conducts training on cultural identity, of which race is one. Because those conversations can be difficult, the training was structured, facilitated, and designed to help raise under-

standing, awareness, respect, and compassion. The trainings he attended were usually conducted by a facilitator. He recalled that the facilitator would use exercises, conversations, or question-and-answer to introduce topics, frame and re-frame the subject, and give participants a chance to go through ideas together. Topics he recalled being addressed included white privilege, stereotypes, attitudes, and prejudices. The trainings were designed to walk a diverse group of people together through topics that can be difficult. They encouraged empathy, compassion, breaking down barriers, and giving access to decisions and resources in a way that is fair and takes into account the complexities of the topics addressed. The courageous conversations trainings that he attended were mostly mandatory; additional optional trainings were available. He was taught that there had to be framing, authorization, and an understanding of what would be reviewed and discussed in a way that was geared at understanding and learning, and that was framed in a way that made it constructive.

Marshman testified that the courageous conversations training could be confusing, and that the rule and the definitions changed. He was confused about what was an HRAR 2.02 violation, and what to do if he suspected one; he believes other employees were confused, as well. His recollection was that one way to reduce the number of investigations on that subject was to have courageous conversations instead of "ringing the bell" and starting an investigation. The strategy would be to have the employees have a courageous conversation about what was said, the intent, and how it was received, and try to resolve the concern at that level. One goal, in his view, was not to report everything to BHR. He would have considered it important to hear Appellant's view of that concept at the due process meeting.

Modica testified that people of color commonly have conversations among themselves on topics that are considered to be courageous conversations for others, because of the way they were treated immediately and historically. He testified such conversations were considered "courageous conversations" in the City's equity lexicon when they included non-diverse participants. He recalled attending trainings on this topic that degenerated into personal offense by some participants. It was his understanding that courageous conversations should be mutually respectful, understanding that, if a participant felt unsafe or insulted or unsure, they could leave the conversation.

TRAINING ON HRAR 2.02 AND DIRECTIVE 330.00

The City Attorneys Office conducts mandatory training for supervisors and managers on HRAR 2.02, Directive 330.00, and other related topics. Appellant attended the mandated trainings. Managers are instructed to report to BHR if they learn of conduct that may violate law or policy. No formal complaint is necessary;

merely learning of conduct that may implicate protected status is sufficient to require a report to BHR. Amberg testified that he emphasizes that issues should be addressed before they get to the point of unlawful harassment or discrimination. Even if the complaining employee says s/he does not want anything done, supervisors are to report to BHR within two days from when they "know or have reason to know." He specifically trains that it is irrelevant whether the complaining employee is a friend or not in the chain of command, or if the information comes in an off-duty encounter; a supervisor or manager never "takes off" that hat. He does not train them to suggest that the complaining employee go back to the person who made a troublesome comment to ask what they meant. He trains that "no action is not an option." He testified that supervisors are responsible for recognizing a potential violation, but not for determining whether it is a violation; that is BHR's responsibility.

According to now-retired BHR Director Anna Kanwit, supervisors and managers are not to evaluate whether conduct did, indeed, violate policy; that is BHR's bailiwick. The requirement to report to BHR within two days was instituted after reports that employees had taken concerns to supervisors without corrective action having been taken. Reporting to BHR ensures that BHR can investigate and take appropriate action if necessary. Kanwit was unaware whether the BHR investigators questioned whether this statement was reportable. The BHR recommendation of training on HRAR 2.02 did not, in her view, suggest that the investigators did not think the question was reportable; BHR had no jurisdiction to discipline PPB employees.

OTHER MATTERS RAISED BY RESPONDENT

Respondent is subject to a Settlement Agreement with the U.S. Department of Justice that arose out of complaints regarding alleged excessive use of between police and persons with perceived or actual mental illness. A portion of that Settlement Agreement addresses investigations of alleged misconduct and discipline. It requires, inter alia, that PPB complete investigations of officer misconduct within 180 days of receipt of a complaint of misconduct. It defines completion of administrative investigations as "all steps from intake of allegations through approval of recommended findings by the Chief, including appeals, if any, to [the Citizen Review Committee]." It also requires PPB to

> develop and implement a discipline guide to ensure that discipline for sustained allegations of misconduct is based on the nature of the allegation and defined, consistent, mitigating and aggravating factors and to provide discipline that is reasonably predictable and consistent.

The discipline guide that was used in determining the level of discipline in this case was in process at the time of that Settlement Agreement, and was completed and implemented thereafter.

A later Compliance Assessment noted, inter alia, that PPB was administering the 180-day deadline to complete investigations, in part, through the use of "180-day memos" that identify the source of the delay and take corrective action. No evidence exists that a 180-day memo issued in this case.

ARGUMENTS OF THE PARTIES

RESPONDENT:

This is a straightforward discipline case. There is nothing novel about the discipline imposed, and the relevant facts are not in dispute. Appellant learned of an offensive racial question that Weatheroy asked Mattys. PPB internal directives and HRAR 2.02 required Appellant to report that information to BHR. Despite his unique position as the IA Captain and his training on HRAR 2.02, he failed to report the inappropriate conduct. His 2-day suspension was the lowest level of discipline permitted by the PPB's discipline guide. The PPB had just cause for discipline and the discipline was objectively reasonable.

Appellant had a duty to report Weatheroy's offensive question, "Why did you marry a white man?" As IA Captain, he occupied a unique position. His primary responsibility was to ensure organizational and individual police accountability. He was the gatekeeper for administrative personnel investigation. His main responsibility was to ensure that complaints of misconduct by PPB members were investigated. He was virtually the only person in the PPB who could initiate an internal investigation.

Police accountability is the cornerstone of the PPB. It goes to the heart of community trust and the PPB's legitimacy with citizens. If the PPB does not hold members accountable, it faces losing community trust.

The IA Captain was a direct report to the Chief, who delegated authority to conduct personnel investigations. This demonstrates the importance of the Professional Standards Division to the organization. The City has an entire division in the Auditor's Office, the IPR, monitoring police accountability.

The City's settlement with the US DOJ reflects another layer of police accountability. That settlement addressed police accountability, among other issues. It required accountability "pursuant to a disciplinary system that is fair and consistent." It required the PPB to retain the PRB process and adopt a discipline guide.

Mattys told Appellant at lunch about Weatheroy's question. Appellant did not ask questions that might have provided more information about context or the tone in which it was said. In the investigatory interview, he only grudgingly admitted that he understood that the question upset Mattys. Despite his position as IA Captain and his training on HRAR 2.02, he did not tell anyone what Mattys had told him or contact BHR; he

did not initiate an investigation; he took no action to stop Weatheroy's conduct. Contrary to his training, he suggested to Mattys that she circle back with Weatheroy and ask what she meant.

Directive 330.00 requires members to report possible misconduct. Section 2.3 gives the IA Captain complete authority over initiating administrative investigations. It imposes a special reporting requirement on the IA Captain to consult with the City Attorney's Office, BHR, and the IPR when investigating allegations of harassment, discrimination or retaliation under HRAR 2.02. Appellant failed to report Weatheroy's question to anyone identified in Directive 330.00.

HRAR 2.02 imposes two primary duties on supervisors and managers. The first is to take action when they know or have reason to know inappropriate conduct is occurring. Supervisors and managers are taught that taking no action is not an option. The second primary duty is to notify BHR of a complaint within two working days. HRAR 2.02 does not require a formal complaint before making a report. The duty to report is triggered when an employee tells a supervisor or manager that something is bothering them and the conduct implicates protected status. It is not the supervisor or manager's responsibility to determine whether the conduct violates HRAR 2.02; that is BHR's exclusive jurisdiction.

Appellant received training on his duties and responsibilities regarding HRAR 2.02. All PPB members who testified about their training, except Grievant, understood their responsibilities to take action and report potential violations to BHR, even if the complainant was a friend, was not in the chain of command, did not want to file a complaint, or wanted it to keep it confidential. Even Appellant's witnesses understood their responsibilities. In his investigatory interviews, Appellant admitted that his training required him to document what Weatheroy said to Mattys, initiate an investigation, and report to BHR within 48 hours. He retreated from those clear admissions at hearing and claimed he only had a duty to report "legitimate" violations and that he was the arbiter of what was legitimate. He determined that Mattys was "needy" and "hypersensitive" and "kind of goes overboard at times." Based on those perceptions and the fact that he did not find the question offensive, he did not report Mattys' complaint.

Grievant's newly-asserted position that he can determine what is a legitimate HRAR 2.02 complaint is erroneous and contrary to his training. HRAR 2.02 sets the bar very low to trigger the duty to report. All witnesses other than Appellant and Modica clearly understood their reporting obligations.

Appellant's discipline is reasonable and appropriate under the discipline guide. The investigation resulted in findings sustaining the allegation against Appellant. The PRB unanimously agreed that Appellant

failed to report and recommended discipline. Four of the five voting members concluded that the conduct fell within Category E of the discipline guide and recommended the presumptive discipline of a one-week suspension. The discipline guide has been in use since 2014. It determines the category under which the conduct falls; considers the member's disciplinary history to identify the presumptive level of discipline; and evaluates mitigating or aggravating circumstances to arrive at the appropriate level of discipline.

Respondent provided due process. Marshman proposed a two-day suspension. He agreed with four voting PRB members that this was a Category E violation. He tried to be consistent with the discipline he imposed on Modica for failing to report. A two-day suspension is the lowest mitigated discipline for a Category E violation. PPB invited Grievant to a due process meeting on September 22 with King. The meeting occurred on a date when one of Appellant's lawyers was not available. Rather than respond on the merits, Appellant read a statement declining to provide details because of his attorney's inability to attend. King found the facts very straightforward. Based on his own training and experience, King concluded that Appellant had a duty to report, and sustained the violation. He also concluded the violation fell under Category E. He considered mitigating factors in arriving at the level of discipline.

Appellant occupied a unique "gatekeeper" position when he learned of Weatheroy's offensive comment. He knew of his duty to report, but failed to report. That failure warranted discipline. PPB used a discipline guide to ensure fair and consistent discipline. The low-level suspension without pay was objectively reasonable.

BHR did not remove Fairchild from the investigation. The timing of events is nonsensical. Fairchild's email to Commissioner Saltzman was dated July 17. BHR had completed its investigation and submitted its reports by March 6. Fairchild's email does not even mention Appellant; it states Fairchild's opinion that Modica had not violated HRAR 2.02. BHR never removed Fairchild from the investigation. BHR "borrowed" Fairchild from the Fire Bureau to assist in the investigation, and he conducted numerous interviews early in the investigation, but his workload at the Fire Bureau precluded his availability as the investigation wore on. Fairchild never told Rhys that Weatheroy's question to Mattys did not violate HRAR 2.02; he disagreed that Modica had violated HRAR 2.02. Even assuming arguendo that Fairchild had indicated such an opinion to Rhys, Rhys had the final say over whether to accept the draft investigative report. Rhys reviewed and approved the BHR reports.

Woods' attendance at the PRB and due process meeting does not invalidate the discipline. Woods had no conflict of interest. He was the BHR employee assigned as the HR Manager for PPB. He was interviewed to determine when he first learned of Mattys' complaint. That interview was unrelated to Appellant's failure to report. Woods attended PRBs and due process meetings as an advisory member, to answer questions around BHR policy. He had no say in the ultimate decision, and his presence at the due process meeting did not affect King's ultimate decision.

The investigation did not require a fourth interview of Mattys. Mattys did not accuse Appellant of failing to take action. The IA investigator learned of Appellant's failure through the investigation. No one who reviewed the investigation felt it was necessary to interview Mattys about that. Appellant's two interviews provided sufficient proof to sustain the charge. There were numerous points where the investigation could have been sent back if reviewers felt it was insufficient. None of the reviewers felt it was necessary.

Appellant does not have a due process right to have his attorney attend the due process meeting. Employees with a property interest in their jobs have a constitutional right to address the ultimate decisionmaker before discipline is imposed. Loudermill[4] does not require a face-to-face meeting. Since public employees do not have a right to a face-to-face pre-termination meeting, they do not have a constitutional right to have an attorney attend such a meeting. The City is unaware of any authority supporting the proposition that "industrial due process" requires an employer to permit an employee to bring a personal attorney to a due process meeting. The only arbitration case the City has found concluded the opposite.

City rules do not require the City to allow non-represented employees to bring their attorneys to due process meetings. As a matter of courtesy, the City generally permits attorneys if it works out, but the scheduling simply did not work out in this case. The City had been trying for months to schedule the due process meeting. During that time, Marshman resigned, and incoming Chief Outlaw directed Uehara to complete all pending discipline before she took office. By mid-September, the parties had not found a mutually convenient date. The City proposed several dates later that month. Makler indicated none were acceptable because he would be out of the country. Given Outlaw's directive and Makler's unavailability, the City scheduled the due process meeting for September 22.

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[4] Cleveland Board of Educ. v. Loudermill, 470 US 532 (1985)

Makler's inability to attend the due process meeting in person did not prevent him from representing Appellant through a written submission. Employees may attend a face-to-face meeting or submit a response in writing. Appellant was given the choice, chose to attend the meeting, but refused to provide any information or submit anything in writing. He chose not to have his other attorney attend. He chose not to inform King about his concerns over the level of redactions. King was receptive to hearing from Appellant what he had learned, if he apologized or expressed regret, and what he thought was a fair outcome. Appellant harmed himself by refusing to provide information and insisting he had a right to have Makler attend.

Appellant was entitled to review his own investigation file, not the entire Weatheroy investigation. The investigation involved 13 allegations against four members. The main investigation included eight allegations against Weatheroy and two each against O'Dea and Modica. Appellant's case was a narrow inquiry that was an offshoot of the major investigation. Oregon law recognizes the privacy interests of employees subject to discipline, as reflected in ORS 192.345(12). If discipline is imposed, the conditional exemption covers the investigation file. ORS 181A.830 prohibits disclosure of personnel investigations of public safety employees when discipline is not imposed. PPB balances the interests of employees in responding to proposed discipline with privacy interests of other employees involved in an investigation. If an investigation involves numerous members, each member is entitled only to their own investigation file; the portions relating to other employees are redacted. That is what occurred in this case. The redactions did not deprive Appellant of the opportunity to assert defenses, as demonstrated by all the challenges asserted at the PRB and in this appeal.

Appellant likely will assert two new challenges from reviewing the entire file: that Leloff violated HRAR by failing to contact BHR after Mattys complained to him; and that even BHR did not reach consensus on whether Weatheroy's conduct violated HRAR 2.02. Both allegations lack merit. The allegation about Leloff is completely erroneous, and the lack of consensus in BHR is irrelevant.

Mattys told Leloff she had reported Weatheroy's questions to O'Dea and he had done nothing. Leloff was uncertain whether he had a duty to report to BHR, but called Smith in BHR. By contacting BHR, he satisfied his duty under HRAR 2.02.

BHR makes the ultimate decision as to whether conduct violates HRAR 2.02; Appellant does not. His responsibility is to report potential violations to BHR so BHR can evaluate the conduct and make a determination. The fact that BHR debated the issue internally is irrelevant.

Appellant obtained additional information that he believed was relevant to his defenses. He [sic] talked to Mattys and obtained her interview transcripts. Makler talked to Modica's attorney and learned of Fairchild's email to Commissioner Saltzman. Despite the redactions, Appellant brought virtually all of his defenses to the attention of the PRB or raised them in this appeal. The Board does not have to destroy the careful balance between a subject's right to information and other involved members' right to privacy. Appellant articulated virtually all of his challenges from the material he received from IA and additional information he was able to gain outside the investigation process. He seeks to go on a fishing expedition looking for flaws.

Weatheroy's question about why Mattys married a white man was not a "courageous conversation." PPB has trained on cultural identity, of which race is an element. The trainings did not authorize Weatheroy or anyone else to make unwelcome, offensive statements about bi-racial marriages outside of those facilitated discussions. More importantly, it was not Appellant's decision to determine whether the question constituted a "courageous conversation" or a violation of HRAR 2.02. His responsibility was to contact BHR about a potential violation. Weatheroy's question was a potential violation that demanded further evaluation. It implicated race and could be derogatory in questioning why Mattys married outside her cultural group. The question upset Mattys, and Appellant knew it. He had a duty to report.

A manager's failure to report is a serious violation that warrants significant discipline. This is not undercut by the fact that the BHR recommended only training. Although BHR is the ultimate decision maker about whether particular conduct violates HRAR 2.02, BHR does not have authority to impose discipline on PPB employees for violating the rule; that is PPB's exclusive province. BHR can only recommend training.

Police accountability is the IA Captain's primary responsibility. Appellant knew from his position and his training on HRAR 2.02 that he was required to report what Mattys told him. He failed to do that. A two-day suspension was the lowest level discipline possible under the discipline guide for his infraction. He received all the process to which he was entitled. The discipline was for cause and was objectively reasonable. The CSB should dismiss the appeal.

APPELLANT:

Respondent imposed discipline on Appellant unlawfully and without good cause, reasonable cause, just cause, or any cause. It failed to prove that he violated a directive or rule. To sustain allegations against him, impose harsh and unreasonable economic discipline, and sully his stellar reputation in the City and in PPB, Respondent had to portray and find that Appellant knew he should have reported and failed to initiate and/or

report a violation of Directive 330.00 and by extension HRAR 2.02, when Mattys told Appellant about Weatheroy's question. To support this ludicrous conclusion, Responded concluded that Appellant knew or should have known, based on his training and/or his status as the Captain of Professional Standards, that an innocuous question by Weatheroy violated HRAR 2.02. This is not the case and flies in the face of the trainings and information that Appellant had received.

Appellant had no notice that an innocuous lunch conversation between he and Mattys, that happens to mention "white man," in and of itself is a violation. Before considering just cause, reasonable cause, good cause, or any cause tests such as disparate treatment, progressive discipline, or fair punishment, the charged offenses must first be proven. Arbitrators have reduced discipline where some charges are unproven.

Respondent's untenable position and illogical conclusion is based on the faulty premise that, because Weatheroy's question included a reference to skin color, the question in and of itself violated HRAR 2.02 and Appellant, as the Professional Standards Captain, knew this and failed to report the violation. This premise is far-fetched and spurious. It assumes that any mention of a protected class or discussion about protected class is a policy violation. This premise and conclusion does not recognize Respondent's training related to courageous conversations. There was no way for Appellant to know that just the mention of a protected class triggered a duty to report.

Numerous witnesses explained why this conclusion is spurious. Wagenknecht recalled Mortimer raising the thought that this was an attempt to have a courageous conversation. He suggested such conversations had to be done thoughtfully by willing participants. Appellant's and Mattys' lunch chat was, in fact, thoughtful and it was a willing conversation between two people of color in a safe place and in a safe sibling-type relationship. Wagenknecht acknowledged that PPB has training about courageous conversations but also concedes that PPB does not provide training on how a courageous conversation should work or could be started. Appellant and Mattys, both brown-skinned and both culturally diverse, historically, routinely and regularly engaged in courageous conversations, or just plain conversations about race and discrimination because they both had many years of personal experience with such issues. Someone not familiar with their relationship would not understand that the lunch chat was routine, regular and normal for them. Discussion about race, skin color and/or discrimination was also routine, regular and normal for them.

Marshman's testimony about courageous conversation training supports that Appellant's actions and suggestion that Mattys have a conversation with Weatheroy and try to get some context was exactly what was

taught to PPB members by the City in relation to HRAR 2.02. Appellant's actions and suggestion was in compliance with policy and his training.

King was aware of the courageous conversations training. Appellant and Modica were aware of that training. Like Appellant, Modica believed conversations about race and color of skin were allowed to occur between co-workers.

Modica, Wagenknecht, King, Marshman, Mattys and Appellant all recognize in relations to courageous conversation training and concept that context and the relationship between the participants matter. This recognition was not considered by investigators or decisionmakers in evaluating this case and imposing discipline on Appellant. Without specific notice and/or training from the City, the lunch chat was innocuous and did not resonate with or trigger reporting responsibilities.

Appellant was not the only involved employee who did not see or believe that a simple question about a "white man" was a violation of PPB and/or City rules. Modica reached the same initial conclusion when Mattys disclosed the "white man" question. When he asked if Mattys wanted a report made, she was adamant that she did not. He testified he did inform O'Dea of a problem between Mattys and Weatheroy.

For all the above reasons, and because the training and expectations on courageous conversations contradicts HRAR 2.02, there was no notice and no way for Appellant to know his innocuous lunch chat with Mattys was a violation.

There was no full, fair and complete investigation. There was no interview of Mattys about her lunch chat with Appellant, or about her involvement with Appellant in any way. This failure to interview Mattys about her interactions with Appellant is a fundamental flaw in the investigation. The supposed complaining witness/victim was not interviewed. Until her testimony here, there was no evidence or information about her understanding of their lunch conversation and/or if she was making Appellant aware of the question so that he could make a report on her behalf. On the contrary, Mattys did not expect Appellant to make a report, did not want him to make a report, and did not suggest or expect him to make a report. A full, fair and complete investigation would have provided this information and Respondent would have had a better understanding of their relationship and the context of the lunch chat.

All the investigators and decisionmakers ignored this critical misstep and failure. The lack of interview was evident to all the investigators and all the decisionmakers. They ignored this failure because such an interview would mean that their scape-goat (Appellant) would not be available. There were ample opportunities

and many months when Mattys could have been interviewed about her interaction with Appellant. Respondent and PPB knew how to re-interview witnesses; they interviewed Mattys three or four times, and interviewed Appellant twice. Holmgren deliberately chose not to interview Mattys about Appellant.

At hearing, it became evident that there may have been a fourth interview of Mattys on October 28, 2016, to which Appellant was not privy, nor was he provided a report or audio of the interview. When first asked about this interview, Holmgren could not explain why an October 28, 2016, interview of Mattys was listed as part of the investigation file and why that interview was not disclosed. Later, on surrebuttal, Respondent recalled Holmgren to attempt to rehabilitate her. Her explanation was that the transcript was "included on a new case that was opened related to that interview." This testimony is another example of how this case was flawed. The October 28, 2016, interview was not provided; although it is listed as part of this investigation, without having the interview provided, there is no way for Appellant to know if any information from this interview was helpful to him.

The conclusions by investigators and/or decisionmakers were assumptions and inferences as to what Appellant and Mattys intended from their lunch conversation. Or the investigators and/or decisionmakers extrapolated a conclusion based on three or four interviews of Mattys in relation to other involved employees. Mattys was specifically interviewed as to her interactions and conversations with the other involved employees, but not as to interactions and conversations with Appellant.

Since the seminal issue, from Respondent's perspective, was that Appellant failed to report, it is imperative to establish who from Respondent knew about the "white man" question and when. Wagenknecht did not know whether Modica or Appellant was told first, because there was no interview of Mattys asking her and establishing a timeline as to whom she told first about the "white man" question. Since this significant aspect was deliberately not pursued, there was no information for a decisionmaker to rely on other than to extrapolate and draw inferences and conclusions from other interviews. Appellant was fundamentally impacted and unjustly and inappropriately determined to be the lynch pin who should have reported the question.

The investigators failed to ascertain and establish Mattys' intent in relation to Appellant. Wagenknecht knew this but ignored this fundamental flaw in reaching his conclusions. He also ignored his training, experience, and expectation that a victim/complainant should be interviewed. There was no interview. The investigation was flawed, and there was no cause and no basis to conclude that Appellant violated any PPB or

City policy. Marshman and King also acknowledged that Mattys should have been interviewed about Appellant and their lunch chat, but knew she was not interviewed on this topic.

Investigators deliberately and blatantly ignored evidence that multiple members of PPB and BHR did not believe that the "white man" question and other Weatheroy comments related to race were HRAR 2.02 violations or Directive 330.00 violations. Before her written complaint, Mattys told Leloff about the "white man" question. Leloff consulted with Smith and Woods as to whether these comments violated HRAR 2.02 or Directive 330.00. Although Mattys indicated she was upset and told Leloff that she had reported to O'Dea, Leloff did not believe the comments met the mandatory report requirements. Further, BHR members Strayhan [sic] and Woods, with whom he consulted, did not believe the multiple comments constituted a HRAR 2.02 violation that needed to be reported. These conclusions were not known or made available to Appellant until he was already disciplined.

Investigators were not objective and seeking only the facts. Fairchild's testimony shows the decision was pre-ordained and pre-determined. Respondent deliberately hid evidence from Appellant. Fairchild believed that, as a result of voicing his opinion that this was not a HRAR 2.02 violation, he was summarily disinvited and/or removed from the investigation. Respondent deliberately and intentionally hid Fairchild's opinion memo to Commissioner Saltzman from Appellant. Even during this hearing, counsel for Respondent continued to want Fairchild's opinion memo hidden from Appellant and in surrebuttal called Rhys to testify that Fairchild was too busy to participate in the investigation. Either Fairchild or Rhys was lying. Appellant believes Rhys was lying. Fairchild's memo was provided by Modica's attorney to Appellant's attorney at the time Modica testified.

There was no recognition by Respondent or PPB that the investigation was fatally flawed because the investigators and decisionmakers lacked cultural awareness regarding equity, diversity and inclusion. There is an undercurrent of discrimination and an undercurrent that "white" folk know best and what's best for people of color involved in this case. None of the "white" investigators or decisionmakers took a step back and asked themselves, or asked those giving advice and reviewing the case, to consider this case from the perspective someone of color who has historically suffered racism, skin color prejudice, and discrimination.

Modica addressed salient discrimination cultural awareness points about this investigation in his testimony. Critical facts that were unknown to Appellant at the time he received discipline were disclosed by Modica in his testimony. Modica placed "context" around Weatheroy's question: that Weatheroy was

pregnant; the father was not African American; and Weatheroy may have been searching for input from someone who might have a different perspective.

Numerous City witnesses contradicted each other or had inconsistent testimony. Woods testified that neither Smith nor Leloff reported Weatheroy's comments to him and he knew nothing about the issue until Mattys' formal complaint, and that O'Dea was the first person to bring the conflict to his attention. Marshman testified he notified Woods about what Mattys was reporting to him. Woods' testimony is inconsistent with the testimony of Leloff, Marshman and Strayhan. We do not know who is telling the truth, who knew what, and when each person knew about this issue, because the investigation was not full, fair and complete and failed to adequately ascertain these necessary facts and establish this basic information.

It is axiomatic that involved witnesses cannot be involved in an investigation other than as a witness – not as a decisionmaker or adviser to the decisionmaker. Multiple times, Woods did not recuse himself nor disclose that he was an involved witness and had a conflict.

Woods contradicted Appellant's position that a potential HRAR 2.02 violation must be reported. According to Woods, Appellant's suggestion for Mattys to gain context about Weatheroy's question was an acceptable low-level option of how to handle the issue.

The investigators ignored a fundamental flaw identified by Mortimer. That is that BHR representatives and investigators apparently did not believe that each individual statement made by Weatheroy to Mattys was a HRAR 2.02 violation. It was normal for Appellant to talk about race with members of PPB. He represented PPB on numerous groups related to equity and diversity; so did Weatheroy; so their conversations were often explorations about race, diversity and equity. Like many of the witnesses and decisionmakers who believed the question about marrying a white man was not a rule violation, Appellant did not believe his lunch chat with Mattys required any action. Like many of the witnesses that understood there needed to be context to ascertain whether there was a violation, as a result of his personal knowledge and interactions with both Mattys and Weatheroy, Appellant was concrete that he had no obligation to report. Through the investigation, appeal, and hearing, Appellant does not believe that Weatheroy's question was a "potential" violation or any violation of any PPB directive and/or HRAR. He consistently stated that it did not, at the time of the lunch chat, resonate with him that the question was a violation of HRAR 2.02.

The City and PPB regularly and routinely denied Appellant access to information, depriving him of procedural and/or substantive due process. After an investigation that lasted more than 17 months, when

Respondent finally reached a conclusion, Appellant attempted to be responsive and provide exculpatory and/or mitigating information. Respondent made it impossible for Appellant to prepare and respond to any charges because it deliberately and intentionally refused to provide the entire investigation. Instead, it gave him 614 pages of heavily redacted material that made it impractical and impossible to address the findings because there was no context for anything concluded as to Appellant.

Context was critical to understand what happened and why things were said and done. Marshman addressed context when he explained that his conclusions and recommendation was based on a review of all the materials, including the Modica, Weatheroy and O'Dea investigations. Marshman was not aware, and was surprised to learn, that Appellant was provided a heavily redacted version of the investigation.

Context and an understanding of the entirety of conversations, relationships, and interactions was important to the decisionmakers, all of whom saw the entire investigation before and when making decisions. Respondent deliberately and intentionally impeded Appellant's ability to prepare to respond to the sustained allegation, and impeded his ability to provide information about context or history or anything because he was not provided with information about what the other involved members said about the relationship issues among them. There was no interview of Mattys about her lunch with Appellant.

At hearing, King finally understood there was no way for Appellant to be responsive at the due process meeting because he was not provided an unredacted copy of the investigation. He acknowledged it was critical for Appellant to be able to review the contents of the investigative file for the due process meeting and for the PRB. He was surprised that only a heavily-redacted file was provided before the PRB and/or the due process meeting.

The 614 pages provided to Appellant were so heavily redacted that it was impossible for him to prepare to respond in any meaningful way to any sustained allegation. It is now readily apparent that there were numerous failings, that evidence was ignored, and that evidence and materials were deliberately hidden. Had this information been available to Appellant and his legal counsel, Appellant would have been able to provide salient information to the PRB and/or decisionmakers that may have changed the outcome of this case early on. Instead, Appellant appealed this matter seeking reversal of the decision.

In the executive summary, the investigators subjectively wrote their perceptions of the investigation and subjectively distilled the 614 pages of investigation into 40 pages. Mortimer knew and understood this case was all about context and that the City's own rules and training related to HRAR 2.02. Mortimer believed the

investigators' conclusions were inconsistent and failed to account for context. She raised these inconsistencies on multiple occasions because she was concerned that all 614 pages of the investigation needed to be read by all PRB members and all decisionmakers to get the full context and understanding of this investigation. She wrote two memoranda to memorialize her concerns. Like Marshman and King, she understood that context and the entire investigative file needed to be read, reviewed and assessed to understand the context of the case. When she was shown the redacted file, she testified she would not have gone into the PRB having only had access to a redacted file of that nature.

More than 17 months elapsed between the initiation of the investigation to the due process meeting. From 2015, when the lunch chat occurred, until the actual imposition of discipline in November 2017, there was a parade of Police Chiefs and constant change of ultimate decision makers influencing the investigation. This had an impact on Appellant because, as King explained, when Outlaw was anticipated to start on October 1, there was a sudden rush and need to resolve this outstanding case. Although Appellant had been in limbo and waiting to be responsive for close to a year and a half, once Respondent deemed that the investigation was concluded, it unilaterally and deliberately set the due process meeting with King on a date that it knew Appellant would not have his attorney present.

Respondent had clear warning and advance notice that Makler would be unavailable for certain dates in September while Makler was in Europe visiting his daughter. All of a sudden, after 17 months of investigation, Respondent deemed it imperative to get the due process meeting done before Outlaw took office. It is likely this rush was out of concern that the investigation was known to be flawed, and that issues raised by Appellant's attorney at the due process meeting would have necessitated further investigation (i.e., an interview of Mattys specifically about her lunch chat with Appellant). Instead, the rush to get the due process meeting done without Appellant's attorney present deprived Appellant of due process and the ability to have a trained legal professional, who was intimately aware of and involved in the case, present exculpatory information, mitigation information, and/or legal issues with the investigation.

After a 17-month investigation and a forced pre-disciplinary hearing at which Appellant was without his legal counsel, Respondent expeditiously imposed discipline on Appellant on September 29, two days before Chief Outlaw took office. Since both procedural and substantive due process violations occurred, the discipline is without cause, was unlawful, and should be reversed.

Appellant's history experience and professional training were ignored, and he was treated unfairly, disparately and more harshly. He has a longstanding, professional, and extensive resume and history with diversity and equity. Even during the investigation he continued to perform at a high level and act as a consummate professional PPB member. He has no prior discipline, and there was no evidence that an economic suspension or any discipline was warranted to correct his behavior. King found the lack of prior discipline to be significant.

Multiple members of PPB and BHR did not believe the single isolated question from Weatheroy violated any directive or rule. The training in HRAR 2.02 is inconsistent and at odds with the findings. The lack of meaningful consistent training should not result in money being taken out of Appellant's pocket.

An economic suspension for an alleged violation from an innocuous lunch conversation between friends who have a sibling-type relationship is disparate treatment and harsh. No evidence of such treatment of PPB employees exists. Leloff, Modica, O'Dea, Marshman, Strayhan, Woods, and Smith were aware of the relationship issues between Mattys and Weatheroy, and were apparently aware of the "white man" question. None of them received economic discipline for failing to report this question. The 2-day suspension of Appellant was disparate treatment.

Nothing in policies or practice distinguishes penalties for types of statements that constitute a violation of HRAR 202. Respondent's case is built on a false foundation, that Appellant is more culpable because he was the Professional Standards Captain. The focus on his status is unfairly result-oriented, at the expense of focusing on the actual conduct. There was no evidence that Appellant's interaction with Mattys during their routine social lunch led to an actual violation of HRAR 2.02. An enhanced penalty for being the Professional Standards Captain is not justified when the underlying facts and conversation were not proven to constitute a policy violation.

If arguendo the Hearings Officer finds that Appellant violated Directive 330.00, the penalty is still disparate and an economic suspension is unfair considering the lack of progressive discipline. At best, this was the first time Appellant has been subject to an investigation for failing to follow a directive/rule related to HRAR 2.02. At best there is no clear evidence that just being asked "why did you marry a white man," in and of itself, without context, is even a violation of HRAR 2.02. Appellant received no discipline in the past for any types of incidents or conduct the same, similar or even close to these types of allegations.

Oral warnings signify that progressive discipline has begun. A proper warning advises the offender that future conduct of a similar nature will result in more severe discipline. Multiple arbitration decisions demonstrate this principle. Respondent did not prove that Appellant received disciplinary sanctions or warnings for any prior conduct that would support an economic discipline being imposed. Respondent went from zero to sixty and unreasonably imposed economic discipline without good cause, reasonable cause, just cause or any cause, and without any progressive discipline. This was unfair.

Respondent alleged that Appellant had been trained, and knew or should have known, that the "white man" question violated Directive 330.00 and by extension HRAR 2.02. However, Respondent failed to prove that it had any meaningful and ongoing training regarding the definition of a HRAR 2.02 violation, especially in the context of other training such as "Courageous Conversations" training. The "Courageous Conversations" training is intermittent and covers various aspects of HRAR 2.02, but there has been little to no focus on identifying when, where and how a courageous conversation is converted to and/or identified as a violation of HRAR 2.02. The conclusion is that the violation is in the "eye of the beholder" and we will all be able to know it when we see it. The fact that, in hindsight, the Police Chief or others might be able to deem an innocuous lunch conversation between friends who work at PPB and who have long had a sibling-type of relationship is an insufficient basis for discipline.

The City did not have reasonable cause, good cause just cause or any cause to impose a 2-day suspension. Appellant requests an Award and Order that rescinds and reverses the 2-day suspension, orders full back pay, and orders the purging of any and all materials in the possession of the City or any City agents not consistent with the order.

ANALYSIS

PRELIMINARY MATTERS

The issue before the Board, and therefore before me as Hearings Officer, is whether the discipline was "for a political or religious reason, was not for cause or was not made in good faith for the purpose of improving the public service." Respondent bears the burden of proof. The Board applies the "reasonable employer" standard. To apply that standard, the Board must first determine whether the employee's conduct warranted discipline; if so, it must determine whether the discipline imposed for the offense was objectively reasonable. HRAR 3.15 incorporates a lengthy discussion of the concept of "for cause" in which it relies on generally-accepted principles of just cause articulated by labor arbitrators, ERB, courts, and learned treatises.

The record in this case consists of many exhibits, often lengthy and sometimes a bit convoluted (as is particularly the case with the email strings in evidence). Of necessity, this Report has not set out in full detail the voluminous exhibits and three-day hearing transcript. Instead, I have focused on untangling the more convoluted exhibits and highlighting the most significant points in the testimony and exhibits.

The scope of this appeal does not include whether Weatheroy asked the question that Mattys attributed to her or, if she asked it, whether that question violated HRAR 2.02. Further, although counsel for Appellant disputes whether Appellant's lunchtime conversation with Mattys violated HRAR 2.02 or Directive 330.00 or was, instead, a "courageous conversation," that lunchtime discussion was not the allegation that was sustained here. The only allegation against Appellant is that he failed to report the remarks that Mattys described at lunch so an investigation could ensue regarding whether those alleged remarks violated HRAR 2.02 or Directive 330.00. The focus of this case thus is on what Appellant did after lunch.

DUE PROCESS

Appellant has asserted several due process concerns. Due process consists of a number of related principles, including notice of the behavior expected and the consequences of not meeting those expectations; a fair investigation; an opportunity to respond to the charges; and even-handed enforcement of rules of conduct.

An employer may demonstrate notice of prohibited conduct in multiple ways. It may show that employees as a group received notice from promulgated rules and policies of a work rule which is reasonable, consistently applied, and enforced, and widely disseminated; that the charged employee received specific notice from other sources; or that the conduct, while not expressly covered by any rules, policies, or specific notice, so violated common workplace standards that any employee in that position should have known it was prohibited.[5] It is of no moment whether the Board would consider particular conduct unacceptable, or whether it is good practice to prohibit it. Rather, the inquiry is whether an employer has set a standard that makes it unacceptable in this workplace. To set such a standard, employees must have notice of prohibited conduct, the distinguishing factors between permissible and impermissible conduct must be consistent and predictable, and rules of behavior must be enforced reasonably and even-handedly.

A meaningful opportunity to respond to allegations of misconduct is a vital element of due process. Allowing the employee to review the evidence and respond discourages jumping to conclusions based on partial

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[5] Familiar examples include workplace violence and stealing from one's employer.

knowledge. Further, the reason behind even established misconduct inevitably relates to the gravity of the misconduct, and therefore to the appropriate corrective action. Learning the employee's side of the story, even where fault exists, allows the employer to tailor corrective measures. It also makes it more likely that evidence bearing on the employee's justifications will be collected while it is fresh. Moreover, hearing the employee's side of the story permits management to measure the proposed penalty against the offense in light of all relevant circumstances, and to consider what response will best address the misconduct.

Appellant takes issue with multiple elements of the investigation. It can safely be said that there is no such thing as a perfect investigation. To have a reasonable and fair investigation, the investigator must ensure that as much relevant evidence as reasonably possible is collected, and that the evidence is examined with a critical eye.

The decision not to interview Mattys about her lunchtime conversation with Appellant was not unreasonable given Appellant's frank admissions in his interviews that Mattys had told him of the alleged "white man" question and that he had not reported it but had suggested she ask Weatheroy what she meant. At the hearing before me, more than two years after her lunchtime discussion with Appellant, Mattys was uncertain whether she had already told Modica about the "white man" question, and whether she told Appellant that she had reported it to Modica. Appellant did not suggest in his interviews that the reason he did not report Mattys' concerns was that he understood she had already reported them to higher officials. Instead, he asserted a desire to get the context of the alleged "white man" question. Respondent's view is that such an inquiry was BHR's role, not Appellant's. There is room for debate regarding whether that view takes into account Appellant's responsibilities as the IA Captain, but that is not the issue in considering the due process objection. I recommend a finding that the lack of a fourth interview with Mattys specifically about Appellant had no substantive impact on the conclusion reached.

The investigators did not highlight the differing accounts of when various BHR personnel first learned of the alleged "white man" question. Such differences would have been of more significance had the investigation occurred closer in time to when Mattys first began talking about that alleged question to various co-workers, supervisors, and managers. Given the passage of time, and the well known impact of time on memory, I recommend a finding that the investigators did as well as could reasonably be expected in juggling the stories.

Turning to the allegation that Woods should have been recused from the PRB and due process meetings because of an alleged conflict of interest, Woods was a BHR employee, not a PPB supervisor or

manager with a duty to report to BHR. Woods was not a decision maker, nor even a voting member of the PRB. He advised the PRB and King on BHR procedures. That limited participation did not conflict with any role he would have taken as a BHR employee in receiving reports of possible HRAR violations or advising supervisors or managers who sought advice on that subject.

A significant due process objection is that the "Courageous Conversations" training encouraged employees to engage in conversations about race and other protected status that might otherwise be reportable under HRAR 2.02, and thus left Appellant without notice that the alleged "white man" question involved a possible HRAR 2.0 or Directive 330.00 violation that must be reported. The PRB acknowledged the lack of clarity and recommended the development of further guidance on the boundary between a courageous conversation and a potential HRAR 2.02 violation. It did not, however, circle back to whether the need for that guidance undercut the clarity of the notice of expectations that it found Appellant had not met. The record is devoid of training materials, guidelines, or even an agreed-upon articulation of what qualified as a courageous conversation and what did not. Even if courageous conversations required certain preconditions that were not present with Weatheroy and Mattys, no evidence exists that employees received training on those preconditions. Respondent bears the burden of showing that Appellant was on clear notice of the requirement to report comments like the "white man" question. In view of the contemporaneous potentially-conflicting encouragement of "courageous conversations," I recommend a finding that Respondent has not shown that Appellant had clear notice of the reporting expectations in this regard.

Turning to the issues raised with the redacted file, an essential element of due process is the ability to see and respond to the evidence before a final disciplinary decision is made. It is unknown when Mattys provided her interview transcripts and the list of sustained findings to Makler's investigator. An estimate of approximately a year and a half before hearing in this matter places it in the vicinity of the due process meeting, but possibly not in time for the PRB. In any event, Mattys' transcripts, even coupled with a summary of the findings, would not come close to filling in the blanks in this investigative file. Wagenknecht, Marshman, and King all reviewed and relied on the entire investigative file in making their recommendations/decisions. King's testimony raised the possibility that Appellant should have had, for example, the O'Dea materials, to make his response. Respondent did not suggest that Appellant accept limitations on dissemination of the investigative materials beyond a "need to know" as the price for an unredacted or less-redacted investigative file, nor is there any indication that Respondent considered applying the exceptions in 2017 ORS 192.345 or 2017 ORS

181A.830 that were used to provide a full file for this hearing subject to a protective order. I recommend a finding that the extensive redactions denied Appellant denied a reasonable opportunity to review the pertinent materials underlying the allegation against him.

In making this recommendation, I do not suggest that no redaction is appropriate in a case involving multiple involved employees. It is possible for evidence regarding one employee to be so unrelated to the allegations against another employee that being deprived of that evidence does not hamper a response to the charges. In this case, however, one allegation against Modica and O'Dea was identical to that against Appellant, and their explanations overlapped Appellant's. Where Respondent considers redactions appropriate, I recommend that it consider whether other steps, such as a protective order, can serve the same purpose.

Turning to the question of whether Appellant had a reasonable opportunity to respond to the allegations in the due process meeting, the record is thin on Respondent's efforts to set up the due process meeting. Makler initiated efforts to set up a due process meeting on July 10, and continued with those efforts through numerous offers of dates, retracted offers of dates, a date that was scheduled and then preempted by another meeting, and more offers and counter-offers of dates. There was no apparent sense of urgency on Respondent's part to firm up a date. On the contrary, several days passed between some of Makler's requests for a meeting date and Respondent's responses.

At no point in the scheduling process did Respondent articulate a reason for the sudden urgency between September 18 and 20 to schedule the due process meeting on September 22. Bechthold offered to put off the meeting for a week to permit Appellant to secure other counsel. This offer tends to undercut the alleged urgency to hold the due process hearing on such short notice. A due process meeting held a week later would have made a decision unlikely before October 1; King barely met that deadline with over a week to review the file and the limited events at the due process meeting. Marshman was unaware of any directive to complete all the pending discipline before October 1, and King was unsure whether all the pending discipline cases were concluded before October 1.

The last-minute rush to the due process meeting over Makler's objection left Appellant with no legal representation and little opportunity to prepare a response with his attorney out of the country. The constitutional right to an attorney has not been extended to hearings involving public employees with a property interest in their jobs. Rather, the constitutional protection has been to have notice of the proposed discipline and the reasons for it; a copy of the underlying materials; and a reasonable opportunity to respond before final

discipline is determined. Part of industrial due process for represented employees additionally includes the right to Union representation, if requested by the employee. Appellant holds an unrepresented position, and thus had no contractual rights to representation.

Although no constitutional right was implicated, due process is not an empty procedural shell. In this case, after being represented by Makler at earlier stages, including a lengthy and vigorous defense before the PRB, Appellant learned the scheduled date of his due process meeting only two days beforehand. He and Makler also learned literally as Makler was leaving the country that Respondent would not delay the due process meeting for the two weeks that Makler requested. This was Appellant's first discipline. No evidence exists that he or Makerl had notice of the three elements that King testified were his primary focus, and no evidence exists that Appellant received any other information about what he could or should present. No reason exists to believe that Appellant had the advocacy skills to present a defense of the complexity that Makler had presented at length before the PRB, or knew the kind of information that King would seek. In these circumstances, Appellant had no reasonable opportunity to prepare a written or oral response for the due process meeting.

For all the above reasons, I recommend a finding that Appellant was deprived of due process through the lack of notice of the line between a courageous conversation that was to be encouraged and a potential HRAR 2.02 violation that must be reported; through the extent of the redactions in the copy of the investigative file he received; and through the lack of a reasonable opportunity to prepare a response to the allegations at the due process meeting.

THE MERITS

Adoption of the recommendations above regarding due process violations would call for reversal of the discipline and make it unnecessary to consider whether Respondent proved the alleged misconduct. This is a Report and Recommendation; the Board will determine whether to accept or reject it. I therefore will address whether Respondent proved the alleged misconduct, as well as the level of discipline imposed.

PROOF OF MISCONDUCT

The expectation that supervisors and managers will report possible violations under HRAR 2.02 is somewhat analogous to the child/elder abuse reporting obligations of, inter alia, attorneys and public safety employees. The obligation is not to investigate whether an actual violation occurred; it is to report information suggesting a possible violation so that the matter can be investigated by persons with subject matter expertise – in the case of child/elder abuse, by personnel in the Department of Human Services; in the case of HRAR

2.02, by BHR personnel. The question, then, is whether Appellant knew, or should have known, that the alleged "white man" question was a possible violation of HRAR 2.02.

It was a judgment call whether the alleged question was a possible HRAR 2.02 violation. Appellant was not alone in thinking it was not. Mattys complained to both Modica and Chief O'Dea; neither initially viewed her complaint as a complaint of a possible HRAR 2.02 violation. Leloff was concerned enough when she complained to him to seek advice from the BHR, but the advice he got, based on what Mattys had told him, was that the alleged "white man" question and a second alleged comment were not HRAR 2.02 violations. No evidence exists that BHR opened an investigation in response to Leloff's report.

Respondent sustained the identical allegation against Modica and O'Dea, as well as other allegations applicable solely to them. The consistency of Appellant's approach with that of those superiors is of little assistance to his appeal because Respondent was also consistent in its analysis of the reporting obligation. The advice that Leloff received from BHR is more pertinent, although it is notable that he got that advice by doing what Respondent charges that Appellant should have done – he reported the alleged comments to BHR and sought their advice. That advice does, however, suggest that it was not entirely unreasonable for Appellant to miss the possibility of a HRAR 2.02 violation, particularly given his familiarity with both participants.

As Equity Manager, Weatheroy routinely inquired into sensitive racial matters with others, including with Appellant. Rather than view those inquiries as intrusive or potentially violative of HRAR 2.02, Appellant viewed them as opportunities for education on cultural differences. The alleged "white man" question of Mattys was similar to the inquiries he had welcomed. The recent encouragement of "courageous conversations" provided another reason why this inquiry would not necessarily jump out as a potential HRAR 2.02 violation. Unlike Modica and O'Dea, Appellant was unaware of the other alleged racially-tinged comments that did not fit as easily in the "courageous conversations" mold. On this record, I recommend a finding that Appellant did not know, and cannot reasonably be expected to have known, that this single question would require a report to BHR of a possible HRAR 2.02 violation. I therefore recommend a finding that the allegation is "not sustained" and that the Board should find that no cause existed for discipline.

LEVEL OF DISCIPLINE

Under well-established just cause principles, a disciplinary decision must take into account such factors as the employee's record and attitude toward the misconduct, the likelihood of recurrence, the actual and potential effect of the misconduct, and mitigating circumstances. The Board should not second-guess the level

of discipline merely because it would have imposed different discipline. So long as the discipline is within the range of discipline proportionate to the proven offense considering all the circumstances, that discipline must stand. However, if the discipline falls outside that range, or if the offense proven is less serious than the offense charged, then adjustment of the discipline is appropriate. Of course, if no offense is proven, then no discipline is appropriate.

It is unknown what level of violation on the discipline guide the PRB members, Marshman, or King would have found had they addressed consistency of Appellant's approach with that of his superiors and the BHR representatives that Leloff consulted. As it was, there was some disagreement among the PRB members about the appropriate level of discipline, or even which category fit the sustained allegation. Mortimer believed it was a much lower-level Category B violation, necessitating only a letter of reprimand, while the other four felt it was a Category E violation worth of a five-day suspension. Only Mortimer articulated the inherent conflict in the City's equity efforts toward "courageous conversations" and strict adherence to HRAR 2.02.

Marshman and King both agreed that the sustained allegation was a Category E violation, and that mitigating factors warranted mitigating the presumptive discipline to a two-day suspension. If the Board rejects my recommended findings as to due process and the merits, then there would be no basis for second-guessing that judgment, and the two-day suspension would be within the range of reasonable disciplinary responses for the sustained violation.

However, if the Board adopts my recommended findings as to due process and the merits, no just cause existed for any discipline. In that event, I recommend that the Board find that the allegation against Appellant is "not sustained," and order Respondent to rescind the two-day suspension and make Appellant whole for any losses occasioned by that suspension, including back pay and fringe benefits, less deduction for unemployment insurance and interim earnings, if any, as provided in the Post Hearing Remedies provisions of HRAR 3.15.

Appellant requests further that the Board order "the purging of any and all materials in the possession of the City or any City agents not consistent with the order." Respondent did not address the appropriate remedy in this case. Purging of files is not mentioned as one of the Post Hearing Remedies in HRAR 3.15. I recommend an order that Respondent be ordered to amend Appellant's personnel record and other records in the City's possession to reflect that the allegation was "not sustained."

Accordingly, as the Hearings Officer, I issue the following:

REPORT AND RECOMMENDATION

1. It is recommended that the Board find that Appellant was deprived of due process through the lack of notice of the line between a courageous conversation that was to be encouraged and a potential HRAR 2.02 violation that must be reported; through the extent of the redactions in the copy of the investigative file he received; and through the lack of a reasonable opportunity to prepare a response to the allegations at the due process meeting.

2. It is recommended that, if the Board reaches the merits, it find that Appellant did not know, and cannot reasonably be expected to have known, that the single question allegedly made by Weatheroy would require a report to BHR of a possible HRAR 2.02 violation. I therefore recommend a finding that the allegation is "not sustained" and that the Board should find that no cause existed for discipline.

3. It is recommended that, if the Board sustains the allegation against Appellant, it should affirm the two-day suspension imposed; if the Board adopts the recommended findings 1 and/or 2, above, it should find that no just cause existed for discipline.

4. If the Board adopts the recommended findings 1 and/or 2, above, I recommend that the Board find that the allegation is "not sustained," and order Respondent to make Appellant be made whole for the losses occasioned by his two-day suspension, including back pay and fringe benefits. I further recommend an order that Respondent be ordered to amend Appellant's personnel record and other records in the City's possession to reflect that the allegation was "not sustained."

LUELLA E. NELSON - Hearings Officer