In the Matter of the Arbitration Between: CITY OF SOMEWHERE -and- UNION	OPINION AND AWARD Re: Discharge of Stephen CARR Mistreatment of Prisoner

The undersigned, Barry C. Brown, was mutually selected by the parties under the auspices of the American Arbitration Association to render an Opinion and Award in its case no. 54 39.
Hearing was held in the City Hall in SOMEWHERE, Michigan on May 2, 1977
Briefs were exchanged on June 6, 1977 and thereafter the record was closed.

APPEARANCES

For the Union	For the
Business Representative Steward Alternate Steward Stephen CARR, Grievant	Attorney Director of Public Safety Sergeant Jack CANN, Witness Bruce TOPP, Witness

ISSUE:

Did the City have just cause to discharge Stephen CARR on November 29, 1976 for his conduct in connection with the arrest of a C. TEA made on November 18, 1976?

PERTINENT CONTRACT PROVISIONS:

The following is taken from the Agreement between the City of SOMEWHERE, Michigan and Local Union.

ARTICLE VIII Discharge or Suspension

Section 1. The Employer shall not discharge or suspend any employee without just cause, but in respect to discharge or suspension, shall give at least three (3) progressive warning notices of the complaint against such employee to the employee, in writing, and a copy of the same to the Union and Steward, except that no warning notice need by given to an employee before he is discharged if the cause of such discharge is dishonesty or drunkenness or malfeasance while on duty. The warning notice as herein provided shall not remain in effect for a period of more than nine (9) months from the date of said warning notice and shall not thereafter serve as a basis for initiating disciplinary action. Discharge must be by proper written notice to the employee and the Union. Any employee may request an investigation as to his discharge or suspension. Should such investigation prove that an injustice has been done an employee, the employee shall be reinstated and compensated at his usual rate of pay for the period he was out of work. A request by an employee for an investigation as to his discharge or suspension must be made by written request within five (5) calendar days from the date of discharge or suspension. Appeal from discharge or suspension must be heard within ten (10) calendar days and decision reached within fifteen (15) calendar days from the date of discharge or suspension. If no decision has been rendered within fifteen (15) calendar days, the case shall then be taken up as provided for in Article IX hereof.

Section 2. Reports: Reports of all officers shall be complete and specific in matters related to their performance of duty and shall be provided in as timely fashion as the supervisor or police administration reasonably requires. An officer shall have the right to consult with his steward if he has reason to believe that criminal or disciplinary charges may be preferred against him as a consequence of the information given. However, the process of consulting his steward shall not delay the provision of said report.

Section 3. Any officer ordered to give a subsequent statement or report by his supervisor except for clarification of a previous report which might result in criminal charges and/or disciplinary action against the officer, shall be advised of the nature of the alleged charge or inquiry involved. Departmental rules and regulations which relate to criminal charges will be treated as above.

The following is taken from the Departmental Rules and Regulations of the City of SOMEWHERE.

ARTICLE 10 PERSONAL CONDUCT

Individual Deportment

Section 11.1 The conduct of Departmental members shall be free from impropriety. Their personal behavior, both on and off duty, shall be such that at no time will it bring discredit to the City of SOMEWHERE Police Department.

OBEDIENCE TO LAW

Section 11.2 Members shall not knowingly violate any laws of the United States, the State of Michigan, or any ordinance of a local unit of government.

Courtesy

Section 11.5 Members shall be courteous in the performance of their duties. They shall refrain from using profane or insolent language regardless of provocation.

ARTICLE 12 OPERATIONAL RULES

Reporting Serious Crimes and Incidents

Section 13.2 Upon receipt of information regarding serious crimes of violence, disastrous fires and explosions, all fatal traffic accidents, serious accidents involving railways, aircraft, busses, and watercraft, known or threatened racial incidents, strikes, and labor disturbances, election disputes and other unusual and important incidents involving officers or the general public; the recipient officer shall notify the Director and his Command Officer immediately.

ARTICLE 13 ARREST AND CARE OF PRISONERS

Control and Treatment of Prisoners

Section 14.3 Officers shall be responsible for the treatment and control accorded prisoners in their custody. Visible cuts, bruises or other apparent injuries suffered by any person arrested or of whom they have custody shall be reported in writing to their Commanding Officer. Officers shall exert only such force as may be necessary to overcome resistance to a lawful arrest and to maintain proper custody of a prisoner.

ARTICLE 18 DISCIPLINARY OFFENSES

Summary of Actions Subject to Discipline

Section 18.8 Conduct on or off duty that shall be prejudicial to the reputation and good name of the Department.

STATEMENT OF FACTS:

On November 18, 1976 the grievant, patrolman CARR, and Deputy Sheriff Tom BOAT drove from the SOMEWHERE City Hall toward the "Dutch Uncle" Restaurant. As they drove near the "Hut" Bar they heard people shouting and when they approached they saw a young man who appeared to be fighting with another person. That young man tried to leave the scene but Deputy BOAT stopped him, identified himself as a police officer and told him to come over to the police car. The young man, Charles TEA, came to the car but he was staggering and seemed very intoxicated. Patrolman CARR, the grievant in this matter, had been talking to the bartender and others at the bar when TEA came up to the car. CARR had learned that another patron of the bar had been cut on the throat during a fight which had involved the suspect, TEA.

The grievant thereupon arrested TEA for being drunk and disorderly. BOAT and CARR then had TEA put his hands on the car while the "patted" him down to be sure he was not carrying any weapons. Then TEA turned and said: "Cops, big deal" and shoved the patrolman BOAT who partially fell. He then also shoved patrolman CARR. The patrolmen got him under control, put handcuffs on the subject and put him in the back seat of the patrol car.

The patrolmen then continued their investigation at the bar. They learned from the sister of the man who was cut that there was another young man with TEA who made the assault. The patrolmen then searched the streets and in the college area for the other suspect but could not locate him. They then drove TEA to the police station at the City Hall.

There is no jail or lock up in the City Hall. When the grievant brought TEA in he was taken into a back room and he was handcuffed between the legs of the chair. This caused him to sit in a very bent down position so that his arms could pass on each side of the chair and be attached underneath. Then officer CARR interrogated TEA. The grievant's principal objective in the interrogation was to learn the name of the other college student who had been involved in the bar fight earlier that night. TEA would not say who he was with. Periodically the grievant would leave TEA to talk with other officers, talk with other witnesses or to leave the building.

TEA admitted that he was very drunk on the night of November 18, 1976. He later said he had consumed five quarts of beer that evening. He was so intoxicated as a result that when he got in the police car he defecated in his pants. He also had some facial cuts and bruises when arrested. He looked as if he had been injured in a fight. A visitor in the city hall, a policeman from a nearby city, was asked by the grievant to watch TEA while he cleaned up his pants in the men's room. The visitor, TOPP, took off TEA's hand cuffs so that he could wash up. The grievant then cursed TEA and wouldn't let him wash up adequately in TOPP's presence. This witness also reported that TEA was polite and

non threatening in his conduct toward the grievant. However, another patrolman described TEA as belligerent and that he had a "cocky" attitude. When TEA was brought again to the back room the questioning resumed. Then the grievant abruptly pulled up TEA's head by his hair. He did it in a burst of temper while again cursing TEA. He then read the Miranda statement to TEA. He read it so fast that TEA did not understand what was being said. When TEA was again returned to the chair he was then handcuffed with his hands in his lap. The grievant threatened TEA's life if he tried to escape. There were other threats and strong language used against TEA by the grievant. Later TEA was handcuffed to a steam pipe in a hall area while the grievant talked to other witnesses. When the grievant moved TEA from one room to another he would do so roughly. Later that evening TEA was taken down to the county jail and incarcerated.

TEA was subsequently charged with assault on a police officer and with being drunk and disorderly. The judge subsequently issued an acquittal when the prosecutor entered a plea of Nolle Prosequi. The defense attorney, Jack CANN, had told the City that if TEA was prosecuted he would sue the City for the alleged mistreatment of TEA when he was arrested. TEA was killed in an auto accident three weeks before the arbitration hearing.

The arrest of TEA occurred on the night of Thursday, November 18, 1976. Soon thereafter Sergeant APPLE received a verbal complaint from Patrolman GRAPE regarding the arrest and the subsequent interrogation by the grievant. Thereupon Sergeant APPLE and Sergeant MANN conducted an internal investigation of the incident on Tuesday, November 23, 1976. After some but not all witnesses to

the events of that night had given statements the grievant was suspended. Other statements were taken by the Sergeants on November 23, 1976 and subsequently on November 24 they recommended "that some form of disciplinary action should be implemented against Patrolman Stephen CARR." On that same Tuesday, November 24, the grievant's Supervisor, John APPLE, issued five warning reports regarding his misconduct on November 18 as follows:

A) Use of force in interrogating a prisoner Violation of Department Rule Article 18, Section 18.9

B) Use of profane language in interrogating a prisoner Violation of Department Rule Article 11, Section 11.5

C) Threatening and intimidating a prisoner Violation of Department Rule Article 11, Section 11.2

D) Failure to notify command officer of serious crime Violation of Department Rule Article 13, Section 13.2

E) Bring discredit to Department Violation of Department Rule Article 11, Section 11.1

On Monday, November 29, 1976, the City Manager, Charles CLOCK, wrote to the grievant to say that the investigation regarding his treatment of TEA was complete. Mr. CLOCK said further that he had decided that Patrolman CARR's totality of action indicated that there was misfeasance and/or malfeasance on his part. Therefore he was discharged on November 29, 1976. The grievant first filed his grievance when he was suspended on November 24, 1977. The City Manager wrote the grievant on December 2, 1976, as follows:

> Dear Mr. CARR:
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> In reference to a grievance received from you on November 29, 1976 subject of which is the charges brought against you, to wit: Use of force in interrogating a prisoner; use of obscene and abusive language; threatening and intimidating; holding an illegal line-up; failure to notify supervisor; conduct unbecoming to an officer.

The position of this Office remains the same, and we will proceed in pressing these charges. "

Signed: Charles W. CLOCK

The illegal line-up charge was apparently later dropped. No criminal or civil charges were ever made against the grievant. The parties were unable to resolve this grievance and it is now before this arbitrator for disposition.

DISCUSSION:

The presentation of facts above is the arbitrator's determination of what took place on November 18, 1977. It is his conclusion that TEA was very drunk and somewhat mouthy and pushy when he was picked up. Later he sobered up a little and became more respectful as the seriousness of the situation came to him. Thus, TEA was not as orderly as TOPP described him nor was he as uncooperative as UNION STEWARD MIKE BEAR said he was.

Both TOPP and UNION STEWARD BEAR gave unreliable testimony. TOPP told three different versions of how the grievant struck and pulled the hair of TEA. Yet TEA and his attorney were very specific that his hair was pulled only once. No other testimony corroborated that of TOPP. UNION STEWARD BEAR's testimony was also not in line with what other witnesses said. He seemed to be protecting his brother officer.

No other witness heard the threat that officer GRAPE heard uttered by the grievant. Therefore, such threat is not considered a part of the facts in this case. It seems clear that GRAPE does not like the grievant and that at least some of his role in the discharge of grievant CARR was related to this dislike. As

TOPP wanted to be employed by GRAPE, this may account for his exaggerated and unreliable testimony.

In brief summary, the background to the offensive interrogation is: the grievant picked up a drunk college student who had been in a bar fight. Someone had been cut on the neck in the fight. The grievant was seen by the arresting officers in a fight in front of the bar. He was identified by the bartender as "one of them". He pushed the officers as he was arrested and he seemed belligerent then. He was so drunk that he moved his bowels in his pants. When in the patrol car and at the City Hall he would not name who else was involved in the bar fight.

In the interrogation the grievant is alleged to have used profane language and to have threatened and intimidated the prisoner. These actions were said to have brought discredit on the Department. While cumulatively all of these matters were said to be the basis for the discharge of the grievant the prime act of misconduct must have been the use of force.

The arbitrator is convinced that the grievant never did strike TEA. Further, from TEA's own testimony the grievant only once pulled his head back by the hair. This was done to look directly in TEA's face because he had just said something that sounded like a threat on the grievant's family. The rough movement from room to room and the handcuffing to chairs and pipes were not violence. Thus the only violence to the prisoner was the one incident of hair pulling. While this treatment of a prisoner is not acceptable, it is not the brutalizing of a prisoner intended to be covered by this sort of rule. Prisoners who are very drunk and who have just been in a fight may be treated somewhat roughly as they are brought

into the station. An arm up the back or a grip on the hair may be used to insure prisoner control. This prisoner had been unruly when arrested and he did apparently threaten the officer. The arbitrator therefore determines that though the grievant did not treat this prisoner properly he did not use violence on him sufficient to violate the work rules of the employer.

The grievant did use profane language. The vile and profane words used in a constant stream on the prisoner were far more than what might be common "shop" talk or acceptable on the college campus. Even though the words used were not uncommon to the ears of all who heard, they were used with such profusion and vehemence to be clearly objectionable. The tolerance or condonation of the employer of profanity by others could not shield the grievant from punishment for his conduct here. Possibly the years of exposure to Detroit street talk has warped the grievant's sense of propriety. There is no reason that a police officer should have to use that sort of language on a shackled prisoner. The grievant clearly violated this rule.

The grievant did threaten and intimidate the prisoner. The hair pulling, the unnecessary restraint while sitting in the chair, the bad language and the general treatment of the prisoner was one of intimidation. The use of the handcuffs to the chair and various pipes seemed only standard procedure to prevent escape. The grievant cannot explain his behavior by saying he was using the "good guy - bad guy" type of interrogation. One may use what ever approach needed to gain information as long a department rules are not broken in the process. It seems here that the grievant's intimidating methods were excessive and beyond the bounds of good judgment.

The catch all rule that was said to be broken requires that the patrolman not bring discredit to the department. It is true that the college, the prosecutors office, the legal community and others may have known of the TEA arrest and its negative aspects. But apparently many people relied upon the stories of GRAPE and TOPP. These stories have since been shown to be inaccurate and unreliable. Even though the grievant has been proven to have engaged in certain misconduct, it was not so great that he has brought discredit on the City's Police Department. These catch all rules will stand or fall as does the principal charge. In this case no "violence" was shown, therefore, no discredit was proven.

Regarding the Grievants alleged failure to properly report a serious crime, the arbitrator determines that the City did not substantiate this charge. Several patrolmen and the dispatcher were also involved in the Hut Bar incident. Another patrolman made the arrest of the actual felon who cut the person at the Hut Bar on November 18. The disturbance there was not a riot nor a civil disorder of such proportion to require a immediate reporting. The employer's witnesses said that wide discretion is allowed the patrolmen in reporting of such incidents. It is the Arbitrator's impression that this rule violation charge was a "throw in" with the other charges of prisoner abuse and that the City did not seriously press this alleged rule violation. The Arbitrator concludes that the Grievant did not violate the Employer's rule regarding the reporting of serious crimes.

The City argues that the Grievants malfeasant acts were sufficient in themselves to justify his discharge. The City did mention in passing in its argument that CARR had two "active" warnings on his

record. Thus, they said under the contract, it was appropriate for him to be discharged for even a lesser offence as this was his third warning. However, there is no evidence on the record of the nature of these warnings. Nothing is known of how long ago they were issued or how they might relate to this most recent incident of prisoner abuse. On the other hand, the record does show that the Grievant was a productive police officer and that he had received several commendations for his good work. One Sergeant testified that CARR was a good police officer. Another said that he was unfit to be a police officer because he became over-bearing in a uniform. It was brought out at the hearing that the Grievant had never before been proven to be abusive of prisoners though once before he was so accused. The Arbitrator must reject any unsupported statements that the Grievant is or was a alcoholic or psychotic. While great freedom is allowed in the presentation of evidence in arbitration proceedings, naked allegations of such serious matters made without documentation or professional diagnosis is simply not acceptable proof. In summary, the Grievant's past record is at least poor, if not bad; however, it has not been shown that his past record was such that a third warning for any reason should automatically justify his discharge.

In conclusion, three of the five reprimands issued against the Grievant on November 24, 1976, have been held by this Arbitrator to be not supportive of any discipline. The abusive language and the intimidation of the prisoner by Patrolman CARR on November 18, 1976 would collectively seem to violate the employer's work rule 14.4. Prisoners should not be mistreated, and police officers should be disciplined when they violate the employer's rules protecting the

prisoners. In this case, there was no real provocation of justification in the Grievant's language and intimidation of Prisoner TEA. For this misconduct, he should be punished. However, discharge is too severe a penalty under the circumstances.

Part of the City's case was based on defective evidence. As the two sergeants continued their investigation after the Grievant was suspended on November 23, 1976, they should have discovered that BOAT, TEA and CARR were all telling the same story and that their accounts differed materially from the one told by TOPP and GRAPE. With this further information, the City should have decided that an appropriate penalty for the Grievant was a long-term layoff. In the world of employment -- discharge is the death penalty. There is simply not enough here to support such a severe penalty for Patrolman CARR. More appropriate discipline would have been a layoff without pay of approximately 60 days duration. It is the judgment of the Arbitrator that a fair and impartial review of the record made by the sergeants should have resulted in allowing the Grievant to return to work February 1, 1977.

AWARD

The Grievant, Stephen CARR, was guilty of misconduct in mistreatment of a prisoner on November 18, 1976. However, the penalty of discharge was too severe under the circumstances. The appropriate penalty for Patrolman CARR should have been disciplinary layoff until February 1, 1977. The Grievant should therefore be reinstated with full seniority to his previous position. He should be made whole for any net loss wages suffered since February 1, 1977. In calculating back wages, the employer may take into account unemployment benefits and wages earned at another job.

DATED: July 5, 1977

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Barry C. Brown, Arbitrator

McGINTY, ROSEWARNE, HALVERSON,
BROWN & JAKUBIAK, P.C.

271 Woodland Pass, Suite 103
East Lansing, Michigan 48823
Telephone: (517) 351-0280