STATE OF NEW YORK
DISCIPLINARY GRIEVANCE ARBITRATION

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In the Matter of the Arbitration by and between

BUFFALO POLICE BENEVOLENT ASSOCIATION,
Employee Organization,

and

CITY OF BUFFALO,
BUFFALO POLICE DEPARTMENT,
Public Employer.

**OPINION**

**AND**

**AWARD**

Grievance No. IC#2019-060
Re: PO Joseph Hassett- Discipline

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BEFORE: Jeffrey M. Selchick, Esq.
Arbitrator

APPEARANCES:

For the PBA
Personius Melber, LLP
Rodney O. Personius, Esq.

For City of Buffalo, Buffalo Police Department
Timothy A. Ball, Corporation Counsel
John J. Hannibal IV, Esq., Assistant Corporation Counsel, II

In accordance with Article XII ("Discipline and Discharge") of the Collective Bargaining Agreement (hereinafter "Agreement") (Joint Exhibit 1) and the Disciplinary MOA (Joint Exhibit 2) of the parties (hereinafter "PBA" and "City"), the undersigned serves as Arbitrator. Hearings were held on March 3 and March 12, 2020 in Buffalo, New York.

The parties were accorded a full and fair hearing including the opportunity to present evidence, examine witnesses, and make arguments in support of their respective positions. The parties filed post-hearing briefs, and the record was closed upon receipt of the briefs on or about May 27, 2020.

## ISSUES

The parties stipulated to the following issues to be determined by the Arbitrator:

1. Are the disciplinary charges dated 9/16/19 timely filed pursuant to the Agreement?

2. If so, was there just cause for the charges dated 9/16/19?

3. If so, what shall be the penalty?

4. If not, what shall be the remedy?

## RELEVANT PROVISIONS

Article XII (Discipline and Discharge) of the parties' Agreement reads in pertinent part:

> 12.3 Suspension Pending Determination of Charges: Penalties
>
> …
>
> (E) No removal or disciplinary proceeding shall be commenced more than one (1) year after the occurrence of the wrong-doing complained of or its discovery, if later. However, such limitation shall not apply where the wrong-doing complained of would, if proved in a court of appropriate jurisdiction, constitute a crime. (Joint Exhibit 1, 25).

Chapter 15: Discipline and Discharge of the parties MOP reads in pertinent part:

**1.0 DISCIPLINE – GENERALLY**

…

1.5 TIME LIMITATIONS

No disciplinary proceeding shall be commenced more than one year after the occurrence of the wrongdoing complained of or its discovery, if later. However, such limitation shall not apply where the wrongdoing complained of would, if proved in a court of appropriate jurisdiction, constituted a crime. (Joint Exhibit 3, Chapter 15-5).

**CHARGES DATED SEPTEMBER 16, 2019**

**Charge 1** … **violation of Chapter 1, Section 1.1 b) of the Rules and Regulations for the Government and Discipline of the City of Buffalo Police Department and Chapter 3, Section 3.5 of the Rules and Regulations for the Government and Discipline of the City of Buffalo Police Department.**

Specification 1 Police Officer Joseph Hassett did fail to obey all the Rules and Regulations, General Orders, and authoritative instructions of the Department as follows:

On April 17, 2019, Erie County District Attorney John Flynn drafted a letter to the Commissioner of the Buffalo Police Department, Byron Lockwood, stating the following: The Erie County District Attorney's Office, after a comprehensive review of Internal Affairs files and federal Grand Jury minutes relating to the conduct of the subject Officer, has found that the subject Officer's credibility is irremediable and therefore he will no longer be called upon as a witness in any pending

or future criminal action in accordance with Brady v Maryland, Giglio v. United States, People v. Geaslen, and CJI2d(NY)[Credibility of Witness].

On September 4, 2019 the Internal Affairs Division received a copy of Officer Hassett's May 2015 Grand Jury testimony[1] and a surveillance video relating to an arrest he made on September 9, 2014 at approximately 2330 hours in the vicinity of South Park Ave. and Louisiana St., both of which had previously been unknown and unavailable to the Department. After a thorough review of the Grand Jury minutes, surveillance video, related IAD cases, and arrest reports/documents prepared and/or sign by Officer Hassett, it has been found that Officer Hassett was untruthful regarding the factual circumstances of the arrest.

Specification 2 Police Officer Joseph Hassett did fail to obey all the Rules and Regulations, General Orders, and authoritative instructions of the Department as follows:

On April 17, 2019, Erie County District Attorney John Flynn drafted a letter to the Commissioner of the Buffalo Police Department, Byron Lockwood, stating the following: The Erie County District Attorney's Office, after a comprehensive review of Internal Affairs files and federal Grand Jury minutes relating to the conduct of the subject Officer, has found that the subject Officer's credibility is irremediable and therefore he will no longer be called upon as a witness in any pending or future criminal action in accordance with Brady v Maryland, Giglio v. United States, People v. Geaslen, and CJI2d(NY)[Credibility of Witness].

On September 4, 2019 the Internal Affairs Division received a copy of Officer Hassett's May

[1] The Grand Jury testimony was actually given by Grievant on January 7, 2016. (Joint Exhibit 19).

2015 Grand Jury testimony relating to an arrest he made on March 30, 2014, at approximately 0425 hours in the vicinity of Myrtle Ave. and S. Cedar St., which had previously been unknown and unavailable to the Department. After a thorough review of the Grand Jury minutes, related IAD cases, and arrest reports/documents prepared and/or sign by Officer Hassett, it has been found that Officer Hassett was untruthful regarding the factual circumstances of the arrest.

**By his actions, Police Officer Joseph Hassett failed to be truthful in speech and writing whether or not under oath.**

**Charge 2** **… violation of Chapter 1, Section 1.1 b) of the Rules and Regulations for the Government and Discipline of the City of Buffalo Police Department and Chapter 3, Section 3.13 of the Rules and Regulations for the Government and Discipline of the City of Buffalo Police Department.**

[The two specifications to the Charge are the same as Specifications 1 & 2 under Charge 1].

**By his actions, Police Officer Joseph Hassett failed to give testimony impartially, and without reservation, and with no desire or design to influence the result.**

**Charge 3** **… violation of Chapter 1, Section 1.1 b) of the Rules and Regulations for the Government and Discipline of the City of Buffalo Police Department and Chapter 6, Section 6.1 c) of the Rules and Regulations for the Government and Discipline of the City of Buffalo Police Department.**

[The two specifications to the Charge are the same as Specifications 1 & 2 under Charge 1].

**By his actions, Police Officer Joseph Hassett falsely submitted an official report on the records of the Department.**

**Charge 4** **… violation of Chapter 1, Section 1.1 b) of the Rules and Regulations for the Government and Discipline of the City of Buffalo Police Department and Chapter 3, Section 1.2, of the Manuel of Procedures of the City of Buffalo Police Department.**

[The two specifications to the Charge are the same as Specifications 1 & 2 under Charge 1].

**By his actions, Police Officer Joseph Hassett made an arrest without warrant for a violation not committed in his presence.**

**Charge 5** **… violation of Chapter 1, Section 1.1 b) of the Rules and Regulations for the Government and Discipline of the City of Buffalo Police Department and Chapter 15, Section 1.5, of the Manuel of Procedures of the City of Buffalo Police Department.**

[Specification 1 of this Charge contains the same language as Specification 1 under Charge 1 and has the additional allegation set forth next]

Officer Hassett's actions would constitute a violation of section 210.05 of the New York State Penal Law.

[Specification 2 of this Charge contains the same language as Specification 2 of Charge 1 and also contains the following allegation set forth next]

Officer Hassett's action would constitute a violation of section 210.05 of the New York State Penal Law.

Specification 3 Police Officer Joseph Hassett did fail to obey all the Rules and Regulations, General Orders, and

authoritative instructions of the Department as follows:

On April 17, 2019, Erie County District Attorney John Flynn drafted a letter to the Commissioner of the Buffalo Police Department, Byron Lockwood, stating the following: The Erie County District Attorney's Office, after a comprehensive review of Internal Affairs files and federal Grand Jury minutes relating to the conduct of the subject Officer, has found that the subject Officer's credibility is irremediable and therefore he will no longer be called upon as a witness in any pending or future criminal action in accordance with Brady v Maryland, Giglio v. United States, People v. Geaslen, and CJI2d(NY)[Credibility of Witness].

On September 4, 2019 the Internal Affairs Division received a copy of Officer Hassett's May 2015 Grand Jury testimony and a surveillance video relating to an arrest he made on September 9, 2014 at approximately 2330 hours in the vicinity of South Park Ave. and Louisiana St., both of which had previously been unknown and unavailable to the Department. After a thorough review of the Grand Jury minutes, surveillance video, related IAD cases, and arrest reports/documents prepared and/or sign by Officer Hassett, it has been found that Officer Hassett was untruthful regarding the factual circumstances of the arrest.

Officer Hassett's actions would constitute a violation of section 210.10 of the New York State Penal Law.

Specification 4 Police Officer Joseph Hassett did fail to obey all the Rules and Regulations, General Orders, and authoritative instructions of the Department as follows:

On April 17, 2019, Erie County District Attorney John Flynn drafted a letter to the Commissioner

of the Buffalo Police Department, Byron Lockwood, stating the following: The Erie County District Attorney's Office, after a comprehensive review of Internal Affairs files and federal Grand Jury minutes relating to the conduct of the subject Officer, has found that the subject Officer's credibility is irremediable and therefore he will no longer be called upon as a witness in any pending or future criminal action in accordance with Brady v Maryland, Giglio v. United States, People v. Geaslen, and CJI2d(NY)[Credibility of Witness].

On September 4, 2019 the Internal Affairs Division received a copy of Officer Hassett's May 2015 Grand Jury testimony relating to an arrest he made on March 30, 2014, at approximately 0425 hours in the vicinity of Myrtle Ave. and S. Cedar St., which had previously been unknown and unavailable to the Department. After a thorough review of the Grand Jury minutes, related IAD cases, and arrest reports/documents prepared and/or sign by Officer Hassett, it has been found that Officer Hassett was untruthful regarding the factual circumstances of the arrest.

Officer Hassett's actions would constitute a violation of section 210.10 of the New York State Penal Law.

Specification 5 Police Officer Joseph Hassett did fail to obey all the Rules and Regulations, General Orders, and authoritative instructions of the Department as follows:

On April 17, 2019, Erie County District Attorney John Flynn drafted a letter to the Commissioner of the Buffalo Police Department, Byron Lockwood, stating the following: The Erie County District Attorney's Office, after a comprehensive review of Internal Affairs files and federal Grand Jury minutes relating to the conduct of the subject Officer, has found that the subject Officer's credibility is irremediable and therefore he will no

longer be called upon as a witness in any pending or future criminal action in accordance with Brady v Maryland, Giglio v. United States, People v. Geaslen, and CJI2d(NY)[Credibility of Witness].

On September 4, 2019 the Internal Affairs Division received a copy of Officer Hassett's May 2015 Grand Jury testimony and a surveillance video relating to an arrest he made on September 9, 2014 at approximately 2330 hours in the vicinity of South Park Ave. and Louisiana St., both of which had previously been unknown and unavailable to the Department. After a thorough review of the Grand Jury minutes, surveillance video, related IAD cases, and arrest reports/documents prepared and/or sign by Officer Hassett, it has been found that Officer Hassett was untruthful regarding the factual circumstances of the arrest.

Officer Hassett's actions would constitute a violation of section 210.15 of the New York State Penal Law.

Specification 6 Police Officer Joseph Hassett did fail to obey all the Rules and Regulations, General Orders, and authoritative instructions of the Department as follows:

On April 17, 2019, Erie County District Attorney John Flynn drafted a letter to the Commissioner of the Buffalo Police Department, Byron Lockwood, stating the following: The Erie County District Attorney's Office, after a comprehensive review of Internal Affairs files and federal Grand Jury minutes relating to the conduct of the subject Officer, has found that the subject Officer's credibility is irremediable and therefore he will no longer be called upon as a witness in any pending or future criminal action in accordance with Brady v Maryland, Giglio v. United States, People v. Geaslen, and CJI2d(NY)[Credibility of Witness].

On September 4, 2019 the Internal Affairs Division received a copy of Officer Hassett's May 2015 Grand Jury testimony relating to an arrest he made on March 30, 2014, at approximately 0425 hours in the vicinity of Myrtle Ave. and S. Cedar St., which had previously been unknown and unavailable to the Department. After a thorough review of the Grand Jury minutes, related IAD cases, and arrest reports/documents prepared and/or sign by Officer Hassett, it has been found that Officer Hassett was untruthful regarding the factual circumstances of the arrest.

Officer Hassett's actions would constitute a violation of section 210.15 of the New York State Penal Law.

**Police Officer Joseph Hassett's actions if proved in an appropriate jurisdiction would constitute a crime.**

**Charge 6** **… violation of Chapter 1, Section 1 b) and Chapter III, Sections 3.2 (a) and/or 3.2(b) of the Rules and Regulations for the Government and Discipline of the City of Buffalo Police Department.**

[The two Specifications to this Charge contain the same allegations as Specifications 1 and 2 under Charge 1].

**By his actions and conduct Police Officer Joseph Hassett did conduct himself in such a manner so as to bring discredit and embarrassment upon the Department and which is prejudicial to the good order, discipline and reputation of the Buffalo Police Department.** (Joint Exhibit 14) (Emphasis in original).[2]

[2] The PBA filed an Answer to the Charges that denied all of the allegations and set forth eight separately numbered defenses. (Joint Exhibit 15).

## BACKGROUND FACTS

By letter dated April 17, 2019, John J. Flynn, the Erie County District Attorney, transmitted the following letter to the Commissioner of Police concerning "Buffalo Police Officer Joseph Hassett":

> In the course of preparing a response to defense motions, the District Attorney's Office has recently completed a comprehensive review of Internal Affairs files and federal Grand Jury minutes relating to the conduct of Officer Joseph Hassett. Based upon our review and analysis, we have concluded that due to irremediable problems of credibility, we will no longer call Officer Hassett as a witness in any pending or future criminal action in accordance with our obligations under *Brady v. Maryland,* 373 US 83 (1963), *Giglio v. United States*, 405 US 150 [1972], *People v. Geaslen*, 54 NY2d 510 (1981), and CJI2d(NY)[Credibility of Witnesses].
>
> Thank you for your courtesies in this matter. (Joint Exhibit 18).

The record indicates that this letter led to an investigation conducted by Lt. Andre Lloyd of the Buffalo Police Department's Internal Affairs Division ("IAD"). After completing his investigation, Lt. Lloyd drafted the Charges against Grievant that constitute the subject matter of this proceeding. As seen in the Charges, the allegations of misconduct against Grievant focus on his role in filing criminal charges against individuals in two different criminal actions: Keith Worthy and Samuel Figueroa. Before describing Lloyd's testimony regarding his investigation and his interpretation of events that led to his conclusion that the Charges in this proceeding should be lodged against the Grievant, it will be useful to identify the accusatory instruments signed by Grievant in both cases

and accompanying P-163s (Arrest Data Forms) for the cases.

As to Worthy, the record indicates that Grievant signed a "MISDEMEANOR/VIOLATION INFORMATION" on September 9, 2014 that charged Worthy with Criminal Trespass in the Third Degree under Section 140.10(a) and (e) of the New York Penal Law, Disorderly Conduct under Section 240.20(5) of the Penal Law, and Obstructing Governmental Administration in the Second Degree under Section 195.05 of the Penal Law. (Joint Exhibit 21). Further, the accusatory instrument charged Worthy with Vehicle & Traffic Law ("V&T") offenses of Unattended Vehicle and Invalid Insurance Card. (Id.).

The allegations set forth in the accusatory instrument read:

> The facts upon which this accusation is based are [x] of my own knowledge …
>
> 140.10-a, e Criminal Trespass in the Third Degree
>
> In that the defendant did knowingly remain upon property which is fenced or otherwise enclosed in a manner designed to exclude intruders, to wit, the fenced parking lot of the Perry Public Housing Projects at South Park and Louisiana, which is used as a Public Housing Project, in violation of conspicuously posted rules or regulations governing entry and use thereof, in that the defendant did stand outside of a 2006 Dodge, NY reg FRD9179 which was stopped at this location, said defendant having no right or authorization to be on this property which is clearly posted "No Trespassing." Officers did observe a 2006 Dodge, NY reg FRD9179 drive into the parking lot at South Park and Louisiana and did observe the above defendant, who was the driver of this vehicle, exit the vehicle, leaving the keys in the ignition and the motor running. Upon further investigation it was determined that the registration for this vehicle is expired and the inspection of this vehicle is also expired and that the defendant did not notify the Department of Motor Vehicles of his change of address and the defendant could not produce proof of insurance for this vehicle.

240.20-5 Disorderly Conduct.

In that the defendant, while at South Park and Louisiana, did intentionally cause and recklessly create a risk of public inconvenience, annoyance and alarm by blocking vehicular traffic at this location, a public place, in that the defendant did stand in the middle of this parking lot, outside of a 2006 Dodge, NY reg. FRD9179 which he had been driving, causing motorists to have to drive around him and around this vehicle and causing annoyance and alarm to several residents of the Perry Projects Public Housing Project at this location.

195.05 Obstructing Governmental Administration in the Second Degree

In that the defendant, while at South Park and Louisiana, did intentionally attempt to prevent a public servant from performing an official function by means of interference and physical force, in that the defendant did while at South Park and Louisiana, when officers were about to place him under arrest for Disorderly Conduct, refuse to cooperate with officers and would not remove his hands from his pockets after being told several times by officers to do so and when taken to officers patrol vehicle, when officers were about to conduct a pat down search for officers' safety and told defendant to place his hands on the vehicle, the defendant did refuse to do so and had to be physically restrained. (Id.)

An understanding of the allegations in the accusatory instrument, as they pertain to the Charges, requires some understanding of the geographical location of South Park Avenue and Louisiana Street in the City of Buffalo. This area is depicted in a Google Map and a smaller part of the area is depicted in a City of Buffalo Department of Assessment and Taxation Map. (Joint Exhibits 28, 34). The most complete testimonial description of the area was set forth in the testimony of PBA witness Lt. Lance Russo. Lt. Russo has been a member of the Police Department for approximately 25 years and for the past ten years was

assigned to the Housing Unit and is very familiar with the geographical area of South Park and Louisiana. (Tr. 428). In light of Lt. Russo's testimony, and focusing on the Google Map (Joint Exhibit 28), one can locate the Big Basha gas station at the northeast corner of the intersection of South Park and Louisiana. Immediately across Louisiana Street and thus running from South Park to Fulton Street, one finds part of the BMHA property known as the Perry Projects. Hence, both the Big Basha gas station and part of the BMHA property are located at South Park and Louisiana Street.

Another document connected to charges against Worthy was an "Arrest Data Form" or P-163 that listed Grievant as the arresting officer. (Joint Exhibit 22). According to the record evidence, the arresting officer typically prepares the P-163 and gives it to a report technician. Lt. Beyer who has been in the Department for approximately 11 and a half years, testified that, based upon his participation in over 1500 arrests, he was aware of the procedure for preparing charges against individuals who had been arrested. (Tr. 45-46). The procedure, according to Lt. Beyer, was that actual charges were prepared by a report technician who would use a template to list the elements of the charge and insert additional information specific to the charge that was gleaned from the P-163, or Arrest Data Form, supplied by the arresting officer. (Id. 48-50).

The P-163 for Worthy, under "Narrative," stated:

> While on routine patrol observed def operate NYReg 9179. Def left vehicle unattended in parking lot running. Def was asked for ID and to take hands from pockets. Def refused to following commands

> given by ofcs. Def was told he was under arrest taken to CB. Hands out of pockets. Hands on veh. (Id.).

The accusatory instrument connected to Figueroa was signed by Grievant on March 30, 2014. (Joint Exhibit 24).[3] Defendant Figueroa and two codefendants, Martinez and Guzman, were charged by Grievant with Criminal Trespass in the Third Degree and Harassment in the Second Degree. (Id.). The relevant portion of the accusatory instrument read:

> The facts upon which this accusation is based are [x] of my own knowledge …
>
> 140.10 & 20.00 – CRIMINAL TRESPASS IN THE THIRD DEGREE
>
> IN THAT THE DEFENDANTS, FIGUEROA, MARTINEZ AND GUZMAN, WHILE EACH BEING INTENTIONALLY AIDED BY OR WHILE AIDING THE OTHER, WHILE AT FAMOUS CORNERS BAR, DID KNOWINGLY ENTER AND REMAIN UNLAWFULLY IN THE BUILDING, LOCATED AT 16 SOUTH CEDAR, IN THAT THE DEFENDANT DID TRESPASS AT THE ABOVE LOCATION WHICH THE DEFENDANT DOES NOT LIVE ON THE PROPERTY AND DID NOT HAVE ANY REASON TO BE ON THE PROPERTY. OFF-DUTY OFFICER JOSEPH HASSETT WORKING AS SECURITY AT THE ABOVE LOCATION, TOLD THE DEFENDANTS TO LEAVE THE ESTABLISHMENT. THE DEFENDANTS REFUSED TO LEAVE AND DID NOT HAVE ANY REASON TO BE ON THE PROPERTY.
>
> 240.26-1 – HARASSMENT IN THE SECOND DEGREE
>
> IN THAT THE DEFENDANT, FIGUEROA, MARTINEZ AND GUZMAN, WHILE EACH BEING INTENTIONALLY AIDED BY OR WHILE AIDING THE OTHER, WHILE AT FAMOUS CORNERS BAR, LOCATED AT 16 SOUTH CEDAR, WITH INTENT TO HARASS, ANNOY AND ALARM OFF-DUTY OFFICER JOSEPH HASSETT, DID STRIKE HIM SUBJECTING HIM TO PHYSICAL

[3] Grievant was off-duty and working security at the Famous Corners Bar, the location of the alleged criminal offenses.

> CONTACT, IN THAT THE DEFENDANT DID HARASS, ANNOY AND ALARM THE COMPLAINANT BY STRIKING HIM WITH A GLASS BEER BOTTLE CAUSING THE COMPLAINANT TO FEAR PHYSICAL INJURY. (Id., Emphasis in original).

The P-163 for Figueroa lists the complainant as Grievant and "SONY", meaning the State of New York. The arresting officer is listed as Officer Zoll. (Joint Exhibit 25). The "Narrative" states in part: "On the above D/T/L comp stated that defs were told to leave the bar, they didn't & then they attacked the comp by punching, pushing … him. Bar staff had to assist. Upon arrival ofc's told def's to get off the bus several times & did not comply with ofcs orders. Printed in hand in the "Narrative" is "Famous Corners 16 South Cedar." (Id.).

As noted, Lt. Lloyd of IAD was directed through the chain of command, by the Commissioner, to conduct the investigation. Lt. Lloyd testified that, as part of his investigation, he obtained a copy of the Federal Grand Jury Minutes referenced in the District Attorney's letter and also reviewed IAD files that concerned excessive use of force investigations of Grievant that were related to both Worthy and Figueroa. Lt. Lloyd also learned, when he spoke with the District Attorney's Office, that there was a video that the District Attorney's Office had reviewed and that formed part of the District Attorney's decision set forth in the letter. Lt. Lloyd testified he received the video. The record shows that the video was played before the Grand Jury when Grievant testified. As well, the video was shown at the hearing in this proceeding and has been viewed several times by this Arbitrator. (Joint Exhibit 26).

The Federal Grand Jury Minutes indicate that, on January 7, 2016, Grievant, after signing a waiver of immunity, testified before a federal Grand Jury that was investigating him for possible federal offenses based on excessive use of force. (Joint Exhibit 19). According to Lt. Lloyd's testimony, his review of the Grand Jury minutes disclosed that "there was some glaring discrepancies between what Officer Hassett attested to on the accusatory instruments, [and] information he put on the P-163s ["Arrest Data Form"], when compared to what the information that was testified to in the Grand Jury minutes." (Tr. 74).

Grievant's Grand Jury testimony concerning the arrest of Worthy, Lloyd testified, was a matter of concern due to his explanation about why Worthy was charged with criminal trespass when, at the time of his arrest as seen in the video, Worthy was not at the Perry Housing Projects. (Joint Exhibit 19, 61; Tr. 76). Lloyd noted that Grievant told the Grand Jury the video did not depict Worthy at the Perry Housing Projects at the time of the arrest but that "doesn't mean he didn't trespass at some time." (Joint Exhibit 19, 61; Tr. 76).[4] Lloyd was shown the video at this hearing. (Tr. 77, et. seq). In viewing the video from Camera 1, Lloyd noted that, at 11:16:08 hours on the video, he observed Worthy's vehicle parked at a gas pump and Worthy walking over to the pump. (Tr. 79). Lloyd answered "yes" in response to the question of whether Worthy was "at or near the vehicle" at that point in time. (Id., 80). At 11:16:53 hours on

[4] The contains footage from a Camera 1 and footage from a Camera 13. (Joint Exhibit 26).

the video, Lloyd testified, Worthy can be seen walking away from the vehicle and can be seen next to the vehicle at 11:17:53. (Id., 81).

Lloyd testified that, at 11:17:58, a police vehicle is seen in the right upper corner of the video and Worthy can be seen walking back towards the vehicle. (Id.). A patrol vehicle, Lloyd testified, is seen at 11:18:29 pulling up behind Worthy. (Id.). Lloyd testified that his viewing of the video "revealed that the [Worthy] vehicle was attended at all times during this video." (Id., 82). At 11:19:29 of the video, Lloyd testified, Grievant and Officer Beyer (now Lt. Beyer) are seen exiting the patrol vehicle and Grievant then engages with Worthy. (Id.). Lloyd testified that this encounter between Grievant and Worthy occurred on "a private parking lot of a Big Basha gas station." (Id., 83).

Viewing what is shown on the video from camera 13, Lloyd noted that at 11:16:19 Worthy, is seen "walking back to his vehicle," then walking away from the vehicle at 11:16:45, 46, and 47. (Id., 83, 84). At 11:17:41, Lloyd testified, two patrol vehicles can be seen, and, at 11:18:05, Worthy is seen at one of the patrol vehicles and can be seen walking away from the vehicle at 11:18:25. (Id.). Worthy's vehicle, Lloyd testified, was in Worthy's "eyesight" during this entire period of time. (Id., 84-85). According to Lloyd's testimony, there was no basis to charge Worthy with leaving his vehicle unattended under Section 1210 of the New York V&T Law "because the vehicle was attended the entire video." (Id., 87).

Lloyd's attention was then directed to that portion of Grievant's testimony in the Grand Jury regarding the Figueroa case. (Id.). According to Lloyd, the Grand Jury minutes show that Grievant was questioned about individuals who were attempting to "get inside Famous Corner." (Id., 88, See Joint Exhibit 19, 82). Lloyd testified that the Grand Jury minutes disclose that Grievant stated he did not let the individuals inside because the bar was closed. (Id.). Lloyd's attention was then drawn to page 89 of the Grand Jury minutes, and he was asked if there was "anything there that you felt warranted bringing charges against Officer Hassett in this case?" (Tr. 88). Lloyd responded that, on page 89 of the Grand Jury minutes, Grievant was asked if in the "information [charging Figueroa] did you say they were inside Famous Corner Bar, [and] you asked them to leave several times and they didn't and they were trespassing; Officer Hassett answered correct." (Id.).

Lloyd also noted that on that page in the Grand Jury minutes Grievant also answered "no" to the question of whether the individuals were ever inside the bar. (Id.). Further, Lloyd testified, at page 93 of the Grand Jury minutes, Grievant was asked if in the accusatory instrument he alleged that Figueroa and the others "did knowingly enter, remain unlawfully in the building located at 16 Cedar Street" and Grievant replied that that was what was contained in the accusatory instrument. (Id., 89). Grievant was asked if they entered and remained inside the building, Lloyd noted in his testimony, and he responded "no." (Id.).

Further, Lloyd observed that Grievant stated before the Grand Jury that "they never entered the building," and, when asked if the criminal charge against Figueroa was incorrect, Grievant responded "that's what was charged, I'm not saying it's incorrect, but they didn't enter the building." (Id., 89-90). Moreover, Lloyd testified that Grievant's testimony in front of the Grand Jury at that point included his answer that "it's correct for that charge" to say they entered and remained in the building but it was not correct to say that they "entered the building," and "the charge is written correctly." (Id., 90).

Lloyd then testified about the language in the Figueroa accusatory instrument. (Joint Exhibit 24). (Tr. 90-91). He was also shown the P-163 (Arrest Data Form) that listed Figueroa as a defendant. (Id., 92). Both documents, Lloyd testified, placed Figueroa "[i]nside the Famous Corner Bar." (Id., 93).

Lloyd's attention was then directed to the transcript of his interrogation of Grievant that took place on November 19, 2019 in the presence of Grievant's counsel. (Joint Exhibit 17). He noted that attached to the transcript as "Exhibit 1" was the accusatory instrument against Figueroa and the other defendants. (Tr. 94; Joint Exhibit 17). Lloyd also identified the fact that each page of the interrogation transcript (pages 1-22) contains Grievant's initials of "JH." (Tr. 95; Joint Exhibit 17).

Lloyd was asked "between this statement, the accusatory instrument and the Grand Jury minutes, [what] made you believe that charges should be drafted against Officer Hassett as regards to the arrest of Samuel Figueroa?" (Tr. 96).

Lloyd replied:

> In the accusatory instrument he placed Samuel Figueroa inside the bar. Also, he related that information to arresting officers that Samuel Figueroa was inside the bar. When I reviewed the Grand Jury minutes, the Grand Jury minutes he stated several …times that Figueroa was not inside the bar, he was only on the porch. So that led me to believe that I needed to place charges for untruthfulness. (Id.).

When asked to clarify what he meant when Grievant said that he relayed "that information" to arresting officers that Samuel Figueroa was inside the bar, Lt. Lloyd replied that the arresting officer who filled out the P-163 had to use information that came from him." (Id., 97). When asked by the Arbitrator if he ever questioned the arresting officer, Officer Zoll, Lloyd replied no. (Id.).

Lloyd's testimony then included the following exchange:

> Q. How does Section 210 of the Penal Law [perjury] apply to the Grand Jury testimony that you reviewed, the accusatory instrument that you reviewed?
>
> A. In this case, there was several incidents where the accusatory instruments listed one story and the Grand Jury minutes listed another. So, either he perjured himself on the accusatory instrument or he perjured himself in Grand Jury." (Id., 99).

On cross-examination, Lt. Lloyd testified that Grievant was truthful when he stated before the Grand Jury that Worthy would not have been trespassing on the Perry Projects when Worthy was at the Big Basha gas station. (Tr. 335). Lloyd testified that he took issue with the "trespassing charge" and not Grievant's testimony before the Grand Jury. (Id., 336). Lloyd also acknowledged that no testimony Grievant offered before the Grand Jury was untruthful. (Id., 340).

Thus, the following exchange then occurred:

> Q. So nowhere in his Grand Jury [testimony] did he commit perjury?
>
> A. Correct. (Id.).

Lloyd on cross-examination acknowledged that a person can commit a misdemeanor in one location and can be arrested anywhere in the State. Thus, Lloyd testified that a person does not have to be arrested at the location of the crime. (Id., 360). Lloyd also testified that Worthy's address at the time was at a residence in the upper West Side of Buffalo, which was nowhere near the location of Louisiana and South Park where the BMHA and gas station properties are located. (Id., 362).

Lloyd testified that he did not know how long Worthy's vehicle had been in the Big Basha parking lot or whether its engine was running or not running at the times it was depicted in the video. (Tr. 370). Nor was Lloyd able to determine who drove the vehicle to the Big Basha parking lot or where the vehicle was before it arrived at the parking lot. (Id.). Thus, Lloyd was not able to testify if the vehicle had been on the BMHA property or whether Grievant had seen Worthy in the vehicle on BMHA property. (Id., 371). Lloyd also testified that he did not ask Worthy if he, Worthy, had been on BMHA property. (Tr. 372).

Regarding Figueroa, Lloyd testified on cross-examination that the P-163 on Figueroa was written at least in part by Officer Zoll. Lloyd testified that Zoll was the arresting officer and acknowledged that Grievant did not prepare the

document. (Tr. 390). No one told him, Lloyd testified, that the information put on the P-163 that was signed by Zoll came from Grievant. (Tr. 391). "Scribbled" information on the P-163, Lloyd acknowledged, stated that the complainant had said that the defendants refused to leave the bar. (Tr. 392). Lloyd noted also that the P-163 was not sworn to. (Tr. 394).

Lloyd's attention on cross-examination was then drawn to the accusatory instrument in Figueroa signed by Grievant (Joint Exhibit 24), which document is also attached as Exhibit 1 to Lloyd's interrogation of Grievant on November 19, 2019. (Joint Exhibit 17). Lloyd noted that the information attached as an exhibit to the interrogation transcript contained underlined portions that Grievant stated at the interrogation were the factual parts of the information. (Tr. 395). This factual part, Lloyd testified, included the assertion that "off-duty officer Joseph Hassett, working as a security at the above location, told the defendants to leave the establishment" and that "the defendants refused to leave and did not have any reason to be on the property." (Joint Exhibit 17, Exhibit 1). Lloyd observed that, before the Federal Grand Jury, Grievant stated the three defendants did not enter the bar and that, in the Penal Law, there is a trespassing violation that can be committed when an individual is not inside a building or enclosed area. (Id., 397).

On redirect, Lloyd's attention was drawn to 11:17:34 of the video, and he testified that "[i]t appears he's [Worthy] standing with two other individuals on the right side of the screen." (Id., 402). Worthy's vehicle, Lloyd noted, was at the

gas pumps and Worthy was in the same screen shot as the vehicle. Worthy, Lloyd testified, was within eyesight of his vehicle. (Id., 403). At 11:18:07 of the video, Lloyd testified, there were two patrol vehicles in the parking lot and Worthy was still within eyesight of his vehicle. When Worthy was approached by a patrol vehicle at 11:18:33, Lloyd testified, he was not out of the sight of his vehicle. (Id., 404).

At 11:18:38, Lloyd noted, a passenger in the patrol vehicle steps out and appears to be engaged with Worthy. (Id.). At 11:19:45, Lloyd testified, Worthy was "being taken to the ground by officers" at a distance of some 15 feet from Worthy's vehicle and within sight of the vehicle. (Id., 405). Lloyd testified that it was his belief that Worthy's vehicle was "attended" during the entire time of the video shown to him on redirect. (Id., 406).

Lloyd was then asked, after acknowledging that he stated on cross-examination that Grievant was not untruthful during the Grand Jury minutes, that he had testified on direct "either way he [Grievant] was untruthful." (Tr. 413). Lloyd was asked to explain, and answered as follows:

> What I meant by that was the Grand Jury – what he testified in the Grand Jury minutes were conflicting to what was attested to on accusatory instruments as well as to what we see in the video.
> So me – me not knowing what the truth was, and particularly the Figueroa case, I can only go by what is documented here. It's documented that Figueroa was inside the bar on his accusatory instruments, but in his testimony he states that he never entered the bar.
>
> So in my understanding of that, either you're telling the truth on the Grand Jury minutes or you're telling the truth on accusatory

> instrument. You can't tell – there can't be two truths. One has to be truth and one has to be a lie. (Tr. 413-414).

## POSITION OF THE CITY

The City argues initially that all Charges against Grievant were timely filed in accordance with Section 12.3(e) of the parties' Collective Bargaining Agreement and Chapter 15, Section 1.5 of the Manual of Procedures (MOP). To advance its position, the City asserts that the Charges against Grievant were based on newly discovered evidence. It identifies the April 17, 2019 letter from the Erie County District Attorney to the Police Commissioner and the directive to Lt. Lloyd to investigate that followed. The City identifies the record evidence that Lt. Lloyd communicated with the District Attorney's Office in an attempt to find out the factual bases for the allegations in the District Attorney's letter and that Lloyd was directed by that Office to the two previous IAD files concerning Grievant's alleged use of excessive force toward Worthy and Figueroa. Lloyd, according to the City, was also urged to obtain the Federal Grand Jury minutes containing Grievant's testimony before that body and also to obtain a copy of the video recording that reflected Grievant's encounter with Worthy.

According to the City, when Lt. Lloyd reviewed the Figueroa and Worthy IAD files, he observed that they only concerned allegations of excessive force and did not contain either the Grand Jury minutes or the video recording. Hence, the City asserts that "the Grand Jury minutes and the video-recording were newly discovered to the Internal Affairs Division as a result of the District Attorney's

Letter to Commissioner Lockwood in the ensuing investigation." The City emphasizes that the Grand Jury minutes and the video were not contained in the excessive force files, and the Charges in this proceeding must be considered "distinct from the previous excessive force charges."

The City also maintains that the disciplinary Charges in this proceeding, to the extent they allege violations of the New York Penal Law, are based on allegations that the Grievant engaged in conduct that would have constituted a crime if established in court. Thus, the City identifies the language in both the Collective Bargaining Agreement and the MOP that the one-year statute of limitations does not apply to criminal conduct.

The City also asserts that just cause "existed for the issuance of the disciplinary charges" and argues that "the Arbitrator need look only to whether the City has established that a cognizable legal theory of Officer Hassett's wrongdoing existed, and that a preponderance of the evidence the City presented supports that theory." The City maintains that the Charges stem from the District Attorney's and the Police Department's obligations to the public. In this regard, the City identifies the fact that the District Attorney, in carrying out the duties of that office to the public, must abide by the Supreme Court's Decision in *Brady v. Maryland*, 373 US 83 and its progeny to provide a defendant with exculpatory evidence, including evidence that bears on the reliability of prosecution witnesses. The City notes that failure to disclose such evidence jeopardizes not only a defendant's right to a fair trial but also the ability of the

District Attorney to prevail on an appeal of a criminal conviction. In the City's estimation, the District Attorney therefore had a "duty to inform the Buffalo Police Department of his beliefs about Officer Hassett's credibility because he could not ethically use Hassett as a witness in the future and be assured that he was truly seeking justice against any criminal defendant." Further, the City notes the Police Department "had a duty to investigate the District Attorney's allegation" given its "general duty to protect the public from criminals." The City maintains that this duty requires it to have officers who can provide "credible testimony in court" and officers themselves had "a duty to accurately complete paperwork in an accurate manner that is not misleading."

The City identifies the appropriate burden of proof to measure whether the Charges have been sustained as the preponderance of the evidence standard. In addressing the record evidence, the City argues that the testimony of its witnesses "was worthier of belief" than the testimony offered by the PBA on Grievant's behalf. Lt. Lloyd, the City notes, is an 11-year veteran of the Department, with three years IAD experience, and also a 22-year veteran of the US Army, holding the rank of Major. Lt. Beyer, according to the City, did not have any reason to offer untruthful testimony. As such, the City argues that his testimony that the arrest of Worthy occurred in a parking lot that was not located on Public Housing Property was credible. The City asserts that Lt. Russo's testimony on Grievant's behalf must be considered suspect because his spouse is a PBA elected official and Grievant was a friend. The City claims that no

analysis need be made of the credibility of Captain Nichols because his testimony did not offer any evidence of probative value.

The City further asserts that its "evidence was of high quality, offered in greater abundance, and established what more nearly took place than the hypothetical situations the defense offered at the hearing." Turning to the evidence connected to defendant Figueroa, the City identifies the accusatory instrument Grievant signed under oath "and the P-163 form which Officer Hassett had a duty to review for accuracy," and the fact that "both placed Figueroa inside the Famous Corner Bar." The City claims that the factual allegations and observations in these two documents "were used to justify the arrest of, and the resultant restraint upon Mr. Figueroa's liberty."

The City asserts that the PBA attempted to "distract" the Arbitrator by focusing on the "aiding and abetting statute" mentioned in the Figueroa trespass charge. That is, the City asserts that the essential question is simply whether Figueroa "was either inside the Famous Corners Bar, or he was not inside that bar on the night in question." As the City views the record, Grievant "allowed police paperwork to be completed which was inaccurate and untruthful in that it stated that Figueroa was in the Famous Corner Bar, but then subsequently, in the Grand Jury minutes, Hassett clearly stated that Figueroa never entered the bar." The record clearly illustrates, according to the City, that Lt. Lloyd took into account this inconsistency and Grievant's testimony before the Grand Jury that Figueroa was not in the bar.

As to Figueroa, the City argues that "a rational reading of the accusatory instrument, considered collectively with the P-163 which the Arbitrator actually had before him, and considered collectively with Grand Jury transcripts that the Arbitrator actually had before him, would lead a reasonable person to the following rational conclusions regarding 'what nearly took place' on the night in question: 1) Figueroa never entered the Famous Corner Bar, 2) Hassett was untruthful about what happened on the night he got into an altercation with Figueroa, 3) Hassett's accusatory instrument was purposefully misleading, and made under oath, 4) Hassett allowed other arrest paperwork involved to be submitted when the factual statements therein were untruthful, and 5) unfortunately, Hassett gave another account of what happened that night when before the Grand Jury, while still insisting that the arrest charges were accurate."

Turning to Worthy, the City notes that Grievant signed the accusatory instrument and also claims that a P-163 form was "completed under Officer Hassett's responsibility." The City points to Grievant's Grand Jury testimony that just because Worthy was not on BMHA property when arrested did not mean that he did not "trespass at some point." The City emphasizes that the video recording does not depict Worthy ever having been on the BMHA property but only shows him "fueling his vehicle at the Big Basha gas station at the corner of Louisiana Street and South Park Avenue." The video also shows, according to the City, that Worthy "was at no time out of eyesight of his vehicle, was always within roughly fifteen (15) feet of his vehicle, and that Mr. Worthy's vehicle was,

in fact, never unattended by any reasonable person's stretch of the imagination."

The City asserts that the PBA would want the Arbitrator to conclude that the trespassing charge against Worthy was "separate and unrelated to the rest of the charges in the accusatory instrument … but this is a strained interpretation of the document which asked the Arbitrator to draw an irrational and nonsensical conclusion as to 'what more nearly took place' that night." The City stresses that, in the accusatory instrument, Grievant stated that Worthy remained on property described as "the fenced parking lot at South Park and Louisiana" and, in the same paragraph, alleged that Worthy drove "into the parking lot at South Park and Louisiana." Further, the disorderly conduct charge, the City notes, referred to actions Worthy allegedly took "while at South Park and Louisiana … in the middle of this parking lot." The obstructing governmental administration charge, similarly, the City argues, refers to South Park and Louisiana. Accordingly, the City questions "how Worthy could 'remain' in a Perry Projects parking lot 'at South Park and Louisiana' in violation of the trespassing law, and simultaneously leave his vehicle unattended in another parking lot 'at South Park and Louisiana,' and also obstruct governmental administration at that second parking lot 'at South Park and Louisiana,' when the basis for the trespassing charge was that he remained in the Perry Projects." Hence, the City asserts that there is "an incongruity in Officer Hassett's arrest paperwork that cannot be explained without delving into far reaching hypotheticals about what could have happened, but for which hypotheticals the defense offered no proof at the hearing."

All the PBA was able to do in Grievant's defense, according to the City, was to imply that Grievant may have "observed Worthy's wrongdoing in the Perry Projects, and then followed Worthy to Big Basha." The City maintains that this argument is only speculation. It contends that "no testimony, and no documentary evidence," was offered to support what describes as a "hypothetical situation … that there were two different parking lots involved in the arrest of Worthy at the corner of Louisiana and South Park."

The City asserts that the testimony of Lt. Russo did not actually help Grievant because he did not establish that there was a parking lot at the corner of South Park and Louisiana that was owned by the BMHA, and a review of the exhibits connected to BMHA owned properties discloses that there is "no identifiable parking lot in which Mr. Worthy could have been present, and that only sidewalks exist on BMHA property at that corner [of South Park Avenue and Louisiana Street]." In the City's estimation, the only rational understanding available of the record ("what more nearly took place") is "1) there was only one parking lot at the corner of South Park and Louisiana that was involved in Hassett's drafting of charges against Worthy, 2) Hassett was untruthful about what happened all in that same parking lot at the corner of South Park and Louisiana, 3) the parking lot involved was not on BMHA property, 4) Hassett had the misfortune of being caught on video recording, 5) Hassett's accusatory instrument was purposely misleading, and made under oath, and 6) Hassett allowed other arrest paperwork involved to be submitted when the factual

statements therein were untruthful."

The City also argues that the Arbitrator should not credit any assertion by the PBA that Grievant was not entirely responsible for the paperwork he submitted. It points to Section 3.5 of the Rules and Regulations "which makes officers responsible for the contents of P-163s and other paperwork." This Rule, according to the City, requires Officers, when signing documents under oath, to "ensure that accurate information is set forth in the document."

Finally, the City argues that Grievant's employment as a Police Officer must be terminated. It asserts that Grievant's "behavior, established by a preponderance of the evidence at hearing, was egregious enough that the District Attorney sent a letter to Commissioner Lockwood which generally stated that they could not use Officer Hassett – ever – in any case." Grievant's "actions," according to the City, "have resulted in him being unable to perform an essential function of his job, and unable to fulfill his duty to the public, [and] there is no punishment, other than termination, that can properly deal with the situation currently before the Hearing Officer."

Accordingly, for all of the foregoing reasons and arguments, the City maintains that the termination of Grievant's employment is for just cause and must be upheld by this Arbitrator.

## POSITION OF THE PBA

According to the PBA, the City has the burden in this just cause disciplinary proceeding to establish the allegations in the Charges. The standard of proof that should be used, the PBA maintains, "should at a minimum be evaluated by the application of a clear and convincing standard" because of the allegations of criminal misconduct and the other allegations in the Charges that imply such misconduct. This standard, the PBA stresses, should be used by the Arbitrator to assess both the timeliness and the questions regarding misconduct.

The PBA observes that the instant Charges are "by no means the first attempt to charge Officer Hassett in connection with the 2014 arrests of Keith Worthy and Samuel Figueroa," and, in fact, "[t]he evidence discloses that there had been an earlier investigation of Officer Hassett by federal authorities with respect to the Worthy and Figueroa matters, which ended in the summer of 2017." This investigation, the PBA puts forth, was then "immediately followed by an investigation of those same matters by the District Attorney's Office," and, "[i]n neither case were criminal charges brought against Officer Hassett with respect to any aspect of the Worthy and Figueroa arrests, including his January 2016 federal Grand Jury testimony."

The PBA observes that the investigation by the Erie County District Attorney did result in criminal charges lodged against Grievant, which resulted in a 2018 acquittal after a trial in State Supreme Court. After the acquittal, the PBA notes, the District Attorney's Office began an investigation into Grievant's

credibility, which gave rise to the issuance of the April 17, 2019 letter from the District Attorney. Four months later, according to the PBA, Lt. Lloyd was directed by the City to initiate the IAD investigation, which then resulted in Charges being issued on September 16, 2019. According to the PBA, there has been an "unrelenting endeavor to pursue Officer Hassett," which has continued past the instant case as seen in the testimony of Captain Nichols that on November 4, 2019 another pending matter was opened.

Focusing on the investigation conducted by Lt. Lloyd, the PBA argues that, despite his IAD training and language in the Manual of Procedures about conducting an investigation that requires interviews of witnesses, Lloyd testified that it was not necessary for him to interview any witnesses, though he had no time constraints that prevented him from doing so. According to the PBA, the record evidence clearly illustrates the "ambiguous character of the video evidence" relating to events at the Big Basha gas station. Nevertheless, the PBA puts forth, the video "was never reviewed with anyone, including Mr. Worthy," even though it was critically important to determine, before he arrived at the gas station, whether Worthy "had been present on Buffalo Municipal Authority property."

The PBA notes that Lt. Lloyd also did not interview an individual identified as Baker whom, the PBA contends, the City asserted was attending to Worthy's vehicle at the gas station. All Lloyd was able to state, the PBA claims, is that he relied on the video evidence "and [he] never bothered to locate Mr. Baker in

order to ask him whether or not he in fact had been watching the Worthy vehicle on September 9, 2014." The PBA asserts that Lloyd also did not "take the time to question the two individuals Mr. Worthy spoke to while he left his vehicle running at the gas pump" and Lloyd also did not question Officers Macey and Robinson who were also at the gas station in their patrol vehicle.

Similarly, the PBA argues that Lloyd also failed to interview witnesses in connection with the arrest of Figueroa at the Famous Corners Bar. Thus, the PBA observes that Figueroa was not interviewed, and that Lloyd eventually acknowledged in his testimony that he also did not examine a transcript of sworn testimony that Figueroa had provided. Figueroa's co-defendants, Guzman and Martinez, the PBA observes, were also not interviewed, nor was Officer Zoll, whom Lloyd assumed authored the P-163 connection with Figueroa's arrest.

The PBA also argues that Lloyd never did "gain a full understanding of the basis for the adverse credibility determination made by the Erie County District Attorney's Office," and acknowledged that he never received a complete response as to the reasons set forth in the District Attorney's letter to the Commissioner in his conversation with Assistant District Attorney Heraty. The PBA thus asserts that, "[b]y failing to interview any witnesses, the investigation proceeded by the path of conjecture and surmise."

As to Grievant's testimony before the federal Grand Jury, the PBA identifies Lloyd's characterization of Grievant's testimony "as evasive, intentionally confusing, perjurious, and based at points upon a feigned non-

recollection of facts." Nevertheless, the PBA asserts, in the hearing testimony of Lt. Lloyd, "there were numerous instances when he demonstrated a failed recollection, misstated facts, and misunderstood questions." When this occurred, Lloyd, the PBA claims, "insisted that he was not intending to lie or mislead," and described "the errors in his testimony as mistakes." In the PBA's estimation, the significance of this observation "is that, in providing testimony, mistakes are made that often do not involve intentional falsehoods."

The PBA identifies Specifications 1 and 2 of Charges 1 and 3 that focus on alleged false statements in the accusatory instruments and arrest reports connected to the Worthy and Figueroa arrest. The PBA notes that the Arrest Data or P-163 form, according to record evidence, is typically prepared at the arrest scene by the Officer in charge and in turn provides the basis for the information then inserted in the factual portion of the accusatory instrument. This form, the PBA notes, is then provided to a report technician who uses it in preparing the accusatory instrument itself. According to the PBA, both Lt. Beyer and Lt. Lloyd agreed that the accusatory instruments are prepared by the report technicians. The PBA notes that Beyer specifically testified that the accusatory instruments "include a template, which is used to identify the statutory violation and list the elements of the offense." According to the PBA, Lt. Lloyd acknowledged that, when Officers sign the accusatory instrument given to them by the report technician, "the surrounding environment may include noise and commotion." Lloyd further agreed, the PBA contends, that he has experienced

instances when report technicians made errors in the accusatory instrument. When asked by the Arbitrator, the PBA observes, Lloyd could not think of an instance where an Officer who signed an accusatory instrument with an error was then brought up on disciplinary charges.

The PBA urges the Arbitrator to find the Charges untimely. It notes that the Charges and Specifications rely either on arrests that occurred in 2014 or Grand Jury testimony given in 2016. As to the video evidence regarding the Worthy arrest, the PBA asserts that there has been no showing by the City that the video constituted protected Grand Jury material. Though Lt. Lloyd stated that the earliest date he became aware of Grievant's testimony before the Grand Jury was July 29, 2019, the PBA claims he could not state when his supervisor, Inspector Rosenswie, learned of Grievant's Grand Jury appearance. No evidence was offered by the City, according to the PBA, "as to when Internal Affairs, as compared to Lieutenant Lloyd, became aware of the Hassett Grand Jury testimony." The record shows, the PBA maintains, that Inspector Rosenswie knew of the federal Grand Jury materials as of May 22, 2019 when he received an email from City Attorney Hannibal because, attached to that email, is an email of the same date from Erie County Assistant District Attorney Keane that made reference to "the consideration of those materials in connection with that office's investigation of Officer Hassett's credibility."

The PBA goes on to argue that there is reason to believe that someone in IAD had knowledge that the Hassett Grand Jury appearance "much earlier than May 2019," as seen in the "email exchange between Buffalo Police Department personnel Stacy Lewis and Harold McLellan, dated August 23, 2017." In her email, Lewis, according to the PBA, informed McLellan that she had met with Deputy District Attorney Agro about sharing various IAD files with him, and Lloyd, during his testimony, agreed that the communication was "evidence of an exchange of documents between IAD and the District Attorney's Office regarding both the Worthy and the Figueroa matters as of that time." Further, the PBA notes that the Worthy and Figueroa arrests had been the subject of earlier disciplinary investigations involving claims of excessive force, with the Worthy investigation opened in 2014 and the Figueroa investigation opened in 2015.

The PBA argues that the City has the burden to demonstrate timeliness, but all it has shown is the knowledge of Lt. Lloyd regarding the federal Grand Jury testimony of Grievant and, therefore, "no reliable evidence has been presented as to when the Internal Affairs Division gained knowledge of the Hassett testimony." "The same void exists with respect to the Big Basha video," the PBA claims, and, particularly in view of the "longstanding interest" that IAD has had with Grievant, it must be concluded that the City has not met its burden of establishing timeliness.

As to the crime exception to the one-year statute of limitation contained in the collective bargaining agreement, the PBA contends that the City has not established that Grievant engaged in any criminal wronging as to either Worthy or Figueroa. Moreover, the PBA claims that "the attempt to justify the delay in commencing this disciplinary proceeding by relying upon an assertion the underlying conduct was criminal in nature, is insubstantial."

The PBA observes that the City's allegations in the Charges and Specifications against Grievant boil down to the unattended vehicle charge against Worthy, the trespassing charge against Worthy, and the criminal trespass charge against Figueroa. As to the unattended vehicle charge against Worthy, the PBA notes that there is no dispute that Worthy left his vehicle at the Big Basha gas station pump while its engine was running, with the only question being whether the vehicle "was attended" at all times within the meaning of Section 1210 of the V&T Law. The PBA maintains that, prior to the hearing, the City claimed the vehicle was "attended" by an individual that it identified at the hearing as Baker, but during re-direct examination, it would appear that the City's theory of wrongdoing changed by the claim made by Lt. Lloyd that the vehicle was "attended" because it was always within Worthy's eyesight.

Because Baker was not interviewed, the PBA asserts that the only evidence that bears on the matter is the video evidence. This evidence, the PBA notes, contains two different camera angles: Camera 1 and Camera 13. On cross-examination, Lloyd acknowledged, the PBA asserts, that Baker most likely

was with the women he was seen leaving the gas station with. Baker, in fact, the PBA claims, was near Worthy's vehicle for approximately 87 seconds and, even for this short period of time, the City did not show that Baker was "attending" the vehicle. The video from Camera 13, the PBA stresses, shows Baker being met by two women who had left the gas station and then departing the area of the Worthy vehicle in the company of the two women, eventually crossing the street and leaving the scene. In re-direct examination, Lloyd, the PBA claims, for the first time stated that the Worthy's vehicle was attended because it was always within Worthy's eyesight. The PBA contends, however, that "Lieutenant Lloyd admitted not knowing if the presence of an operating, but abandoned vehicle within eyesight of the driver would satisfy the statutory standard under NYS Vehicle & Traffic Law §1210." Judicial decisions are cited by the PBA that establish that a violation of the statute can occur even if the vehicle is in sight of the person who had been operating the vehicle.

Regarding the trespassing charge against Worthy, the PBA claims that, on direct examination, Lloyd stated his conclusion that his investigation caused him to believe that Grievant arrested Lloyd on BMHA property when the video depicts that Worthy was not arrested on said property. As the PBA views it, Lt. Lloyd "assumed without ever knowing that Officer Hassett was alleging that the trespass violation occurred at Big Basha, which is not BMHA property." Such an assumption, according to the PBA, is "flawed," as seen in the P-163 that only states that the arrest address was Big Basha and does not allege that a trespass

occurred at that location. The accusatory instrument, the PBA notes, "in fact reports two separate events involving Mr. Worthy; the trespass and a later encounter leading to his arrest."

Lloyd acknowledged, according to the PBA, that the first six lines of the accusatory instrument referenced Worthy being outside the vehicle on housing project property where he committed trespass and then the instrument goes on to state the separate event of Worthy leaving his vehicle unattended at the Big Basha gas station. The PBA claims the record shows that Lloyd "was unfamiliar with what parts of the surrounding area [of the gas station] constituted Buffalo Municipal Housing Authority property." Lloyd also acknowledged, according to the PBA, that "the commission of an observed misdemeanor violation of the law entitles a law enforcement officer to effectuate an arrest for that offense anywhere in New York State." Hence, the PBA claims that "observing the trespass at point A and then arresting Mr. Worthy at point B was entirely proper." The PBA argues, Lloyd "proceeded upon the basis of a false, unsupported assumption" and that the record evidence would "support the conclusion that Keith Worthy was observed trespassing on Perry Public House Project property at the intersection of South Park Avenue and Louisiana Street, and was then followed across the street to the Big Basha gas station, where he was arrested."

As to the Figueroa trespass charge, the PBA asserts that Lloyd acknowledged that, in his Grand Jury testimony, Grievant "at least twice testified that Mr. Figueroa was on the porch and never entered the Famous Corners Bar

proper." Lloyd's allegations of misconduct, the PBA puts forth, stem from "his belief the Arrest Data Form, P-163, and accusatory instrument for Mr. Figueroa alleged that he had in fact been inside the bar." Regarding the P-163, Lloyd, according to the PBA, admitted that he did not have any knowledge as to the circumstances surrounding its preparation. The P-163 form, the PBA notes, lists Officer Zoll as the arresting Officer and Grievant as the complainant, and, the PBA claims, Lloyd "was not able at the hearing to definitively state who had filled out the form." No statement appears on the P-163 form, the PBA notes, that indicated that Figueroa or his two co-defendants were ever "inside the bar."

The PBA claims that Lloyd "interpreted the language" in the accusatory instrument charging trespass "to categorically allege that Mr. Figueroa and his two colleagues had been present in the bar." It contrasts that interpretation by Lt. Lloyd with Grievant's testimony before the Grand Jury that "states the exact opposite; that is, Mr. Figueroa had not been inside the bar, but rather was present on the porch of the bar." The "perceived discrepancy," the PBA observes, "forms the basis for Lieutenant Lloyd's allegation of misconduct in reference to the Figueroa arrest and related Grand Jury testimony of Officer Hassett."

The PBA notes that, during the interrogation of Grievant, which occurred on November 19, 2019, Grievant was asked to underline on the accusatory instrument the factual portion of the trespass charge, namely, that he told the defendants "to leave the establishment" and that they "refused to leave and did

not have any reason to be on the property." Lloyd acknowledged, according to the PBA, that under the Penal Law, a separate trespass violation can be committed without being inside a building or enclosed area and that the section definitions for the trespassing article of the Penal Law define "premises" as both a building and a property. When "fairly read," the accusatory instrument, according to the PBA, "actually alleges Trespass as a violation level offense," consistent with the account that Figueroa and the two co-defendants were on the porch of the bar, with no allegation that anyone entered the bar. As the PBA sees it, "[t]hat a report technician may have referenced the wrong section of the statute in actually preparing the accusatory instrument would not be unusual," "[n]or would the fact this was not noticed by Officer Hassett when he signed the document have had a sinister purpose – mistakes are from time to time made." The PBA also argues that there is no reliable proof "as to the circumstances surrounding the preparation of the Figueroa Arrest Data Form, P-163." The fairest reading of the document, the PBA puts forth, "is that the stated facts correctly charge Trespass as a violation level offense," and that the P-163 includes no reference "to any of the defendants having actually entered the bar."

Focusing with more detail on the Charges and Specifications, the PBA notes that Charge 1, Specification 1, Charge 3, Specification 1, and Charge 5, Specifications 1 and 3, allege that the Worthy accusatory instrument was false because the vehicle was never unattended and the Big Basha gas station does not constitute BMHA property. "Both the believable evidence, as well as the

concessions made during the testimony of Lieutenant Lloyd," the PBA asserts, "demonstrate that the Worthy vehicle was in fact left unattended with the engine running … and the trespass charge brought against Keith Worthy was not based upon a claim this offense occurred at the Big Basha gas station."

Further, the PBA notes, Charge 1, Specification 2, Charge 3, Specification 2 and Charge 5, Specifications 2 and 4 allege that the accusatory instrument and Arrest Date Form concerning the arrest of Figueroa falsely stated that Figueroa was inside the Famous Corners Bar. The PBA claims that "[i]t has been shown that the Figueroa Arrest Data Form … does not allege that anyone was ever present inside the Famous Corners Bar" and "[i]nsufficient proof has otherwise been presented with the respect to the circumstances surrounding the preparation of this document." As to the accusatory instrument for Figueroa, the PBA claims that references to "establishment" and "property" in the instrument "may not fairly be interpreted to allege that any of the defendants were inside the bar" and that the "factual portion of this charge accurately portrays Officer Hassett's encounter with Samuel Figueroa on the porch of the Famous Corners Bar."

Charge 2, Specification 1, according to the PBA, alleges that Grievant in effect provided "evasive testimony" concerning the arrest of Worthy at the Big Basha gas station when he testified before the federal Grand Jury. Lt. Lloyd concluded Grievant was being evasive, the PBA maintains, based on his observations that Grievant did not want to place himself at the scene and that

Grievant suggested the trespass had occurred before Worthy arrived at the gas station. Despite making general conclusory comments about Grievant being evasive, Lloyd, the PBA argues, "did not support his conclusory testimony by referring to any particular responses of Officer Hassett before the Grand Jury that were evasive."

Charge 2, Specification 2, as seen in Lloyd's reference to page 93 of the Grand Jury transcript, is described by the PBA as dealing "with the facial correctness of the Figueroa trespass charge juxtaposed against Officer Hassett's agreement Mr. Figueroa never entered the building." (53) When his testimony was reviewed in detail on cross-examination, according to the PBA, Lloyd acknowledged that he understood the distinction drawn by Grievant "between the facts and the facial sufficiency of the charge," and eventually conceding that the testimony was not evasive.

Charge 5, Specifications 5 and 6, the PBA notes, allege that Grievant committed testimonial perjury, but, the PBA emphasizes, there is "[a]bsolutely no detail" that has been "shared regarding what parts of Officer Hassett's testimony constituted perjury." Indeed, the PBA argues, "on four separate occasions, Lieutenant Lloyd conceded that none of the Hassett federal Grand Jury testimony was perjurious."

Charge 6, Specifications 1 and 2, the PBA notes, allege Grievant's handling of the arrest of Worthy and Figueroa brought discredit on the Department. These contentions, however, the PBA observes, rest on Lloyd's

conclusions that Grievant had fabricated facts to make arrests and was barred from testifying by the Erie County District Attorney. Further, Lloyd asserted that Grievant has sworn falsely on accusatory instruments as well as in his testimony before the Grand Jury. In the PBA's estimation, Grievant never fabricated any facts, did not engage in false swearing on accusatory instruments, and did not commit perjury before the Grand Jury. Thus, it must be concluded, the PBA argues, that Grievant "neither discredited nor prejudiced the Buffalo Police Department."

For all of the foregoing reasons and arguments, the PBA, on behalf of Grievant, requests that the Arbitrator find the Charges to be untimely, and in the alternative, find no just cause to sustain the Charges.

## OPINION

A threshold issue in this proceeding is whether the Charges against Grievant were timely filed. Under Section 12.3(E) of the parties' Agreement, a disciplinary proceeding cannot be "commenced more than one (1) year after the occurrence of the wrong-doing complained of or its discovery, if later" unless "the wrong-doing complained of would, if proved in a court of appropriate jurisdiction, constitute a crime." Charge 5 and its Specifications accuse Grievant of committing perjury under various provisions of the New York Penal Law, and, by charging criminal conduct, Charge 5 is not subject to the one-year statute of limitations.

As to Charges 1-4 and 6, the "wrong-doing complained of" dates back to Grievant's preparation of charges against Worthy and Figueroa in 2014 and Grievant's 2016 Grand Jury testimony. The Arbitrator notes that the Grievant's Grand Jury testimony included a reference to a video played before the Grand Jury and introduced into the record of this proceeding. The video constitutes an additional piece of evidence upon which the City has relied, and, given its depiction of events surrounding Worthy's arrest, dates back to 2014. Hence, to establish the timeliness of Charges 1-4 and 6, the City necessarily relies on the "discovery" language set forth in 12.3(E).

In viewing the language of Section 12.3(E), the Arbitrator observes that the "discovery" exception to the one-year statute of limitation is not coupled with any "due diligence" type of language. That is, an assessment of timeliness under 12.3(E) does not include the question of whether the "wrong-doing" discovered on a certain date could have been discovered through the exercise of due diligence at an earlier time. Thus, the City's burden is only to establish that it did not discover Grievant's alleged "wrong-doing" prior to September 16, 2018, given the Charges in this proceeding were filed September 16, 2019.

A reasonable understanding of the record regarding the discovery of Grievant's alleged wrongdoing is that the City learned of the alleged "wrongdoing" when it received the Erie County District Attorney's letter dated April 17, 2019 and eventually the material referenced in that letter, which included Federal Grand Jury Minutes. (Joint Exhibit 18). The Arbitrator finds

that, upon receipt of the letter, the Police Department's IAD proceeded to take the necessary steps to obtain the underlying material that led to the conclusion asserted by the District Attorney in the April letter. In this regard, the Arbitrator notes a July 29, 2019 email from Assistant District Attorney Heraty to Lt. Lloyd raising the possibility that there may be the "need" to obtain "an order to disclose some of the items that support the DA's conclusion." (PBA Exhibit A). The Arbitrator understands this communication to underscore the fact that, as of the end of July 2019, the City had not yet had a sufficient "discovery" of Grievant's alleged wrongdoing to determine if Charges should be brought. Seen in this light, the "discovery" of alleged wrongdoing occurred only months before the Charges were filed. The Hearing Officer, in other words, is persuaded by the record evidence that Charges 1-4 and 6, along with Charge 5, are timely.

In addressing whether the City met its burden of establishing the Charges, the Arbitrator will use the preponderance of evidence standard. He finds this standard is consistent with the great weight of arbitral authority, even in disciplinary cases calling for termination and alleging criminal conduct. This standard, the Arbitrator finds, protects the interests of the accused officer by requiring a thorough and considered assessment of all relevant evidence and also reflects the interests of the City in imposing, when necessary and warranted, discipline on officers who engage in misconduct.

All Charges against the Grievant involve the allegation set forth in all Specifications that "a thorough review of the Grand Jury minutes, related IAD cases, and arrest report/documents prepared and or sign[ed] by Officer Hassett" establish that he "was untruthful regarding the factual circumstances of the arrest[s]." It is noted that, as to Keith Worthy, the allegation also includes a "thorough review of … surveillance video." At this juncture, the Arbitrator finds that there is no evidence in the record that the "related IAD cases," which were connected to claims of excessive force, contain information relevant to the Charges in this proceeding. The Arbitrator also notes that the "report/documents" language in the Specifications refers to the accusatory instruments and the Arrest Data Forms (P-163s).

Viewing the essential allegations in the Specifications identified above, and taking into account the City's position as advanced in the hearing and in its post-hearing submission, the Arbitrator identifies the following allegations as comprising the City's case against Grievant:

1. In the accusatory instrument he signed charging Worthy with various offenses, and in the P-163 submitted in connection with Worthy's arrest, Grievant was untruthful when he charged Worthy with criminal trespass on BMHA property. According to the City, the language of the accusatory instrument and P-163, would lead one to believe that Worthy committed criminal trespass on BMHA property when, in fact, Grievant's encounter with Worthy was limited to events at the Big Basha gas station, which is located on private property.

2. The video evidence connected with Grievant's encounter with Worthy at the Big Basha gas station reflected that, at all times, Worthy's vehicle was not unattended within the meaning of

Section 1210 of the New York V&T Law and Grievant, therefore, was untruthful in claiming in the accusatory instrument and in the P-163 that the vehicle was unattended.

3. For Figueroa, the accusatory instrument signed by Grievant charging Figueroa and others with criminal trespass alleged that Figueroa was inside the Famous Corners Bar, which was false, as acknowledged by Grievant in his Grand Jury testimony when he testified that Figueroa was not inside the bar.

4. In Charge 5, the allegations of untruthfulness have been coupled with the conclusion that Grievant committed perjury under various provisions of Article 210 of the New York Penal Law.

The Arbitrator will thus analyze each one of the above contentions that has been advanced by the City. It is premature to analyze whether any of the Charges have been established until a finding has been made that the alleged untruthfulness about "the factual circumstances" of the Worthy and Figueroa arrests have been established. As a final preliminary observation regarding an assessment of the City's claims against the Grievant, the Arbitrator does not find that there is any basis in any assertion in the testimony of Lt. Lloyd that Grievant's testimony before the Grand Jury could be characterized as untruthful because it was evasive or contained any omissions. Any such observations by Lt. Lloyd, the Arbitrator finds, were not linked to any assertion of fact on Grievant's part that could be considered untruthful. The above summary of the City's claims, in other words, represents a complete summary of the City's position regarding alleged factual and truthfulness on Grievant's part.

Turning first to the criminal trespass charge against Worthy, the accusatory instrument, under the criminal trespass charge, also contains allegations constituting the V&T Law charges against Worthy. The first sentence of the criminal trespass charge alleges a criminal trespass that occurred in "the fenced parking lot of the Perry Public Housing Projects at South Park and Louisiana." The second sentence then alleges the V&T charges and contains the observation that Worthy drove "into the parking lot at South Park and Louisiana … exit[ed] the vehicle, leaving the keys in the ignition and the motor running." The third sentence continues with the V&T charges by alleging that "it was determined that the registration for this vehicle" and "the inspection of this vehicle is … expired" and that Worthy "did not notify the Department of Motor Vehicles of his change of address" and "could not produce proof of insurance for this vehicle."

The Arbitrator does not find that the "fenced parking lot" referenced in the first sentence of the trespass charge was intended by Grievant to refer to the parking lot mentioned in the second sentence. That is, the language of the accusatory instrument, which was based on Grievant's "own knowledge," leads to a reasonable understanding that Grievant observed Worthy allegedly commit criminal trespass in the "fenced parking lot" of the BMHA property at South Park and Louisiana, which was located directly across the street from the Big Basha gas station, and then observed Worthy drive into the "parking lot" of the Big Basha station "at South Park and Louisiana" and leave his vehicle unattended.

The City's proffered reading of the three sentences under the charge of criminal trespass that it was the same "parking lot" for the criminal trespass charge and the V&T charges, putting aside the input of the report technician in preparing the charges, is no more reasonable than the reading given it by the Arbitrator that two different parking lots were referenced in the trespass charge.

Additionally, there is no evidence in the record that Grievant did not observe Worthy allegedly commit criminal trespass at a fenced BMHA parking lot. Grievant's Grand Jury testimony contained his acknowledgement that Worthy was not on BMHA property at the time of his arrest, which, as Grievant testified, "does not mean that he did not trespass at some point." (Joint Exhibit 19, 61). The close proximity between BMHA property and the Big Basha gas station property underscores the reasonableness of the Arbitrator's reading of the accusatory instrument. The Arbitrator also finds there is no evidence in the record why Grievant would have been motivated to fabricate a charge against Worthy, which would be the case if Grievant falsified the factual allegations in the criminal trespass charge. The video evidence, it can finally be added, only establishes various events at the Big Basha gas station parking lot and does not in any way negate the claim made by Grievant in the accusatory instrument that in a nearby location Worthy engaged in criminal trespass.

The Arbitrator, in concluding that the City did not establish that Grievant was untruthful in reporting on Worthy's arrest for criminal trespass, has taken into account the P-163. (Joint Exhibit 22). That document does not reference in its

"Narrative" anything about the criminal trespass charge. Accordingly, it does not support the City's case of untruthfulness regarding the criminal trespass charge.

Turning next to the charge Grievant made against Worthy for violating Section 1210 of the V&T Law for leaving his vehicle unattended, the Arbitrator observes that the City's position of untruthfulness on this point is based entirely on the video evidence. (Joint Exhibit 26). While, at various points, the video evidence depicts an individual near Worthy's vehicle, known in this record as Baker, the video evidence also shows this individual joining up with and leaving the property with two other individuals. (Id.). At best, the video evidence is unclear as to whether this person was watching Worthy's vehicle for him or for that matter, was even acquainted with him.

The City argues that Grievant falsely claimed that Worthy left his vehicle unattended, on the basis that the video evidence establishes that the vehicle was always within Worthy's eyesight. The fact that a vehicle is in a defendant's sight, however, does not necessarily support the conclusion that the vehicle was not unattended. A review of judicial decisions decided under Section 1210 of the V&T Law reveals that a typical Section 1210 issue arises in a civil case where someone has stolen a vehicle and a claim is made against the owner or driver of the vehicle that the owner or driver was negligent by leaving the vehicle unattended.

In *Brennan v. City of New York*, 108 AD2d 834 (2nd Dept. 1985), the driver of a sanitation truck wanted to inspect a mechanical problem at the rear of the truck. He left the truck's cab with the keys in the ignition and the motor running while he went about his inspection. When the driver was at the rear of the truck, another individual took the truck and drove to a point where it collided with plaintiff's vehicle. The claim was made that the driver of the truck was negligent by leaving the truck unattended. The court found that the jury's conclusion that the driver violated Section 1210 by leaving the truck unattended was a reasonable finding. Obviously, the truck driver had the truck in sight at all times. Thus, even if Worthy kept his vehicle in his sight at all times, that fact alone does not necessary negate the charge that he violated V&T Section 1210.[5] Therefore, the City's argument that Grievant made a false assertion by charging Worthy with a violation of Section 1210 is baseless.

The Arbitrator has found, therefore, that the City did not establish that Grievant "was untruthful regarding the factual circumstances of the arrest" of Worthy. In view of this finding, there is no need to engage in any analysis of the assertion in Charge 5 that Grievant perjured himself in connection with any report, statement, or testimony he gave regarding Worthy's arrest. Thus, the City has not met its burden in establishing a predicate for a finding that Grievant is guilty of any of the six Charges as they pertain to the Worthy arrest.

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[5] Judicial decisions cited by the PBA in its brief are to the same effect.

Regarding the allegations against Grievant based on the Figueroa arrest, the Arbitrator observes that the City's position, as noted, is based on the language in the accusatory instrument charging criminal trespass in the third degree that Figueroa was "in the building," which the record knows to be the Famous Corners Bar. (Joint Exhibit 24). The crime of criminal trespass in the third degree, as defined in Section 140.10 of the Penal Law, occurs when a defendant "knowingly enters or remains unlawfully in a building or upon real property," with seven subsections of either types of a "building" or "real property" listed. All subsections would exclude the porch of a bar.

If, as Grievant testified before the federal Grand Jury, Figueroa was not "in" the Famous Corners Bar, then Figueroa's refusal to leave the property would not amount to this Class B misdemeanor offense and the charge of criminal trespass in the third degree was an overcharge. In such case, Figueroa and his co-defendants more properly should have been charged with the violation of trespass, which, under Section 140.05 of the Penal Law, occurs when a person "knowingly enters or remains unlawfully in or upon premises."

The question becomes whether the accusatory instrument or Grievant's testimony before the federal Grand Jury was untruthful on the point of whether or not Figueroa was inside or not inside the Famous Corners Bar. At this juncture, it is useful to consider Section 210.20 of the Penal Law, which sets forth a theory of perjury based on "inconsistent statements." The Arbitrator recognizes that only Charge 5 alleges perjury, but he finds the inconsistent statements theory

can fairly be considered as to the remainder of the allegations that claim that Grievant was not truthful when either reporting or testifying about the Figueroa arrest. The essence of the inconsistent statement theory is set forth in Section 210.20:

> Where a person has made two statements under oath which are inconsistent to the degree that one of them is necessarily false, where the circumstances are such that each statement, if false, is perjuriously so, and [for the crime of perjury itself], where each statement was made within the jurisdiction of this state …, the inability of the people to establish specifically which of the two statements is the false one does not preclude a prosecution for perjury. …

Applying the inconsistent statement theory to Grievant's sworn statement in the accusatory instrument and sworn statement before the Grand Jury, the question becomes whether one of those statements must be considered "necessarily false." To reach this conclusion, it would have to be shown that there were irreconcilable differences between the two sworn statements and, if there were such differences, the differences were not due to a mistake, fallibility of memory, lack of consciousness of the nature of the statements made or correction of prior testimony. See *People v. Samuels*, 284 NY 410 (1940); *People v. Lombardozzi*, 385 AD2d 528 (2nd Dept. 1970); *People ex. rel. Hegeman v. Corrigan*, 195 NY 1 (1909).

The Arbitrator finds it cannot be concluded that the "necessarily false" standard has been established because he cannot find that there is a preponderance of the evidence that the statement in the accusatory instrument

that Figueroa was “in the building” can be attributed to Grievant as opposed to part of a template used by the report technician. The record, in fact, shows that, at his interrogation by Lt. Lloyd, Grievant underlined the factual portion of the trespass charge derived from his knowledge, which did not include any claim that Figueroa or the other defendants were “in the building.” (Joint Exhibit 17). Further, the P-163 for Figueroa, which the record shows was likely authored by arresting Officer Zoll, contained in its narrative factual information attributed to Grievant, and it did not include any assertion that defendant Figueroa or the other defendants had been “in the building.” (Joint Exhibit 25). It is at least as likely, the Arbitrator finds, that the inconsistency between the accusatory instrument and the federal Grand Jury testimony of Grievant was because of an unintentional error made by the report technician on the accusatory instrument rather than any untruthful statement authored by Grievant. Put differently, the Arbitrator is not able to conclude that the accusatory instrument and its language that Figueroa was “in the building” could be considered “necessarily false.”

Accordingly, the inconsistent statement theory does not establish that Grievant made any false statement in the accusatory instrument or his testimony before the Federal Grand Jury. Further, the analysis offered above as to why the inconsistent theory statement cannot be considered support for the City’s allegations of untruthfulness also shows that there is no other evidence that would serve to satisfy the City’s burden of proof. That is, the very real possibility that the “in the building” language in the accusatory instrument was placed there by the report technician rather than Grievant is a plausible explanation of how the

language found its way into the accusatory instrument. As with Worthy, there is also no evidence that would establish that Grievant had a motivation to falsify what he put in the accusatory instrument. Further, as Lt. Lloyd acknowledged in his testimony, there is no reason to believe that Grievant's sworn testimony before the Grand Jury on any particular point, Figueroa included, was not true.

The Arbitrator would add that the inconsistent statement theory as it pertains to the perjury charge contains another flaw, namely, Grievant's testimony before the Federal Grand Jury cannot be considered, in the language of Section 210.20, "a statement … made within the jurisdiction of this state," which disqualifies the Grand Jury statement as a basis for the insistent statement theory. See *People v. Iadarola*, 85 Misc.2d 271 (NY Co. 1975); Rampolla v. Coombs, 1989 US Dist LEXIS 6736 (SDNY 1989).

The City, therefore, did not establish by a preponderance of the evidence that Grievant was "untruthful regarding the factual circumstances of the arrest" of Figueroa. Nor has the City established, as noted, that Grievant committed perjury in connection with his accounts of the Figueroa arrest, including his testimony before the Grand Jury. Hence, as with the Arbitrator's analysis of the City's claims against Grievant regarding Worthy, the City has not met its burden in establishing a predicate for finding that Grievant is guilty of any of the six Charges as they pertain to the Figueroa arrest.

Accordingly, and based on the foregoing, I find and make the following:

## AWARD

1. The disciplinary charges dated 9/16/19 were timely filed pursuant to the Agreement.

2. There was not just cause for the Charges dated 9/16/19.

3. The Charges dated 9/16/19 are dismissed.

STATE OF NEW YORK )
COUNTY OF ALBANY ) ss:

I, Jeffrey M. Selchick, do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this Instrument, which is my Award.

Dated: July 13, 2020
Albany, New York

JEFFREY M. SELCHICK, ESQ.
ARBITRATOR