2016 IL App (2d) 150402-U
No. 2-15-0402
Order filed June 1, 2016
Modified Upon Denial of Rehearing July 18, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE CITY OF ROCKFORD, Plaintiff-Appellant/ Cross-Appellee, v. POLICEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, UNIT 6, Defendant-Appellee/ Cross-Appellant.	))))))))))))	Appeal from the Circuit Court of Winnebago County. No. 14-MR-105 Honorable Eugene G. Doherty, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: We defer to the arbitrator's finding that the City did not have just cause to terminate the police officer. However, because the arbitrator exceeded her authority by issuing a remedy that had no basis in the parties' collective bargaining agreement, we vacate the remedy and remand for the arbitrator to determine a new remedy.

¶ 2 In August 2009, Rockford police officer, O.P.,[1] shot and killed a suspect, Mark Barmore, following a hand-to-hand struggle over O.P.'s gun. The case was presented to a grand jury, but no indictment followed. This was the fourth incident in 10 years where O.P. shot a suspect or suspects. In total, two persons died, one person suffered critical injury to the chest, and two persons suffered non-critical injuries. After the fourth shooting, the Rockford police department (Rockford PD) placed O.P. on paid leave. O.P. received treatment for post-traumatic stress disorder (PTSD). In July 2010, the police chief, Chet Epperson, ordered O.P. to report for a psychological fitness-for-duty examination. Plaintiff, the City of Rockford (City), retained an expert, Dr. Daniel O'Grady, to examine O.P. Dr. O'Grady opined that O.P. was not fit for duty. O.P. retained his own expert, Dr. Matthew Finn, who opined that O.P. was fit for duty. Epperson reviewed each evaluation and decided to terminate O.P.'s employment. O.P., while represented by defendant, the Policemen's Benevolent and Protective Association, Unit 6 (Union), filed a grievance, which was sent to arbitration pursuant to the collective bargaining agreement (CBA).

¶ 3 The arbitration hearing was bifurcated. In the first hearing, the arbitrator considered whether the City had the authority to terminate O.P. where there were conflicting psychological evaluations. She found that it did.

¶ 4 In the second hearing, the parties stipulated to the following question: "Whether the City had just cause to terminate the Grievant [O.P.] on [July 15, 2011], and, if not, what is the proper remedy?" The arbitrator heard testimony from both experts, Epperson, O.P., and several other witnesses. She also received into evidence the written evaluations, department reports of prior policing incidents, and consultants' reports of the Barmore shooting. She considered this

[1] Due to the sensitive nature of O.P's medical records, we refer to him by his initials throughout the order.

evidence through the lens of O.P.'s fitness for duty. She found that the City failed to prove by a preponderance of the evidence that O.P. was unfit for duty. Thus, in her view, the City did not have just cause to terminate O.P. For a remedy, she ordered that O.P. be reinstated to the position held immediately prior to his 2011 termination, which was paid leave. Further, she ordered that, before O.P. return active duty, he must be evaluated by a third psychologist, whose fitness determination would be final. She did not state whether O.P. was entitled to back pay.

¶ 5 The Union filed a post-award motion for confirmation, seeking, *inter alia*, back pay. The arbitrator did not agree that the motion was for confirmation; rather, she characterized it as an untimely motion to vacate or modify the award. Thus, O.P. did not receive back pay for the time between his 2011 discharge and his 2013 reinstatement.

¶ 6 The City moved for administrative review of the decision. It sought to vacate the arbitrator's just-cause determination. The Union answered in opposition. It also filed a cross-motion for administrative review, again seeking back pay.

¶ 7 The circuit court affirmed the arbitrator's just-cause determination. However, it found portions of the remedy unworkable. It accepted the order that O.P. undergo additional fitness testing before returning to active duty, but it rejected the method of authorizing a third doctor to make a final decision on the matter. It vacated the remedy in its entirety, and it remanded for the arbitrator to create a new remedy where the arbitrator retained decision-making authority. The circuit court also rejected the Union's claim for back pay. It explained that the award did not mention back pay. It determined that the Union requested an untimely modification of the award, not a confirmation of the award.

¶ 8 Both the City and the Union appeal to this court for administrative review of the award. The City challenges both the just-cause determination and the remedy. As to the just-cause

determination, the City argues that the arbitrator: (1) violated public policy by undermining the goal of an efficient and disciplined police force; and (2) exceeded her authority by interpreting the CBA to require just-cause for termination in the context of a fit-for-duty case. As to the remedy, the City argues that the arbitrator exceeded her authority by issuing a remedy that had no basis in the parties' CBA. We reject the City's arguments as to the just-cause determination, but we agree that the remedy must be set aside. The arbitrator exceeded the scope of her authority by issuing a remedy that had no basis in the parties' CBA. We remand for the determination of a new remedy. We do not address the Union's cross-appeal concerning back pay, because, having vacated the remedy, each party is now free to argue anew for its preferred remedy based on the evidence in the record as it exists. Just-cause determination affirmed; remedy vacated and cause remanded.

¶ 9 I. BACKGROUND

¶ 10 Having provided a general overview of the case history, we begin our background discussion by addressing the arbitration hearings, followed by the circuit court ruling.

¶ 11 A. Arbitration: First Hearing

¶ 12 At the first hearing, the arbitrator considered the following question: "Did the City have the authority under the [CBA] to terminate Officer O.P.'s employment where there were two conflicting fitness-for-duty reports and, if not, what is the proper remedy?"

¶ 13 The arbitrator turned to the 2004 CBA, which stated in part:

¶ 14 "Section 1.2- Management Rights. *** The City retains the sole right and authority to operate and direct the affairs of the City, including the exclusive management, control, and operations of the Police Department including, but not limited to *** the right to set standards of service and protection to be offered to citizens; direct

work forces; *** hire and promote employees; demote, suspend, discipline, or discharge *for just cause* *** provided, however, the exercise of any of the above rights shall not conflict with any of the provisions of this Agreement.

* * *

Section 15.9D- Chief's Authority. *** The Chief shall also have the authority to discharge employees for just cause.

* * *

Section 15.15- Fitness for duty. No employee shall be required to undergo psychological, psychiatric, or physiological testing unless the Chief of Police has reasonable cause to believe the employee is then unfit for duty. Basis for the reasonable cause shall be set forth in writing to the employee at the time the employee is ordered to undergo such testing.

Employees shall have the right to Union representation when being informed of the need for testing, and shall have the right to secure similar testing at their own expense from psychiatrists, psychologists, or physicians of their own choosing. The City shall utilize the service of qualified medical doctors, psychiatrists[,] or psychologists." (Emphasis added.)

¶ 15 Union attorney Timothy O'Neil testified that, in his experience, most CBA's that included a fitness provision also included a tie-breaking option. O'Neil recalled a 2004 stand-off about including such a provision. In O'Neil's view, the fitness provision would be meaningless if the City could terminate an employee in the face of conflicting evaluations.

¶ 16 Former legal director for the City, Ron Schultz, testified that he recalled the 2004 negotiations differently. The Union assured the City at that time that the police chief would be

able to act on a fitness report. The City attorney, Joseph Bruscato, testified that his notes from the 2004 CBA negotiations reflected only one brief exchange concerning the fitness provision, which did not squarely address the question of conflicting evaluations.

¶ 17 Deputy Chief Lori Sweeney testified to the instant 2008 grievance proceedings. Although she believed the City had the authority to terminate based on Dr. O'Grady's evaluation alone, she had offered O.P. the *non-precedential* option of a third doctor who would issue a binding, tie-breaking opinion. Similarly, the City's current legal director, Patrick Hayes, testified that the City's offer of a third, tie-breaking doctor was simply a non-precedential attempt to resolve its dispute with O.P.

¶ 18 In April 2012, the arbitrator decided the first issue in favor of the City. She stated that section 15.15 of the CBA contained a "gap," meaning that section 15.15 did not instruct what to do in the face of conflicting opinions by the City's evaluator and the officer's evaluator. However, the arbitrator determined that section 15.15 did not require additional tie-breaking procedures. "The[] scraps of [2004] bargaining history do not provide support for the Union's theory that Section 15.15 was intended to limit the City's right to terminate individuals who had exercised their right to obtain a second fitness-for-duty evaluation." The City's 2008 offer to conduct a binding, tie-breaking evaluation was merely part of an attempted settlement with O.P., not an indicator of section 15.15's requirements. Thus, the arbitrator concluded, the City may terminate based on one negative evaluation, even if there is a conflicting, positive evaluation. The arbitrator recognized that section 15.15 does not mandate a specific course of action upon a finding of unfitness: "[Section 15.15] does not place any explicit limitation on the City's authority to terminate. Absent such a limitation, *the City is free to take what action it deems appropriate*, subject only to the contractual limitations imposed by the CBA." (Emphasis

added.) The City's decision to terminate, the arbitrator noted, is subject only to the limitation in section 1.2 of the CBA that the termination be for just cause.

¶ 19 B. Arbitration: Second Hearing

¶ 20 At the second hearing, the arbitrator considered the following question: "Whether the City had just cause to terminate the Grievant [O.P.] on [July 15, 2011,] and, if not, what is the proper remedy?"

¶ 21 The City's position was that it had just cause to terminate O.P. based on Dr. O'Grady's finding of unfitness. The City noted that it followed the CBA in all respects: it had "reasonable cause" to order the fitness-for-duty evaluation, it properly notified O.P., it allowed O.P. to secure similar testing, and it relied upon the report it found reliable.

¶ 22 The Union's position was that the City did not meet its burden of proving, by a preponderance of the evidence, just cause to terminate. The Union argued that Dr. O'Grady's report contained misstatements and bias. Further, the Union noted that, in 10 years as a police officer, O.P. had never been disciplined. In the Union's view, the City was predisposed to terminate O.P., because the Barmore shooting had caused unrest in the community. It sought reinstatement and a make-whole remedy.

¶ 23 The arbitrator heard testimony from both experts, Epperson, O.P., David Hooks (O.P.'s supervisor), and Elizabeth Sue Frankiduccia (the coroner). She also received into evidence the written evaluations, department reports of prior policing incidents, and consultants' reports of the Barmore shooting.

¶ 24 1. Prior Shooting Events

¶ 25 Prior to the Barmore shooting, O.P. shot four other suspects in three separate shooting events.[2] According to police reports, in 2002, while working in Washington D.C., O.P. was called to a domestic violence scene in a mixed business and residential neighborhood. The suspect, Robert Green, fled the scene in his vehicle, with a female victim in the passenger seat. O.P. believed both that Green was trying to kidnap the woman and that Green was trying to hit O.P. with the vehicle. Indeed, the vehicle hit O.P. in the hip as it reversed and turned. Therefore, as O.P. was hit, or immediately after, he fired shots at Green. He hit Green in the chest, critically wounding him. The other officers on the scene then helped the woman out of the car. O.P. was the only officer on the scene to fire his weapon. The department investigation labeled the incident: "Justified, policy violation."[3]

¶ 26 In 2007, while working in Rockford, O.P. approached suspects Billy Peavy and Robert Evitt, who were sitting in a car in a driveway in a residential neighborhood. (It is unclear why O.P. wanted to question them; reports indicate that Peavy, who "borrowed" the car from a person

[2] O.P. also shot a pit bull under circumstances all parties accept as self-defense, and, so, we do not detail that shooting.

[3] The report places a comma between "justified" and "policy violation." However, later, witnesses such as Dr. Finn refer to O.P.'s action as simply "justified." The punctuation affects the meaning. With a comma, the use of force was "justified," though the force was implemented with "policy violation(s)." Without the comma, the entire course of action was justified. Elsewhere in the reports, it is clear the first meaning was intended: "I find that Officer O.P.'s use of the service pistol is Justified, Policy Violation. Officer O.P. was justified in defending himself; however, in doing so, he violated policy by considering the [car] a weapon and shooting at its operator."

named "Don," may not have had permission to use the car). As O.P. approached on foot, Peavy and Evitt backed the car out of the driveway in an attempt to flee. Thus, the car initially moved in O.P.'s direction. The driver accelerated in an erratic manner. It was later determined that he had been using cocaine. O.P. fired nine shots at the moving vehicle, hitting both Peavy and Evitt. Both men were taken to the hospital, but neither man was critically wounded. One was shot in the hand. Three bullets missed O.P.'s intended target; one hit a parked car on the road. O.P. was not disciplined for his conduct. Still, it was against Rockford policy to fire at a moving vehicle. The City submitted a Rockford PD policy manual from the relevant time period. According to policy, an officer should move out of the way of the moving vehicle, rather than shoot at it. Absent exigent circumstances, such as life in peril, an officer should not shoot. The risks of shooting are too high; these risks include harm to third parties from ricocheting bullets.

¶ 27 Also in 2007, O.P. and three other officers came to the scene of a distraught, 66-year old man, Lewis Henderson. Henderson had just been involved in, or near the scene of, a traffic accident. Henderson had a warrant against him for aggravated battery. O.P. believed that Henderson was holding a gun under his shirt. O.P. told Henderson to drop the weapon. Henderson refused, shouting expletives. Though Henderson was walking backward, O.P. believed that Henderson was reaching for a gun. O.P. shot five times, four of which hit Henderson. Henderson died from his wounds. Two of the other officers had drawn their guns, but only O.P. shot his gun. It was later determined that Henderson had left a suicide note and had been taking cocaine. Henderson did not have a gun. The object under Henderson's shirt had been a hammer. O.P. was not disciplined for the incident. The case was presented to a grand jury, but no indictment followed.

¶ 28 2. IAM Report

¶ 29 The City retained Independent Assessment and Monitoring (IAM) to conduct an investigation of the Barmore shooting. After interviewing numerous witnesses and reading police reports, IAM summarized the events leading up to the shooting as follows. On August 24, 2009, a woman called the Rockford PD alleging that, the night before, Barmore threatened to slit her throat. The woman provided a residential address where she knew Barmore to be sleeping. When the police arrived at the residence, Barmore saw them and fled out the back. O.P. and his partner, Stanton North, responded to dispatch to search for Barmore. They were told that Barmore may be armed with a knife and had a felony warrant against him.

¶ 30 A short time later, O.P. and North saw Barmore outside the House of Grace Church, talking with church members. Barmore told church members that he was having "trouble," in that he "almost" slit his girlfriend's throat. The church members encouraged Barmore to make a positive change in his life, such as joining the church boxing group. When Barmore saw O.P. and North, the conversation broke, and Barmore said something to the effect of, "No, they're not going to get me today. They're not going to get me." Barmore ran into the church by slipping in behind a church member.

¶ 31 O.P. and North reported to dispatch that they saw Barmore enter the church. A church official opened the church door for the O.P. and North. Two women in the church told O.P. that Barmore fled to the basement and that there were children in the basement. The basement served as a daycare. O.P. drew his weapon before going downstairs. North drew his weapon just before entering the basement. Immediately upon entering the basement, O.P. and North saw between 8 and 15 preschool-aged children and "about two adults." North asked, "Where did he go?" At least one of the children and possibly the daycare teacher stated that Barmore went into the "closet," *i.e.*, the boiler room.

¶ 32 According to some accounts, O.P. and North told Barmore to come out, get down, and put his hands up. ("The officers must have seen the guy in the room and started yelling for him to come out.") However, according other accounts, including by O.P. and North, O.P. and North immediately attempted to push open the boiler room door. Whatever the timing, when O.P. and North attempted to open the door, Barmore pushed back. O.P. described Barmore as "attempting to barricade the door closed." Barmore released his hold on the door in order to grab a long, metal ballast cover. At that point, O.P. and North succeeded in opening the door. The force of entry pushed Barmore farther into the room and caused him to drop the ballast cover. North stepped backward to extend the distance between himself and Barmore. O.P. stepped forward, closer to Barmore. He later explained that his reason for stepping closer to Barmore, with his gun held close to his chest in "combat style," was to prevent Barmore from getting away or taking hostages. According to North, O.P. reached out to Barmore with his left arm, either to push Barmore or grab him. With O.P.'s approach, Barmore was able to reach out and grab the barrel of O.P.'s gun. Barmore had both hands on the barrel of the gun, and O.P. had one hand on the gun grip and one hand over Barmore's hands. The two struggled over O.P.'s gun, within inches of each man's chest. O.P. feared that Barmore might disarm him and attempt to shoot. Therefore, when O.P. was able to push the weapon back toward Barmore, he shot. He saw the bullet strike Barmore's neck. Barmore fell, but continued to struggle for the gun. North could not tell who had fired the gun and who had been shot. He feared for the lives of O.P., himself, and everyone in the basement. North fired three shots at Barmore. Barmore ceased to struggle. O.P. extracted the gun from Barmore. North broadcast over the police radio for assistance and medical attention, stating that Barmore was "down." Medical personnel responded within "moments." Still, in the short time it took them to arrive, Barmore had stopped breathing; he had

no pulse. Based on dispatch recordings, the total time between reporting a first sighting of Barmore at the church and reporting Barmore shot was just over two minutes.

¶ 33 Meanwhile, Sheila Brown, a pastor and the proprietor of the daycare, had followed O.P. and North down to the basement, because she saw that the officers' guns were drawn and she wanted to make sure the children were safe. She and the daycare teacher gathered the children into a corner and "shielded the kids with their bodies." *After* the struggle with Barmore, North heard the children screaming. "As additional officers arrived on the scene, *** North and O.P. began yelling for the adult daycare workers to get the children out of there."

¶ 34 IAM assessed whether O.P. and North's actions complied with policy, training, and sound tactics. IAM stated that the officers used "poor tactics" during the incident. "Their actions presented unnecessary risks to officer safety and the safety of others." Specifically, in entering the church, the officers failed to establish a perimeter, summon back-up, evacuate the church, inquire about the number of occupants of the church, or ask about the layout of the church, including entry and exit points. In entering the basement, the officers failed to address the "most pressing" safety issue: removing the children and daycare workers from the room. There was a marked exit from the basement to the outdoors. The children and teachers would not have had to pass by the boiler room door to reach the exit.

¶ 35 Instead of immediately evacuating the children, the officers attempted to remove Barmore from the boiler room. The boiler room had only one entry/exit, and nothing in the reports suggested that O.P. and North believed otherwise. In fact, they were told the room was a "closet," and O.P. believed Barmore to have "barricaded" himself in it. Until O.P. and North tried to force open the door, Barmore had not acted aggressively toward them. Rockford PD policy dictated that, when facing a barricaded and potentially armed suspect, police should

"avoid confrontation *** in favor of isolation and containment until [a] supervisor, trained tactical [person], or special response *** unit[] arrives." Had the officers waited, they would have been able to consider the use of intermediate tactics, such as "OC spray," an electronic control weapon, a negotiation team, or a canine unit. No exigent circumstances, such as the presence of an active shooter, weighed in favor of going against policy guidelines.

¶ 36 Once the officers opened the boiler room door, North took the correct action in stepping back. The distance would have allowed Barmore to retreat further into the contained space and would have given the officers another opportunity to evacuate the room. The distance also gave North more time to react to any of Barmore's actions. O.P. took the incorrect action by stepping closer to Barmore and by reaching out to push or grab him. This allowed Barmore to grab O.P.'s gun and increased the risk of injury or death to bystanders. "There [was] no evidence, including in the statements by [North and O.P.], providing a legitimate rationale for [O.P.'s] decision to employ this high risk tactic" of stepping close to Barmore with a drawn gun.

¶ 37 O.P. had stated that, in part, he acted as he did because he feared a hostage situation. However, O.P. asked witnesses no questions in furtherance of this concern. IAM stated that there is no evidence to suggest O.P. actually believed Barmore had a hostage in the boiler room. In fact, O.P.'s actions would have been even more troubling if Barmore did have a hostage in the boiler room, because the confrontation would have heightened the risk to a hostage.

¶ 38 As a final point, IAM noted that the officers violated Rockford PD policy because they attempted to arrest a person out on a felony warrant without wearing protective vests. In balance, IAM also criticized the Rockford PD, in that dispatch provided confusing directions to the church, supervisors never radioed O.P. and North to tell them to slow down, and department investigators should have conducted a more timely and thorough internal investigation.

¶ 39 In sum, IAM opined that O.P. and North first should have evacuated citizens from the premises and then waited for specialized back-up before attempting to extract a potentially armed, barricaded suspect. Rockford PD policy instructed for this approach, and O.P. and North did not follow the Rockford PD policy.

¶ 40 O.P. was not disciplined for the Barmore incident. The Barmore case was presented to a grand jury, but no indictment followed.

¶ 41 3. Dr. O'Grady's Evaluation and Testimony

¶ 42 Dr. O'Grady, hired by the City, submitted a 19-page, single-spaced report of the psychological evaluation. Dr. O'Grady had been performing fitness-for-duty evaluations for police officers since 1992. In that time, he conducted over 300 evaluations. Dr. O'Grady came from a "police family." His father and uncle were officers. His cousin was killed in the line of duty.

¶ 43 As part of the evaluation, Dr. O'Grady reviewed extensive police documents and memoranda from both Rockford and D.C., consulted with O.P.'s psychotherapist, conducted a mental-status examination, engaged in five hours of clinical interviews, and administered, or had a colleague administer, eight psychological tests (the Minnesota Multiphasic Personality Test-2 (MMPI-2), the Personality Assessment Inventory (PAI), the Millon Clinical Multiaxial Inventory-III, the State Trait and Expression Inventory, the Beck Depression Inventory, the Symptom Checklist-Short Version, the Rorschach Ink Blot Test, and the Wechsler Adult Intelligence Scale-IV (WAIS-IV)). Dr. O'Grady met with O.P. on three different days in the winter and early spring of 2011. O.P. signed a waiver of confidentiality.

¶ 44 Dr. O'Grady reported that, according to the PAI, O.P. has a "positive interpersonal style" of "warm-control." Seventy percent of police and public safety applicants score in this category.

Further, according to the MMPI-2, O.P. has a "public self-presentation of correctness and friendliness. He has significant ego strengths, practical effectiveness[,] and self-sufficiency in a wide variety of areas."

¶ 45 Dr. O'Grady administered the WAIS-IV intelligence test. Dr. O'Grady explained in testimony[4] that he considered the WAIS-IV test to be the "best" cognitive measure, because it contains several subtests that are able to highlight "very specific problems or strengths." Despite its advantages, many psychologists do not administer the WAIS-IV test, because it is one of the more expensive tests to administer, costing about $2,000.

¶ 46 In 14 of the 15 WAIS-IV intelligence tests, including a Full Scale I.Q. test, O.P. scored in the average to high-average range, 102 to 113. This placed O.P. in the top 45 to 19% of the general population. However, in one of the WAIS-IV tests, the "processing speed index," O.P. scored in the low-average range, 84. Processing speed index is critical to "judgment and decision making in stressful situations that require quick information processing." It is "dynamically related to mental capacity, reasoning[,] and efficient use of working memory for higher order fluid tasks." As Dr. O'Grady explained in testimony, a famous example of a person who likely has a high processing speed index is the pilot Sully Sullenberger, who successfully executed an emergency landing on the Hudson River. In contrast, O.P.'s processing speed index score of 84 placed him in the bottom 14% of the general population. The categorization of "low average" often "confuses people." Psychologists call it "low average," but a score of 84 is 1 1/2 to 2 standard deviations away from the norm, "so it's actually a very low score" and "kind of a dramatic thing." As stated in the written evaluation, the 29-point difference between O.P.'s

[4] We specify when information came from testimony, as opposed to the written evaluation, because this distinction informed the arbitrator's decision.

highest and lowest scores was significant; only 2.6% of the general population have a similar range. Having a comparatively low "processing speed index" score is usually a sign that something is wrong: a neurological condition such as epilepsy, traumatic brain injury, cognitive decline through aging, attention deficit disorder, *or* serious depressive and/or anxiety disorders. In Dr. O'Grady's view, O.P.'s state was caused by serious depressive and/or anxiety disorders. O.P. had no indications of a neurological condition, a brain injury, or, at age 39, advanced aging. Additionally, O.P. was unlikely to have attention deficit disorder, because he achieved a normal "working memory" score.

¶ 47 O.P. did, however, have a long history of PTSD. While working in Washington D.C., O.P. took three medical leaves for PTSD. First, in March 2002, following the Green shooting, O.P. was diagnosed with PTSD and received three weeks of counseling. Second, in June 2002, O.P. was the first officer on the scene of a gruesome double-murder, involving the mutilations of a young child and an elderly woman. O.P. again was diagnosed with PTSD and received eight weeks of individual psychotherapy. Third, in December 2002, while investigating an unrelated crime, O.P. witnessed the emergency-room death of a drowned baby. O.P. broke down into tears at the hospital, again was diagnosed with PTSD, and received 10 weeks of treatment. While working in Rockford, O.P. again was diagnosed with PTSD following the Barmore shooting.

¶ 48 Dr. O'Grady opined that tragic events in O.P.'s personal life contributed to his anxiety. For example, growing up, O.P.'s father's alcoholism caused discord in the family; his mother threatened to leave his father. His younger brother committed suicide at age 17 by using a gun. Following that, his mother was hospitalized in a mental health facility for a number of weeks. O.P. denied feeling sad or depressed over his brother's suicide. Instead, he felt angry at his brother for devastating the family, and he turned his attention to funeral arrangements. More

recently, in the early 2000's, O.P.'s eight-year-old son was paralyzed from the waist down following an unsuccessful surgery. O.P. denied experiencing "depressive feelings" following the paralysis of his son. In Dr. O'Grady's view, O.P. has not adequately worked through these tragic events.

¶ 49 Dr. O'Grady formed a number of "remarkable impressions and observations" of O.P. during the clinical interviews: (1) victim perspective and blame; (2) lack of motivation to change; (3) denial; and (4) lack of self-insight. In discussion, O.P. repeatedly moved away from his own behavior and, instead, blamed others. This was true of the Barmore shooting, where O.P. portrayed himself as the victim of misinformation from the churchgoers, inadequate support from the police department, political gamesmanship on the part of the mayor, and error by the professionals who conducted the study of the shooting. When asked what he wished he had done differently in the Barmore case, he responded that he could not have done anything differently. His responses were similar with respect to the other shootings. In Dr. O'Grady's view, these responses demonstrated a "self-righteous" attitude and a resistance to change, improvement, and growth. O.P. denied in a written test that he experienced any anxiety, yet, in the same session, he verbalized that he was experiencing a lack of support from the police department, had poor sleep, tightness in his chest, and "bathroom issues." O.P. denied any history of depression within his family of origin. However, later in that session and in other sessions, he came to reveal the story of his brother's suicide and his mother's hospitalization. While being treated for PTSD in Washington D.C. and in Rockford, O.P. displayed a pattern of insisting he was well early into the treatment. However, the frequency with which O.P.'s PTSD "re-triggered" suggested that he never adequately addressed it. In fact, "[a]lthough [O.P.] has had PTSD four different times, he has almost no awareness or knowledge of it." He had a difficult time relaying symptoms or

therapy techniques. He provided only vague accounts, such as, "We talked about it and then I went back to work;" "I was just F*** up;" and "I have to depend on myself and my family. Therapy for me was mostly just me talking."

¶ 50 Dr. O'Grady drew similar conclusions based on the eight psychological tests. Though O.P. was cooperative during the entire evaluation, "[h]e demonstrated great effort not to reveal anything negative about himself." As a result, O.P.'s test results likely "seriously underemphasize the severity of any psychological disturbance." O.P. did admit to some "relatively intense experiences of anger and negative affect," but O.P. considered the experiences "not out of the norm for police officers."

¶ 51 Dr. O'Grady opined that O.P. was in a "chronic state of irritation," and had a "chronic stimulus overload." This state of being lowered his tolerance for frustration and created a marked tendency for impulsive, reactive behavior, unwarranted aggression, and ill-advised action.

¶ 52 On the section of the MMPI-2 addressing "personnel evaluation," *i.e.*, "employment readiness and potential for work[-]related problems," O.P. scored a "Level 5." Level 5 is the "least acceptable category." Public safety personnel are expected to score a "Level 1" or a "Level 2." O.P.'s score showed that he has "significant potential to minimize his psychological problems, misinterpret the motives of others, act on these inaccurate beliefs and be self-righteous and punitive." Further, O.P.'s MMPI "profile" is associated with "repressed anger, passive aggressive behavior, and paranoid trends in [one's] thinking." O.P.'s "underlying paranoid projections" lead to "subtle distortions of his reality." "At times, he can provoke others into reactions that he would take as confirming of his projections."

¶ 53 On the MCMI, a test to assess personality disorders, O.P. scored as having obsessive-compulsive disorder with histrionic personality traits and narcissistic personality features. Dr. O'Grady found it remarkable that, "even as defensive as [O.P.] was in taking this test," O.P. still scored as he did. Persons with obsessive compulsive disorder can "unreasonably insist that others submit to their *** way of doing things, ***, demand control of a situation and become very angry when it is lost, and experience difficulties when confronted with new situations that demand flexibility and compromise." The personality test also showed that O.P. has "poor self-insight and a lack of psychological mindedness which complicates efforts for him to change and grow." "Beneath his overtly sociable, cooperative, and controlled façade, there may be significant feelings of inadequacy and insecurity." "He denies almost any negative feeling."

¶ 54 Dr. O'Grady consulted telephonically with O.P.'s private therapist, Leonard Pink. Pink's work with O.P. consisted exclusively of "talk therapy." Pink stated that O.P.'s PTSD symptoms had decreased to periodic episodes. However, O.P. "gets hyper-vigilant about cars and sounds" and he continues to have sleep disturbances. Pink did not think that O.P.'s police actions were overly aggressive under the circumstances. However, Pink never asked O.P. whether O.P. learned anything from the shootings. In Pink's view, O.P. did not regret "having to do his job," but O.P. "took [no] kind of pleasure in shooting people."

¶ 55 After reading the police reports, Dr. O'Grady noted that O.P. "demonstrated aggressive behavior and questionable judgment" in a number of work situations. In the 2009 Barmore shooting:

> "[O.P.] and his partner did not follow [Rockford PD] policy and training. They utilized unsound tactics in pursuing [Barmore] into the church basement. When I asked [O.P.] about these criticisms, he dismissed all of it as political. Then, he made the

following highly revealing statement: 'The police job is easy. Sweep the area, take down the suspect, cuff him, while the other officer keeps watch.' That is the simplistic and rigid formula he follows in doing his job. That was his mentality going into the church in pursuit of [Barmore]. But[,] the reality was much more complicated and not that 'easy.' Civilians and children were all over the room. He and his partner needed *** to talk to each other. Backup police should have been called in. Civilians and children should have been told to exit the room as soon as [O.P.] and his partner entered the room.

These alternative behaviors [of telling the civilians and children to exit the room, etc.] require quick cognitive processing and not the rigid formula of 'sweep… take down… cuff… keep watch.' [O.P.'s] emotional rigidity, internal chronic stress, anger[,] and slow cognitive processing speed may have negatively influenced his judgment in th[e] tragic situation ***."

¶ 56 Dr. O'Grady opined that the 2007 arrest of Terrell Sockwell was also a good example of O.P.'s reactivity, aggression, and poor judgment:

"[O.P.] cuffed [Sockwell] and then grabbed him by his shirt and pants and threw him into a squad car face down. When [Sockwell] did not crawl into the car so the door could close, [O.P.] jumped on him and started hitting him in the face. All this was done in front of a crowd that included [Sockwell's] mother. This was the behavior of an angry and aggressive police officer who escalates a bad situation into a worse one."

Dr. O'Grady considered O.P. to have a "distorted perception" of the incident, as demonstrated by O.P.'s statement that he hit Sockwell in self-defense. (Sockwell was already in handcuffs.) Dr. O'Grady stated that the Sockwell incident showed that: "[O.P.] projects his anger onto others and then overreacts to what he perceives as aggression toward[] him. He does not adjust to or

quickly process information in a high stress situation. He reacts with aggression, and, at times, poor judgment."

¶ 57 Dr. O'Grady also listed, as a history, other actions for which O.P. had been investigated. Dr. O'Grady did not discuss these incidents in the same detail as the Barmore shooting or the Sockwell incident. Dr. O'Grady stated that he could gain insight into O.P.'s motives and cognition based on prior police actions, even if O.P. was not disciplined for those actions. One incident occurred very early in O.P.'s career, when he worked as an officer at the YMCA. There, he pointed a toy gun at a developmentally disabled adult. The adult became upset, but O.P. did not stop immediately. O.P. was written up for the incident. When asked at hearing why he included this incident in his report, Dr. O'Grady explained that the incident showed O.P.'s inability to process environmental cues quickly enough to change his behavior. O.P. was intent on playing a game, but he did not notice that the game was upsetting to another person.

¶ 58 Dr. O'Grady concluded that O.P. appears to have little motivation to change or learn from his past experiences. His four prior treatments for PTSD have resulted in little self-insight. He stated that he would not do anything different in each of the shooting incidents. He would continue to respond to stressful situations with aggressive reactivity and/or poor judgment. Thus, in Dr. O'Grady's view, O.P. was unfit for duty as a police officer. O.P. could, however, benefit from further PTSD interventions. It was unclear to Dr. O'Grady why Pink had not utilized any of the interventions, aside from talk therapy. It would take time and significant effort for O.P. to make the kind of changes necessary to return to work as a police officer. O.P.'s lack of motivation to change is a stumbling block to that end. Rather, O.P. "may function better in a job with the City of Rockford that is not concerned with public safety and high stress situations."

¶ 59 4. Dr. Finn's Evaluation and Testimony

¶ 60 Dr. Finn, O.P.'s expert, submitted a 12-page, single-spaced report of the psychological evaluation. Dr. Finn had never conducted a psychological fitness-for-duty evaluation; instead, Dr. Finn's experience included providing psychological services for residents of a sexually violent persons program and providing therapy and assessments of criminal inmates, particularly those who suffered from mental illness. In that context, he had performed hundreds of evaluations.

¶ 61 As part of the evaluation, Dr. Finn reviewed extensive police documentation, reviewed Dr. O'Grady's report, conducted a clinical interview took a psychosocial history, consulted with O.P.'s psychotherapist (Pink), conducted a mental-status exam, and administered, or had a colleague administer, eight psychological tests (the General Assessment Mental Abilities (GAMA), the Beck Depression Inventory-II (also conducted by Dr. O'Grady), the Beck Anxiety Inventory, the Symptom Checklist-90 Revised (also conducted by Dr. O'Grady), Trauma Symptom Inventory (TSI), the Minnesota Multiphasic Personality Inventory-2 (MMPI-2, also conducted by Dr. O'Grady), and the Personality Assessment Inventory (PAI, also conducted by Dr. O'Grady)). Dr. Finn met with O.P. on three different days in the late spring of 2011, one month after Dr. O'Grady submitted his report to Epperson. O.P. signed a waiver of confidentiality.

¶ 62 Dr. Finn's social history and employment summaries were similar to those provided by Dr. O'Grady. One exception is that Dr. Finn did not record O.P.'s father's alcoholism. O.P. told Dr. Finn that his relationship with his parents was "great" and that he grew up in a "nice, quiet" environment.

¶ 63 Dr. Finn's first three psychological tests, the MMSE, the Shipley 2, and the GAMA, measured O.P.'s cognitive and intellectual functioning. The MMSE required O.P. to perform verbal memory tasks, simple subtraction, spontaneously produce a written sentence, and reproduce a geometric design. O.P. demonstrated no difficulty and scored 29 out of 30. The Shipley 2 measured both crystallized cognitive ability and fluid cognitive ability. Crystallized cognitive ability measures knowledge acquired over time. Fluid cognitive ability measures the ability to use logic and other skills to acquire new information. O.P. scored a 108 and a 114, respectively, placing him in the above-average range. The GAMA measured intellectual ability. It required O.P. to use logic and reasoning to solve problems. O.P. scored a 118, placing him in the high-average range. Dr. Finn could state with 95% accuracy that O.P.'s GAMA IQ was between 108 and 125.

¶ 64 The next four tests, the BDI-II, the BAI, the SCL-90-R, and the TSI, measured for various symptoms such as depression, anxiety, and posttraumatic stress. O.P. scored an 8 out of 63 on the BDI-II. This indicated that O.P. was experiencing minimal levels of depression. O.P. scored an 8 out of 63 on the BAI. This indicated that O.P. was experiencing minimal levels of anxiety. The SCL-90-R measured for somatization, obsessive-compulsive symptoms, interpernal sensitivity, depression, anxiety, hostility, phobic anxiety, paranoid ideation, and psychoticism. O.P. "did not have a significant elevation" in any of these indices. The TSI measured for posttraumatic stress and other psychological sequelae of traumatic events. O.P.'s score indicated that he responded to the assessment in a "valid" manner. Additionally, O.P. did not reach a clinical level for any of the 10 symptoms associated with posttraumatic stress, including anxious arousal, depression, anger/irritability, intrusive experiences, defensive avoidance, dissociation,

sexual concerns, dysfunctional sexual behavior, impaired self-reference, and tension reduction behavior.

¶ 65 The remaining two tests, the PAI and the MMPI-II, measured personality traits. As before, O.P.'s PAI test results indicated that his interpersonal style was one of "warm-control." O.P. tried to portray a "positive impression" and, as to the MMPI-II, responded in a "somewhat defensive manner." O.P. was unwilling to disclose faults that most people are willing to disclose. However, in Dr. Finn's view, this level of defensiveness did not mean that O.P.'s profile was not valid, because it was consistent with a person taking the test as part of an employment evaluation. O.P.'s clinical profile did not deviate substantially from the normative sample. O.P.'s profile indicated that he has a tendency to avoid confrontation and ignore problems to avoid alienating people. He may be naïve in his interactions with others. However, individuals with O.P.'s profile generally consider themselves able to manage their lives and show resiliency. Sixty percent of police officers share O.P.'s profile. In Dr. Finn's view, O.P.'s personality tests suggest that he would have very few employment problems and would have little trouble adapting to a wide range of work environments.

¶ 66 Dr. Finn concluded that O.P. was fit for duty as a police officer. In his view, O.P. showed "no discernable intellectual, mental health, or medical problem either on detailed examination, or by self-report, that would preclude him from performing his duties as a police officer at this time."

¶ 67 On cross-examination, Dr. Finn addressed O.P.'s WAIS-IV processing speed index score of 84 determined by Dr. O'Grady. Dr. Finn did not administer the WAIS-IV processing speed index test, nor did he administer any test to measure the same aptitudes. Dr. Finn stated it was not the score of 84 that was significant, but the difference between O.P.'s high score of 113 and

low score of 84. Later, the City reminded Dr. Finn that a score of 84 placed O.P. in the bottom 14% of the general population. Dr. Finn then stated, "Is 14% a striking number? Yes. But that also is in the low average range."

¶ 68 The City also questioned Dr. Finn about the results of the PAI. The City noted that Dr. Finn recorded in his written evaluation for the court the positive PAI result of a "warm-control" personality style. The City then pointed to several negative, "statistically significant" or "elevated" PAI results contained in the raw test results. For example, O.P.'s scores for dominance and physiological depression were two standard deviations from the norm as compared to other police officers. O.P.'s score for paranoia, subcategory persecution, was "statistically significant." Dr. Finn confirmed the scores and their statistical significance. Dr. Finn admitted that, when he testified on direct, he stated that O.P. did *not* have *any* "elevated" clinical scores. Dr. Finn further admitted that he did not include the negative PAI scores for dominance, physiological depression, or paranoia, subcategory persecution, in his written evaluation for the court.

¶ 69 5. Epperson's Testimony

¶ 70 Chief Epperson testified that he worked for the Rockford PD for 29 years, and, in that time, he held every rank within the department. He manages a workforce of 285 officers and serves a population of 156,000. Epperson became concerned about O.P.'s fitness based on five of six letters written by Pink, the psychologist with whom O.P. worked following the Barmore shooting. In July 2010, Epperson ordered O.P. to report for a psychological fitness-for-duty examination. Up to that point, Epperson had never ordered a psychological fitness-for-duty examination for any of his officers.

¶ 71 Epperson terminated O.P. based on Dr. O'Grady's evaluation. In comparing the reports of Dr. O'Grady and Dr. Finn, Epperson found Dr. O'Grady's report to be more thorough and detailed on the precise question of whether O.P. was psychologically fit to perform police work. Epperson thought that Dr. Finn failed to address some of the concerns that Dr. O'Grady had raised. Additionally, Epperson considered Dr. O'Grady to be a more experienced evaluator than Dr. Finn. Dr. O'Grady had a reputation for being neutral, as opposed to pro-management or pro labor. Dr. O'Grady had conducted hundreds of psychological fitness-for-duty evaluations of police officers in the Chicago area.

¶ 72 Particularly concerning to Epperson were Dr. O'Grady's findings that O.P. took a simple "cuff 'em and stuff 'em" approach to complicated situations, exhibited impulsiveness, escalated rather than deescalated events, was slow to process information and was unable to make split-second decisions, lacked self-reflection or openness to change, had a victim perspective and tendency to blame others, and remained in denial about the cumulative effects of work-related and family incidents. Epperson believed, based on Dr. O'Grady's report, that O.P. was "unfit to make split-second decisions in life and death situations for the citizens of Rockford." Epperson considered it his responsibility as the chief of police to make cautious decisions that are in the best interest of the subject officer, the fellow officers, and the citizens of Rockford. In Epperson's view, O.P.'s continued employment was a "threat to public safety." Thus, Epperson felt compelled to terminate O.P.'s employment.

¶ 73 During cross-examination, the Union asked whether, following investigation, O.P. was found "not guilty" of certain citizen complaints. Epperson stated that the Union was not using the correct terminology. The possible findings are "unfounded," "exonerated," "sustained," or

"not sustained." As to the Sockwell incident, the allegation of excessive force was "not sustained."

¶ 74 6. O.P.'s Testimony

¶ 75 O.P. testified to his service in Washington D.C. From 2000 to 2004, O.P. covered a high-crime area. During that time, O.P. received several awards, including Patrol Service Area Officer of the Year, and of the Month, for his district. O.P. was eligible for rehire at the time he left Washington D.C. O.P. described two instances where he discharged his service weapon: the Green incident and the dog incident. As to the Green incident, O.P. testified that, as Green fled the scene in a car, the car hit O.P. in the hip, knocking O.P. into the intersection. O.P. immediately fired shots at Green. Green was critically injured and could no longer drive. O.P. could "not recall" whether there was a female passenger in the car when he fired shots. However, he later acknowledged that his partner helped a female out of the vehicle. His partner did not fire a service weapon. O.P. further acknowledged that department policy forbade firing at a moving vehicle absent a perpetrator's use of deadly force.

¶ 76 O.P. next testified to his service for the Rockford PD. He began working in May 2004. He testified to three instances where he discharged his service weapon: the Peavy and Evitt incident, the Henderson incident, and the Barmore incident. As to the Peavy and Evitt incident, O.P. acknowledged that it was against Rockford policy to fire at a moving vehicle. However, the feedback that O.P. received following the incident had been "more positive than negative."

¶ 77 As to the Henderson incident, O.P. addressed his earlier statement to Dr. O'Grady that there was nothing he would do differently if he had it to do over again. O.P. clarified that he would have acted differently if he had better information. For example, if he knew that Henderson only had a hammer, he would have tackled, rather than shot, Henderson.

¶ 78 Finally, O.P. testified to the Barmore shooting. His account was substantially similar to that given in the IAM report. O.P. did not see an exit sign in the daycare room.

¶ 79 O.P. also testified to his personal stress following the Barmore shooting. In February 2010, after returning to work, he appeared in court for an unrelated matter. While at the courthouse, he saw a witness who testified against him in the Barmore grand jury proceedings. According to O.P., the witness then summoned, via cell phone, a large group of people to gather at the courthouse to talk about the Barmore case. This upset O.P. It caused him to reflect that, despite the grand jury's finding, neither the City nor the Rockford PD ever issued a public statement in support of his actions. O.P. returned to sick leave and treatment with therapist Pink, where he remained through a large part of the instant fitness investigation.

¶ 80 7. David Hooks

¶ 81 Sergeant David Hooks testified that he signed O.P.'s 2008 and 2009 annual performance evaluations. Hooks collaborated with approximately three other sergeants in issuing the evaluation. Hooks considered O.P.'s ratings to be "above average." O.P. responded reliably to calls, whether the calls were related to traffic stops, domestic situations, or other tense situations. Hooks never knew O.P. to exacerbate a situation.

¶ 82 8. Elizabeth Sue Frankiduccia

¶ 83 Elizabeth Sue Frankiduccia, the county coroner, testified that she was present at a press conference concerning the Barmore shooting where Epperson gave the public misinformation. Epperson told the public that Barmore had been shot nine times in the chest, which, according to Epperson, was "totally unacceptable." Frankiduccia then addressed the public to correct Epperson, stating that Barmore had not been shot nine times and that she would issue her report in due course. She later reported that Barmore had been shot four times.

¶ 84 9. Arbitrator's Analysis and Award

¶ 85 In November 2013, the arbitrator issued her award. She stated:

> "[I]n order for the discharge to be upheld, the City must establish, by a preponderance of the evidence, that at the time the City terminated [O.P.'s] employment, his psychological condition precluded him from working as a police officer. For the reasons stated below, the City has not met its burden." (Emphasis added.)

¶ 86 The arbitrator made the following chart to summarize the key areas of disagreement.

Topic	Dr. O'Grady	Dr. Finn
Use of Deadly Force	Five shooting incidents raised questions of judgment	Five shooting incidents were justified
Work History	Tendency to be reactive and escalate stressful situations	Positive work history with no discipline; several commendations
Clinical Interview	Copes with trauma through denial and defensiveness; not motivated to change	No evidence of behavioral concerns; stable family life, cooperative, showed resiliency
Leaves of Absence	Recurrent leaves for PTSD in last two police jobs; buried symptoms persist	Leaves of absence appropriate; counseling addressed symptoms
Testing	Low-average cognitive processing speed; aggressive behavior; high defensiveness	Above average intelligence; test results similar to other male police officers; some defensiveness

¶ 87 She determined that Dr. O'Grady's opinion was less reliable than Dr. Finn's. Dr. O'Grady's written evaluation was not consistent with his testimony, because his written evaluation was "unqualifiedly negative," but his testimony was "nuanced and balanced." The written evaluation contained the following flaws: (1) Dr. O'Grady exceeded his area of expertise by criticizing police tactics; (2) Dr. O'Grady's criticisms of O.P.'s actions in the Barmore shooting were "inconsistent" with Dr. O'Grady's concession that O.P. had been "cleared" of

wrongdoing in the Barmore shooting; (3) Dr. O'Grady did not provide adequate details in support of his assertion that O.P. "plays the victim" and blames others for the Barmore shooting; and (4) Dr. O'Grady "misled" her when he described O.P. as previously shooting a "staffordshire shay terrier" rather than a "pit bull."

¶ 88 In contrast to the written evaluation, Dr. O'Grady's testimony was more "balanced," in that he "referred to O.P.'s strengths, positive work record as a police officer[,] and genuine likeability as well as his perceived shortcomings, particularly in stressful situations." The discrepancy in quality between the written evaluation and the testimony suggested that Dr. O'Grady made "deliberate choices" about what to include in the written evaluation and, thus, lowered the reliability of his opinion. Nevertheless, the omissions and "occasional blurring of fact" in the written evaluation did not rise to the level of "disqualifying bias."

¶ 89 The arbitrator's assessment of Dr. Finn's report consisted of a single paragraph:

> "By contrast, Dr. Finn's testimony was consistent with his written report. The City argues that he was not as qualified as Dr. O'Grady at completing [fitness-for-duty evaluations] for police officers. However, Dr. Finn has also completed hundreds of psychological assessments. He has been qualified as an expert in the Illinois courts many times, and was found qualified in this case. There is no basis for concluding that Dr. Finn's report was unreliable or inferior."

¶ 90 After evaluating each expert, the arbitrator concluded in total: "In a just cause case where the burden of proof is with the employer, the decision to discharge must turn on more than a choice between two conflicting medical opinions from two qualified psychologists." Despite ruling against the City, the arbitrator stated in a footnote that Epperson had not been biased or

improperly motivated to terminate O.P., and Epperson's misstatement to the public, as testified to by coroner Frankiduccia, did not convince her otherwise.

¶ 91 As to remedy, the arbitrator reinstated O.P.'s status to that immediately prior to termination, *i.e.*, paid administrative leave. However, prior to returning to *active* duty, at the City's expense, a "neutral doctor with experience in [fitness-for-duty] evaluations for police officers" must determine whether O.P. is currently fit for active duty. "The decision of the neutral doctor shall be final." The arbitrator explained that a current evaluation was necessary because O.P. had not worked on patrol for nearly two years, and: "The City has a strong, legitimate interest in assuring that its police officers are medically and psychologically fit to perform their work. It would be no favor to return [O.P.] to a job for which he is not qualified and where he could bring harm to himself or others."

¶ 92 C. Post-Award Motions

¶ 93 Three months later, the Union filed two post-award motions. In the first motion, the Union sought confirmation of the award in the form of back pay. The Union reasoned that O.P. was entitled to back pay, because the award ordered that he be reinstated to the status held immediately prior to his wrongful termination. In the second motion, the Union sought to vacate the arbitrator's order for a current fitness evaluation. The Union argued that the arbitrator exceeded the bounds of the question presented to her when she considered the issue of whether O.P. was currently fit for duty. The arbitrator characterized the Union's motions as untimely motions to modify the award, and she denied them.

¶ 94 D. Circuit Court

¶ 95 The City appealed to the circuit court for administrative review of the arbitrator's award. The Union cross-appealed. It sought confirmation of the award in the form of back pay.

¶ 96 The circuit court affirmed the arbitrator's determination that the City did not prove just cause. The court rejected the City's argument that the arbitrator's determination violated public policy. The court agreed that there was a compelling public interest in ensuring the fitness of police officers to perform their duties. However, that policy was not violated merely because the arbitrator determined that the City failed to prove unfitness. "At its core, the City's position here is that the only way to respect public policy in favor of police officers being fit for their job is to simply vest in the City the unfettered right to make a fitness determination."

¶ 97 The circuit court noted that there is not an automatic correlation in every case between unfitness and just cause to terminate. For example, in some cases, unfitness may be time limited and not just cause for termination. In those cases, paid leave may be a "prudent approach." Section 15.15 of the CBA, concerning unfitness, does not provide a separate basis to terminate. The arbitrator still must consider unfitness in the context of section 1.2 of the CBA, which requires just cause to terminate. "Just cause" for termination, commonly defined as a "substantial shortcoming recognized by law and public opinion as a good reason for termination," may include a consideration of psychological fitness.

¶ 98 The circuit court accepted the City's argument that the arbitrator exceeded her authority, but only as that argument pertained to the remedy. The court vacated the remedy in its entirety. It stated that it "under[stood] the City's consternation that the arbitrator frame[d] [current] unfitness as an open question after having found that the City failed to prove [past unfitness.]" Nevertheless, it did *not* fault the arbitrator's decision to determine, long after the initial fitness tests, whether O.P. was *still* fit to return to duty. Ensuring that O.P. was still fit to return to duty did not undercut the original determination that the City failed to prove unfitness at the date of termination.

¶ 99 The court *did* fault the *process* the arbitrator set out to determine current fitness. The arbitrator should not have left the ultimate and "final" decision of current fitness to a psychologist. Instead, the arbitrator should have retained jurisdiction to hear evidence of current fitness and make a decision after hearing the evidence. In the court's view, the arbitrator's decision to "punt" the issue to a psychologist "lacked the hallmarks of adjudicative procedure." It also violated public policy in that, by "punting" the issue, the arbitrator failed to adequately ensure that only competent police engage in active service. Thus, the court remanded for construction of an "appropriate remedy, which gives the parties sufficient input into the process and which vests in the arbitrator the ultimate responsibility to decide, based on the evidence presented, whether O.P. is fit to return to active duty." The court declined to direct the arbitrator on the precise course to follow, so that the arbitrator retained "significant discretion" in crafting the new remedy.

¶ 100 The circuit court denied the Union's request for back pay. It stated that the arbitrator never awarded back pay. Thus, the court considered the Union's request as one of modification, rather than of confirmation. Because the Union did not timely move to modify, the court denied the Union's request.

¶ 101 This appeal followed.

¶ 102 II. ANALYSIS

¶ 103 A. Overview

¶ 104 On appeal, the City challenges both the just-cause determination and the remedy. As to the just-cause determination, the City argues that the arbitrator: (1) violated public policy by undermining the goal of an efficient and disciplined police force; and (2) exceeded her authority by interpreting the CBA to require just-cause for termination in the context of a fit-for-duty case.

As to the remedy, the City argues that the arbitrator exceeded her authority by issuing a remedy that had no basis in the parties' CBA. We reject the City's arguments as to the just-cause determination, but we agree that the remedy must be set aside.

¶ 105 We review the decision of the arbitrator, not the circuit court's review of the arbitrator's decision. See, *e.g.*, *Firefighters v. City of Chicago*, 323 Ill. App. 3d 168, 169 (2001). The Illinois Uniform Arbitration Act authorizes courts to review and, in limited circumstances, modify or vacate arbitration awards. 710 ILCS 5/12 (a) (West 2012). These circumstances include: (1) the award was maintained by corruption or fraud; (2) the arbitrator was not impartial; (3) the arbitrator exceeded his or her authority; (4) the arbitrator unreasonably refused to postpone the hearing or hear material evidence; or (5) there was no arbitration agreement. *Id*. Judicial review of an arbitration award is extremely limited. *Board of Trustees of Community College District No. 508 v. Cook County College Teachers Union, Local 1600*, 74 Ill. 2d 412, 418 (1979). The purpose of such limited review is to provide finality to labor disputes submitted to arbitration. *American Federation of State, County & Municipal Employees, AFL-CIO v. Department of Central Management Services*, 173 Ill. 2d 299, 304 (1996) (AFSCME II). Courts must enforce an arbitration award so long as the arbitrator acts within the scope of his or her authority and the award draws its essence from the parties' collective bargaining agreement. *Id*. at 305.

¶ 106 A municipality seeking to terminate a police officer's employment is required at the arbitration hearing to prove its allegations against the officer by a preponderance of the evidence. *Decatur Police Benevolent & Protective Ass'n Labor Committee v. City of Decatur*, 2012 IL App (4th) 110764, ¶ 44; *Clark v. Board of Fire & Police Comm'ners of the Village of Bradley*, 245 Ill. App. 3d 385, 392 (1993) (stating that the preponderance standard is particularly appropriate,

because the potential for harm to each party in police officer dismissals is roughly equal). A preponderance of evidence is evidence that renders the fact at issue more likely than not. *People v. Houar*, 365 Ill. App. 3d 682, 686 (2006). It has also been defined as " 'evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it.' " *Board of Education of the City of Chicago v. Johnson*, 211 Ill. App. 3d 359, 364 (1991) (quoting Black's Law Dictionary, p. 1064, 5th ed. 1979)). A police officer may not be discharged except for cause. *Clark*, 245 Ill. App. 3d at 393. Cause for termination has been defined as a "substantial shortcoming recognized by law and public opinion as a good reason for termination," and a "substantial shortcoming which renders the employee[']s continuance in office in some way detrimental to the discipline and efficiency of the service." *Dowrick v. Village of Downer's Grove*, 362 Ill. App. 3d 512, 521 (2005); *Clark*, 245 Ill. App. 3d at 393.

¶ 107 An arbitration award may be vacated where the arbitrator exceeds her authority under the CBA. 710 ILCS 5/12(a)(3) (West 2012); *Amalgamated Transit Union, Local 241 & Local 308 v. Chicago Transit Authority*, 342 Ill. App. 3d 176, 179 (2003). This is because an arbitrator's power is derived from, and limited by, the CBA. *Amalgamated Transit*, 342 Ill. App. 3d at 179. We begin with the presumption that the arbitrator did not exceed her authority. *Bird v. Stoneville Furniture Co.*, 134 Ill. App. 3d 149, 154 (1985). However, the question of whether the arbitrator exceeded her authority is one of law, which we decide *de novo*. *City of Chicago v. American Federation of State, County & Municipal Employees, Council 341*, 283 Ill. App. 3d 446, 451 (1996).

¶ 108 B. Just-Cause Determination

¶ 109 1. Just-Cause Determination Did Not Violate Public Policy

¶ 110 The City argues that, by finding that there was not just cause to terminate O.P., the arbitrator violated public policy in favor of a disciplined and efficient police force comprised of officers who are fit for duty. A public policy exception exists to vacate arbitration awards that otherwise derive their essence from the CBA. *AFSCME*, 173 Ill. 2d at 307. Questions of public policy are for the courts, not the arbitrator. *County of De Witt v. American Federation of State, County & Municipal Employees, Council 31*, 298 Ill. App. 3d 634, 638 (1998). A public policy analysis has two steps. *AFSCME*, 173 Ill. 2d at 307. First, the court must identify a well-defined and dominant public policy. *Id*. Second, the court must determine whether the arbitrator's award, as reflected in the arbitrator's interpretation of the CBA, violated that public policy. *Id*. at 308.

¶ 111 The City satisfies the first requirement. There is a well-defined and dominant public policy in Illinois in favor of a disciplined and efficient police force comprised of officers who are fit for duty. See, *e.g.*, *Turner v. Fletcher*, 302 Ill. App. 3d 1051, 1056 (1999) (policy in favor of ensuring public safety and maintaining a reliable, responsible police force). Thus, we focus our analysis on the second step.

¶ 112 We first look to *AFSCME* and *De Witt*, two cases cited by the City wherein the court determined that reinstatement of the employee violated public policy. In *AFSCME*, the supreme court ruled that the arbitrator violated public policy in favor of truthful and accurate reporting by social workers when he reinstated a worker who had issued a false report. *AFSCME*, 173 Ill. 2d at 317. The worker stated in a written progress report that she had seen the three children in February 1990 and that they were "doing fine." *Id*. at 301. However, this could not be true, because, in January 1990, the children perished in an accidental fire. *Id*. Thus, there was no

question of fact that the worker issued a false report. The court's public policy ruling did not require it to reject the arbitrator's factual determination.

¶ 113 In *De Witt*, the court ruled that the arbitrator violated public policy against elder abuse when he reinstated a nursing home worker who struck a resident. *De Witt*, 298 Ill. App. 3d at 638. The court acknowledged that it must defer to the arbitrator's factual determinations. It stated, however, that in the case before it, the arbitrator never determined that the employee did not strike the resident. Rather, the arbitrator "seem[ed] to have determined" that the employee "probably did" hit the resident, but not hard. *Id*. at 639. The court ruled that, as a matter of public policy, even the arbitrator's understated characterization of the facts could not be tolerated. *Id*. at 638 ("public policy of this state does not tolerate *any* incidents of abuse upon the elderly, no[] matter how infrequent or mild").[5] Thus, as in *AFSCME*, the court's public policy ruling did not require it to reject the arbitrator's factual determinations.

¶ 114 Unlike the appellants in *AFSCME* and *De Witt*, the City asks us to make a public policy determination that is based on rejecting a factual determination by the arbitrator. A public policy against unfit officers serving on the force is violated if one accepts that O.P. is unfit. The arbitrator made a factual determination to the contrary; she found that the City did not prove O.P. unfit. Even though the City frames its argument as a public policy challenge, it is actually a factual challenge.

¶ 115 The City's public policy argument is essentially an indirect challenge to the arbitrator's fitness determination. The City argues that the arbitrator's factual assessment in this case is not

[5] We acknowledge that certain statements made by the *De Witt* court may be read to suggest that it is acceptable for a court to ignore an arbitrator's factual determinations. We do not adopt these statements.

entitled to the usual deference afforded to arbitrators because: (1) the arbitrator's analysis was extremely weak in that her comparison of the experts was "ridiculously abbreviated" and "incomplete;" and (2) the arbitrator's chosen remedy undermined her fitness determination. We agree with the City's criticisms, but neither of these weaknesses allow us to set aside the arbitrator's fitness determination.

¶ 116 i. Weak Analysis of the Experts Does Not Provide a Basis to Reverse

¶ 117 We agree with the City that the arbitrator's assessment of the experts is not compelling. Because we accept this point, we state only briefly that the arbitrator repeatedly confused the absence of discipline based on policy violations with an affirmative finding that O.P.'s prior actions were wholly justified. In this way, she seemed to overlook Dr. O'Grady's explanation that, regardless of whether an officer is disciplined for his conduct, the conduct can provide insight into an officer's motives and cognitions. She also glossed over significant weaknesses in Dr. Finn's evaluation. Dr. Finn had *never* previously administered a fitness-for-duty evaluation, and Dr. Finn omitted from his written report statistically significant PAI scores, including paranoia.

¶ 118 However, we cannot set aside the arbitrator's fitness determination merely because we disagree or might have ruled differently. *De Witt*, 298 Ill. App. 3d at 637 (1998) (we cannot set aside an arbitrator's determination simply because it is against the manifest weight of the evidence). Dr. Finn was not unqualified, and the City does not argue that he was unqualified. Dr. Finn opined that O.P. was an intellectually talented officer. According to Dr. Finn, based on four different tests, the BDI,-II, the BAI, the SCL-90-R, and the TSI, O.P. showed no sign of PTSD. Dr. Finn submitted a lengthy written report wherein he documented O.P.'s positive

attributes and averred to O.P.'s fitness. The arbitrator was free to find value in, and rely upon, Dr. Finn's report.

¶ 119 ii. Dissonant Remedy Does Not Provide Basis to Reverse

¶ 120 We also agree with the City that the arbitrator's chosen remedy undermines confidence in her fitness determination. A dissonance exists between the two. The arbitrator stated that the City failed to prove O.P. unfit at the time of termination, even by a preponderance of the evidence. Yet, in her remedy, she expressed serious doubts as to O.P.'s current fitness: "The City has a strong, legitimate interest in assuring that its police officers are medically and psychologically fit to perform their work. It would be no favor to return [O.P.] to a job for which he is not qualified and where he could bring harm to himself or others." She did not point to any expert testimony to explain why O.P.'s PTSD and depressed processing speed, which were due largely to chronic stimulus overload, might have worsened after years away from active patrol duty. In our view, it requires effort to harmonize a determination that O.P. was not shown to be unfit at the time of termination with an order that O.P. undergo current fitness testing before returning to active duty.

¶ 121 However, we are not authorized to overturn an arbitration award on the ground that it is illogical or inconsistent. *Herricane Graphics v. Blinderman Construction Co.*, 354 Ill. App. 3d 151, 156 (2004); *Perkins Restaurants Operating Co. v. Van Den Bergh Foods Co.*, 276 Ill. App. 3d 305, 309 (1995). The City's citation to *City of Des Plaines v. Metropolitan Alliance of Police, Chapter No. 240*, 2015 IL App (1st) 140957, does not convince us otherwise.

¶ 122 The City cites *Des Plaines* in support of its argument that we should set aside an arbitration award where its findings are not "rational." In *Des Plaines*, the court found that the arbitrator did not make a "rational finding" as to whether the officer was unlikely to reoffend

upon reinstatement. *Id*. ¶ 36. The court determined that, "the award's absence of any findings, either explicit or implicit, concerning [the officer's] likelihood to reoffend upon reinstatement prevent[ed] [it] from performing a comprehensive assessment of the public policies the award implicates." *Id*. The court remanded for the arbitrator to make a finding concerning the likelihood that the officer would reoffend.

¶ 123 In citing *Des Plaines*, the City takes out of context the *Des Plaines* court's use of the phrase, "rational finding." In using that phrase, the *Des Plaines* court did not mean that courts may ignore a factual determination with which it disagrees. The *Des Plaines* court did not intend to depart from the general rule that a court cannot overturn an award on the ground that it is illogical or inconsistent. Rather, as is clear from the context of the *Des Plaines* ruling, the *Des Plaines* court found that the arbitrator failed to make "*any* findings, either explicit or implicit." (Emphasis added.) *Id*. ¶ 36. Without *any* findings, the court was not equipped to assess the public policy argument.

¶ 124 For the instant case to be analogous to *Des Plaines*, the arbitrator would have had to have made *no* finding, either explicit or implicit, as to O.P.'s fitness. Here, the arbitrator *did* make a finding as to O.P.'s fitness. The arbitrator's entire analysis consisted of criticism of Dr. O'Grady, and, if not praise, a rejection of any of the potential criticisms against Dr. Finn. Surely, this qualifies as a finding, "either explicit or implicit," that Dr. O'Grady was not sufficiently reliable, and, thus, the City failed to prove O.P. unfit. See *Des Plaines*, 2015 IL App (1st) 140957, ¶ 36. The arbitrator's later statement that "the decision to discharge must turn on more than a choice between two conflicting medical opinions from two qualified psychologists" does not change our assessment that the arbitrator found that Dr. O'Grady was not sufficiently reliable, and, thus, the City failed to prove O.P. unfit. The arbitrator made a finding that the City

failed to prove O.P. unfit. Given that the arbitrator here did make a fitness finding, we are sufficiently equipped to determine that the award did not violate public policy.

¶ 125 In sum, the City likely knew that a weak or inconsistent analysis on the part of the arbitrator does not provide the court with a basis to overturn the arbitrator's just-cause determination. Thus, the City attempted to recast as a public policy argument what was essentially a fact-based challenge to the arbitrator's fitness determination. Here, the arbitrator made a finding that O.P. was *not* unfit. We defer to that finding, and, thus, it guided our public policy analysis. We do note, however, as we will discuss, *infra* ¶ 129, a finding of unfitness for full-service, active duty would not *necessarily* have mandated termination as opposed to a lesser consequence, such as the consequence of reassignment suggested by the City's own expert.

¶ 126 2. Just-Cause Determination Was Not Outside the Arbitrator's Authority

¶ 127 The City argues that the arbitrator exceeded her authority by interpreting the CBA to require "just cause" for termination in the context of a fit-for-duty case. The City calls the just-cause requirement "extra-contractual," but it fails to acknowledge section 1.2 of the arbitration agreement, which states that termination will be for just cause. The City cites several out-of-state arbitration cases for the proposition that, where termination is due to inaptitude for the job as opposed to conduct subject to discipline, the only question for the arbitrator is whether the employer's decision to terminate was reasonable and made in good faith. See, *e.g.*, *Shell Oil Co. v. OCAW Local 4-367*, 109 L.A. 965, 969 (Baroni, 1998). Thus, in the City's view, a just-cause analysis does not apply. [6]

[6] We must note that the City's approach to the case has not been consistent. While it argued that a just-cause analysis does not apply, it also stipulated to a just-cause analysis when it submitted the question to the second arbitration hearing, "Whether the City had *just cause* to

¶ 128 Even if we disagreed with the arbitrator's determination that the CBA contained a just-cause requirement, which we do not, we would have no authority to reverse. We have no power to undo an arbitration award even if we "strongly disagree" with the arbitrator's contract interpretation. *Herricane*, 354 Ill. App. 3d at 156 (2004). The parties bargained for the arbitrator to interpret its CBA, not the court. Section 8.2 of the CBA states: "The Arbitrator shall have the power to *** interpret *** this Agreement." Thus, we defer to the arbitrator's determination at the first arbitration hearing that section 15.15 does not mandate a specific course of action upon a finding of unfitness and the City is free to take what action it deems appropriate, subject to the contractual limitation imposed by section 1.2 of the CBA that the termination be for just cause.

¶ 129 The City's argument that it should not be limited by section 1.2's just-cause requirement caused much confusion in this case. The City essentially argued that it should have the power to terminate based on section 15.15 alone (unfitness), without the limitations of section 1.2 (just cause). In this way, the City encouraged the arbitrator to view the ultimate question as one of fitness, not just cause. By encouraging the arbitrator to view the ultimate question as one of fitness, the City forfeited an opportunity to argue that, even if O.P.'s mental condition did not rise to the level of unfitness, O.P.'s mental condition, combined with other factors, such as policy violations and firearm misuse, could constitute just cause to terminate. We believe that, in erroneously framing the ultimate question as one of fitness, the City invited the arbitrator to issue the somewhat confusing analysis of which the City now complains, including a weak comparison of the experts and a seemingly dissonant remedy. The award reads as though the arbitrator did

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terminate the Grievant [O.P.] on [July 15, 2011,] and, if not, what is the proper remedy?" (Emphasis added.)

not realize that she could both find O.P. unfit and still find no just cause to terminate (based on mitigating factors such as trauma incurred on the job, and, despite prior policy violations, a good disciplinary record and, thus, effective condonation by the department of the policy violations and firearm misuse (see, *e.g.*, *Des Plaines*, 2015 IL App (1st) 140957, ¶ 13, ¶ 21)). For the reasons stated, however, the arbitrator's somewhat confusing analysis does not provide a basis to set aside the award in favor of a cleaner analysis, particularly where the City encouraged the arbitrator to view the case as it did. We affirm the arbitrator's just-cause determination.

¶ 130 C. Remedy

¶ 131 The City argues that the arbitrator exceeded her authority by issuing a remedy that ordered a third psychologist to render a controlling opinion as to O.P.'s fitness. We agree that the arbitrator exceeded her authority in issuing the remedy.

¶ 132 The parties bargained for an arbitrator to decide the remedy, not a psychologist. See *Trimble v. Graves*, 409 Ill. App. 3d 506, 513 (2011). Here, the arbitrator placed the question of O.P.'s return to active duty at the sole discretion of a psychologist. We agree with the circuit court that the arbitrator's remedy "punts" a decision to a psychologist and, thereby, abdicates all "hallmarks of adjudicative procedure."

¶ 133 Additionally, the arbitrator's remedy of allowing a single psychologist to decide O.P.'s current fitness deviates from the fitness procedure set forth in the CBA. Again, section 15.15, concerning fitness evaluations, states:

> "Section 15.15- Fitness for duty. No employee shall be required to undergo psychological, psychiatric, or physiological testing unless the Chief of Police has reasonable cause to believe the employee is then unfit for duty. Basis for the reasonable

cause shall be set forth in writing to the employee at the time the employee is ordered to undergo such testing.

Employees shall have the right to Union representation when being informed of the need for testing, and shall have the right to secure similar testing at their own expense from psychiatrists, psychologists, or physicians of their own choosing. The City shall utilize the service of qualified medical doctors, psychiatrists[,] or psychologists."

¶ 134 The use of only one doctor to evaluate current fitness potentially conflicts with section 15.15 of the CBA, which states that, when a police chief orders an officer to undergo fitness testing, the officer may procure his own expert(s). Although it is the arbitrator, rather than the police chief, ordering the evaluation in this proposed remedy, and although the parties refer to a "third" doctor, the new doctor would be the *first* and only doctor to evaluate O.P.'s current mental state. It has now been five years since Dr. O'Grady's and Dr. Finn's evaluations. The new doctor would *not* fulfill the role of providing a "tie-breaking" opinion on O.P.'s 2011 mental state as initially offered by the City in the negotiations preceding O.P.'s termination. Because the new doctor would be the first doctor to render an opinion on O.P.'s current fitness, there is a fair question as to whether O.P.'s, or, for that matter, the City's, bargained-for right to hire a chosen expert would be triggered.

¶ 135 We vacate the remedy in its entirety. It would be difficult for the arbitrator to fashion a new remedy if we retained certain aspects of the remedy and disallowed other portions. The arbitrator may not have chosen certain aspects of the remedy had she known that we would disallow other portions. Looking back to the original question submitted by the parties, "Whether the City had just cause to terminate the Grievant [O.P.] on [July 15, 2011,] and, if not, what is the proper remedy," the arbitrator has a blank slate as to the last part of the submitted

question, "if not, what is the proper remedy." Thus, although the circuit court noted aspects of the remedy with which it agreed, and, in so doing, appeared to "lock-in" the remedy of reinstatement to paid leave, we refrain from doing so. The parties bargained for the arbitrator to decide the remedy, not the court. We note only our reason for vacating the remedy—that is, there is no basis in the CBA to allow a single psychologist to decide current fitness and have complete control over whether O.P. may serve as an active police officer. The arbitrator may consider input from the parties in issuing the new remedy, but, ultimately, the arbitrator must decide the remedy.

¶ 136 Having vacated the remedy in its entirety, we do not address the Union's cross-appeal concerning back pay. We order the arbitrator to issue a new remedy, and we provide no opinion as to whether the new remedy should include or exclude back pay.

¶ 137 In its petition for rehearing, the City argues that our decision to vacate the remedy in its entirety allows the Union to improperly raise the forfeited back-pay issue. However, the City does not recognize that it, too, will have the opportunity to argue anew for its desired remedy. The City did not address our earlier point that the arbitrator may not have chosen certain aspects of the remedy if she had known that we would disallow other portions. Thus, we do not find its argument compelling.

¶ 138 Also in its petition for rehearing, the City argues that the CBA provides no basis for the suggested remedy of reassignment. It notes that the CBA gives the *City*, not the arbitrator, "managerial authority to assign and reassign employees… [and] relieve employees due to lack of work or other legitimate reasons."

¶ 139 The portion of the CBA quoted by the City does not address the situation at issue here. That is, where the arbitrator determines that there is not just cause to terminate, she may issue a

remedy that reduces the termination to a less severe consequence or punishment. *American Federation of State, County & Municipal Employees, AFL-CIO v. State*, 124 Ill. 2d 246, 256 (1998). Here, the arbitrator has ruled against termination. She has indicated that she does not favor full reinstatement. We earlier cited reassignment not to mandate a solution, but to show that many options fall between termination and full reinstatement, including but not limited to: reinstatement to paid leave (as initially proposed); suspension (*Humbles v. Board of Police & Fire Commissioners of the City of Wheaton*, 53 Ill. App. 3d 731, 735 (1977) (if there is not cause to terminate, the Board may impose an alternative sanction less severe than termination, such as suspension)); reassignment (*City of Springfield v. Springfield Police Benevolent & Protective Association Unit No. 5*, 229 Ill. App. 3d 744, 746-47 (1992) (part of the initial punishment chosen by the department included reassignment from the third shift to the first shift, where there was a lower likelihood that the officer would face confrontational situations)); or a last chance agreement (*Casanova v. City of Chicago*, 342 Ill.App.3d 80, 87-88 (last chance agreement was a supplement to, as opposed to a separate agreement from, the collective bargaining agreement), and *Rettig v. Northern Illinois University*, 2012 IL App (2d) 110862-U, ¶ 4 ("Prior to the discharge hearing, the parties reached a settlement, set forth in a written 'Last Chance/Return to Work Agreement' ")).

¶ 140 The City states that the Union would be unlikely to agree to anything less than full reinstatement. However, absent a settlement, the Union will not be in a position to agree to a remedy. The Union may argue for or against any remedy, as may the City, but the arbitrator will make the decision.

¶ 141 III. CONCLUSION

¶ 142 For the aforementioned reasons, we affirm the arbitrator's just-cause determination. However, we vacate the remedy in its entirety and remand for the arbitrator to issue a new remedy.

¶ 143 Affirmed in part and vacated in part; cause remanded.