VOLUNTARY LABOR ARBITRATION TRIBUNAL
Michael C. Ryan, Esq., Arbitrator

In the matter of the arbitration between	
BOSTON POLICE PATROLMEN'S ASSOCIATION	Grievance No. 16-2220 Case No. P-040-15 Officer Helen Bucelewicz-Termination
-and-	
CITY OF BOSTON	

DECISION AND AWARD

For the City

Nicole Taub, Esquire
Thomas H. Costello, Esquire

For the Union

Alan Shapiro, Esquire
Daniel Fogarty, Esquire

I. Background.

The hearing in this matter took place on April 15, June 23, June 30, and August 18, 2016.[1] The parties stipulated to the following statement of the issues:

> Was there just cause for the discharge of Helen Bucelewicz? If not, what shall be the remedy?

Both parties filed post-hearing briefs.

The following article of the collective bargaining agreement is relevant to the grievance:

[1] The hearing was transcribed, except for the first day.

Article V(A)
Discipline and Discharge

Section 1. No bargaining unit member who has completed his one-year probationary period shall be disciplined or discharged without just cause. …

Also relevant are the following Boston Police Department Rules:

Rule 102
Conduct and General Rights and Responsibilities of Department Personnel

Section 3. Conduct: Employees shall conduct themselves at all times, both on and off-duty, in such a manner as to reflect most favorably on the Department. Conduct unbecoming an employee shall include that which tends to indicate that the employee is unable or unfit to continue as a member of the Department, or tends to impair the operation of the Department or its employees.

Section 35. Conformance to Laws: Employees shall obey all laws of the United States, of the Commonwealth of Massachusetts, all City of Boston ordinances and by-laws and any rule or regulation having the force of law…. An employee of the Department who commits any criminal act shall be subject to disciplinary action up to and including discharge from the Department.

…

Rule 114
Harassment Policy

Section 2. Definitions: …

Sexual Harassment
M.G.L.c. 151B defines the term sexual harassment as unwanted sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:
…

B. Hostile or Abusive Work Environment Harassment
Whether an environment is "hostile" or "abusive" can be determined by looking at all the circumstances, which may include:

a) The frequency of the conduct;
b) The severity of the conduct; and
c) Whether it unreasonably interferes with an employee's work performance. …

A. The Grievant, Helen Bucelewicz

The grievant, Helen Bucelewicz, became a Boston police officer in July 2011 when she was 31 years old. During her probationary year she rotated through four districts; she liked District E-18 (Hyde Park) the best. Once she attained permanent status, she transferred there at the first opportunity, on October 1, 2011.

The grievant was the day-shift booking officer. Her primary responsibilities were: booking arrestees, with all the associated paperwork; supervising them while they were in the station's lockup; and arranging for their transportation and any other services they needed. The rest of the time, she worked at the front desk with a civilian clerk, answering the phones, and handling anyone who walked in the front door.

Captain Francis Armstrong, the commander of District E-18 from January 1, 2013, until May 2014, testified that he liked the grievant and had a "good rapport" with her. He described her as "very outgoing and friendly," and "[v]ery professional." He was not aware of any problems with her performance or behavior.

The grievant is a lesbian who has been out since she was a teenager. She has lived with a same-sex partner for several years and is open about her sexual orientation. Until the events giving rise to this grievance, her sexual orientation was never an issue with the Department or any of its employees.

B. [redacted] has been the [redacted] in District E-18 for nine years. [redacted] When the grievant transferred to E-18, [redacted]

[redacted] first met the grievant in late 2011, during the grievant's probationary rotation in E-18. The grievant was assigned to patrol on a mountain bike and was on a four-and-two schedule, so she and [redacted] saw each other only two or three times a week. [redacted] works a conventional five-weekday civilian schedule.) [redacted] testified that at first, her interactions with the grievant were friendly and "normal." But after a few weeks, the grievant became "a little over-friendly." She called [redacted] "sweetie," "hon," "beautiful," and similar terms of endearment. This made [redacted] uncomfortable. She did not express her objection directly to the grievant, but testified that whenever the grievant used these terms, she would cut the conversation short and walk away to convey her

disapproval.

On the last day of her probationary rotation, the grievant gave goodbye hugs to a number of the E-18 staff, including [redacted] returned the hug. She testified that she did so because she was relieved that the grievant was leaving, and "the uncomfortableness of … being called honey and sweetie and things like that" would be finished.

C. Layout of the District E-18 Station

At this point, it is necessary to describe the physical layout and staffing of the E-18 station. At the front of the station is the entrance door, the lobby, and the front desk, which is separated from the lobby by a glass window. The booking officer and a civilian clerk sit at the front desk with computer terminals, phones, and various papers. Four or five feet behind them, parallel to the desk, is a counter with a police radio and more papers.

Directly to the right of the front desk (from the point of view of personnel sitting at the desk) is a door that opens onto a corridor running from the front to the back of the station. On the side of the corridor opposite the door are four offices. From the front to the back of the station, they are:

(1) The office of the duty supervisor, who is in

charge of police business inside the station.

(2) The office of the community service officer. The door of this office faces the door to the front desk. Other community service officers work elsewhere in the station. At any given time, any of these officers may be on the street.

(3) The uniformed clerks' office.

(4) The office of the captain and [redacted] The door opens directly into [redacted] office, and behind [redacted] desk there is another door to the Captain's office.

The offices of the duty supervisor, the community service officer, and the clerks have glass windows looking onto the corridor. [redacted] and the captain's office has a glass door and no window.

On the other side of the corridor, from front to back, are the door to the front desk, a door to the building's stairway, and a door which leads to the booking area, the cellblock, and an office-supply closet. At the end of the corridor is a kitchen.

On the other side of the station—that is, to the left of personnel sitting behind the front desk—are a few offices and desks where patrol officers and detectives do their paperwork, the guard room, and an unoccupied office

called the "fishbowl," which contains the drug safe.

On the second floor are some detectives and the citywide detail office. Because of the latter, officers from all areas of the city stop by the front desk to drop off their detail paperwork.

About 30 employees, sworn and civilian, are scheduled to work in the station on the day shift, but the sworn personnel are not always at their desks, because they also work on the street.

D. [redacted]s Testimony Concerning the Grievant's Conduct

When the grievant became the E-18 booking officer in July 2012, she and [redacted] saw more of each other than they had during the grievant's rotation. The grievant still worked four-and-two, but spent most of her time in the station instead of on the street. [redacted] testified that again, their interactions were amicable and "normal" at first. According to [redacted] the grievant was very helpful: "[I]f anything needed to be done, she always stepped up to do it." But after a while, the grievant started calling [redacted] "sweetie" and "honey" again, and also started blowing kisses at her occasionally.[2] At that

[2]At one point, [redacted] recalled that the grievant started blowing kisses during her probationary rotation. But [redacted] also testified that the kiss-blowing occurred when she walked past the front desk, so it must have begun after the grievant became the booking officer.

point, [redacted] became convinced that the grievant had a sexual interest in her and was "targeting" her [redacted] term).

On several occasions, while [redacted] was working in her office, she looked up to find the grievant "peeking around the threshold of the door … just standing there." [redacted] testified that these visits always occurred toward the end of the day, when no one else was around. [redacted] would ask what she wanted, and the grievant would say, "Oh, I just came down to see you." [redacted] testified that she finally said, "You know that's not cool, right?" The grievant again replied, "Oh, I just wanted to see you," and quickly walked away.

[redacted] further testified that the grievant sometimes stood uncomfortably close to her, almost "shoulder to shoulder." Some of the things the grievant said also made [redacted] uncomfortable. When [redacted] thanked her for helping out with something, the grievant would reply, "Any time you need me, I'll be there for you," or "I would do anything for you, honey."

Sometime during the first year of the grievant's assignment to E-18, she told [redacted] she would help her organize the office-supply closet, which was a mess. As noted earlier, the supply closet (which is actually a cage, with wire walls) is at the back of the station, near

the booking area and cellblocks. It is only big enough to admit one or possibly two people. [redacted] did not take the grievant up on the offer. She testified:

> I did not feel comfortable about that at all. … Because of, you know, her behavior up to that point, I just didn't feel it was the right environment to be in with her alone.
>
> * * *
>
> I didn't want her to touch me at all.… I wasn't going to take any chances. …

The grievant ended up straightening up the supply closet herself.

[redacted] testified that the grievant did not behave in this suggestive fashion toward anyone else in the station. She further testified that the grievant's advances were so obvious that she was sure other employees noticed, although "[n]o one would say anything." She recalled that one employee, [redacted] was near the front desk when the grievant did or said something inappropriate to [redacted], and [redacted] "kind of just looked at me and then looked at Helen and looked at me but she never said anything."

During this period, which was roughly the grievant's first year in E-18,[3] [redacted] and the grievant also had amicable interactions. [redacted] testified that they chatted sometimes, and went to the shop next to the station for coffee "once or

[3] [redacted] did not ascribe specific dates or times of year to much of the grievant's conduct.

twice." After the grievant had organized the supply closet, [redacted] took her out for ice cream. When the grievant's partner was diagnosed with cancer, [redacted] sent her a get-well gift of soap.

[redacted] testified that she ceased engaging in such interactions during the grievant's second year, when the grievant began whistling at her from behind the front desk. According to [redacted], the whistles were suggestive: she described them as "a 'woo-who' type of thing." [redacted] testified that other employees "tr[ied] to act like they didn't hear it or see it."

[redacted] testified that until the summer of 2014 she did not directly tell the grievant that any of these actions were unwelcome, or express any kind of objection at all (except for the "that's not cool" remark). Instead, she continued to simply cut off any conversation she was having with the grievant and walk away. She testified, "I didn't welcome [the grievant's conduct] at all, and I didn't want her to think that I did." Nor did [redacted] report the grievant's conduct to anyone else, except [redacted]. [redacted] testified that she continued to hope that if she was unresponsive to the grievant's conduct, the grievant would stop.

One day in the summer of 2014, [redacted] went to the front

desk to check the roster (known as the "BAT") to see who was on duty on a certain date. She testified:

> …I was looking at the roster, and the grievant walked over to me and asked me who I was looking for…and we found the name, and we kind of chatted about that and she said something like, "Well, there you go," and she tapped me on my backside.

[redacted] testified that she firmly told the grievant, "Don't touch me," and the grievant quickly returned to the other side of the desk.

A few weeks later, the same thing happened: [redacted] was at the front desk, looking at the BAT, and the grievant tapped her on the backside. [redacted] testified that she "firmly and loudly said to her, 'Don't touch me again.'" But according to [redacted] the grievant repeated the action during the week of July 21, except that this time, "it was more like a smack" than a tap. [redacted] testified that she told the grievant, "Don't touch me again, and if you touch me again, I'm reporting you." The grievant returned to the other side of the desk and said, "You wouldn't do that, would you?" [redacted] replied, "Don't touch me again." [redacted] testified that no one witnessed any of these three episodes.

On August 5, 2014, between 2:00 and 3:30 in the afternoon, [redacted] walked past the front desk, opened the door to the corridor, turned right, and walked toward her office. She testified that the grievant was standing in

the doorway of the clerks' office, facing outward. [redacted] was in the clerks' office at the water cooler, with her back toward the door.[4] [redacted] testified that as she walked past the grievant, the grievant stepped out of the doorway, turned slightly toward the door to the front desk, and looked toward the front of the station "as if she was going to walk that way." (Later in her testimony, [redacted] recalled that the grievant "looked both ways.) [redacted] testified that the grievant then reached backward and grabbed her buttock. The grievant's hand "slipped and it went in between my legs…in the private area."[5]

[redacted] testified that she screamed loudly and stopped. She turned around, and the grievant "immediately took off" and ran back to the front desk.

No one responded to [redacted] scream. [redacted] testified that [redacted] "definitely" heard the scream, but [redacted] testified that she neither heard the scream, nor saw anything unusual. [redacted] also recalled that she herself had screamed once in that same corridor, when she saw a large cockroach. She testified that employees heard her

[4]There was no evidence that the uniformed clerks were in their office at the time of the incident.

[5] [redacted] repeatedly testified that the grievant's hand "slipped." At one point, she testified, "[H]er hand slipped because my legs were in motion."

and came running.

[redacted] testified that after the encounter in the corridor, she continued walking to her office and stood at her desk "in shock." A few moments later, she left work for the day.

Two days later, on August 7, 2014, [redacted] reported the incident to Capt. McLaughlin, who had replaced Capt. Armstrong the previous May. Asked why she waited to report it, [redacted] testified that in the intervening two days she talked to a friend, retired Boston police officer [redacted], who urged her to inform McLaughlin. Furthermore, August 6 and 7 were the grievant's days off; [redacted] testified that she reported the incident on August 7 because "I knew she was coming back the following day and I didn't want to face her."

After meeting with [redacted] (accompanied [redacted]), Capt. McLaughlin sent the following report to Supt. Bernard O'Rourke, Chief of the Bureau of Field Services:

> [redacted] told me that she was feeling harassed by a female officer. … [redacted] further stated that Officer Bucelewicz was beginning to get more aggressive in her actions toward her and that she warned her several times to stop. She described an incident which happened on Tuesday, August 5…. She stated that Officer Bucelewicz grabbed her buttocks on that date. She stated she was very upset about it and could not sleep at night because she was so upset. … She had asked Officer Bucelewicz several times in the past to stop touching her and making inappropriate comments to her. I asked her

how long this behavior had been going on. [redacted] stated "about 1 year." … She said Officer Bucelewicz would walk by her and whistle or stare at her. She stated several times she would be at the copy machine and Officer Bucelewicz would stand very close to her. She stated that if she made eye contact with Officer Bucelewicz that Officer Bucelewicz would "pucker her lips and blow kisses at her. After each incident, [redacted] would ask Officer Bucelewicz to discontinue her behavior. [redacted] further stated that…([during] approximate week July 21-25, 2014), Officer Bucelewicz slapped [redacted] buttocks. [redacted] told Officer Bucelewicz if she does it again, she was going to report her. Officer Bucelewicz responded, "You wouldn't do that."

[redacted] stated she wanted the behavior to stop and that she did not want to see officer Bucelewicz receive any disciplinary action. I informed [redacted] that I would have to report this information to Boston Police Command Staff Personnel. …

E. The Grievant's Testimony

The grievant testified that she was completely unaware that [redacted] had a problem with her until shortly after August 7, 2014, the date the Department placed her on administrative leave. She testified that as far as she knew, everyone in E-18 had a "great rapport," and she got along well with both officers and civilians. The grievant socialized with one or two of the officers outside of work, and occasionally got together with [redacted] to watch a Bruins game. [redacted] and the grievant were not on those terms, but as far as the grievant knew, their relationship was perfectly friendly. She

testified that [redacted] like others, sometimes took a few minutes to sit and chat at the front desk. She and the grievant talked about [redacted], the weather, the news, "food-related things," and jigsaw puzzles, which they both liked. She and [redacted] occasionally went out for coffee or ice cream; the grievant particularly remembered them splitting a chocolate milkshake one day.[6] [redacted] sometimes asked the grievant to help with a task, like reconciling the account of the caterer who supplied meals to the prisoners, or going to the post office.

The grievant denied having any sexual or romantic interest in [redacted] at all. She testified:

> …I have a girlfriend, I've been with her, it just turned five years now, and I'm an outgoing person, but…she [i.e., [redacted]] must be my mother's age. I didn't find her that way at all. …
>
> I was very open about having a girlfriend. I never was looking for another romantic partner.

The grievant freely admitted calling [redacted] "honey," "sweetie," and similar appellations, "sometimes whenever I saw her." She testified that she addressed many employees in the station that way, and had done it for years: "I'd say: 'Hi, honey, hi, sweetie, how are you?' It's the way I kind of say hi to people." Similarly, the grievant

[6] According to the grievant, this was to celebrate the grievant having lost some weight. [redacted], so the grievant went on a diet to keep her partner company.

admitted blowing kisses at [redacted] but testified that she also blew kisses at other employees. It was her way of acknowledging or greeting people if she was on the phone, or busy with something else.

The grievant also admitted occasionally whistling at [redacted] but testified that it was not a suggestive whistle. Rather, it was a "heads-up" whistle that she used to get people's attention, for example, when they walked past the front desk and she remembered she needed to tell them something. (The grievant demonstrated the whistle at the arbitration.) She recalled that once [redacted] had responded. "I'll be right back."

The grievant testified that she often made physical contact with people while conversing with them, touching them on the arm or shoulder, or even the leg:

> [During a conversation I would] touch maybe the shoulder, touch their arm. … [P]eople would always sit behind me. … They'd be at [the] desk…right behind us that had a police radio on [it]. So people would always be sitting behind you. We would have a conversation, I'd touch, you know, maybe a leg when we were having a conversation.

The grievant testified that she touched "a bunch of people" in this manner, including [redacted] and [redacted]s. She estimated that she touched [redacted] "in daily conversation" about once a week.

The grievant also admitted that sometimes, when she went to

the kitchen, she would peek in [redacted]s office and say hello. The grievant had no idea that [redacted] was reluctant to enter the supply closet with her. She testified that she and [redacted] had been in the booking area (where the closet is located) together several times, when [redacted]eeded her to fill out some forms. The grievant testified that she wanted to organize the supply closet because she couldn't stand the mess. She had already cleaned up the front desk and another closet full of unused forms and other detritus.

The grievant testified that her affectionate forms of expression—the pet names, the whistles, the kisses, and the physical contact—were longstanding habits that she had been doing "forever": "I did it with my family, with my friends. I'm a very outgoing person." Until August 7, 2014, only one person in the Department had objected: [redacted], a patrol officer for over 30 years. [redacted] is the [redacted]. She testified that at first, when she called the grievant [redacted] the grievant called her "hon" or "sweetie." [redacted]n immediately told the grievant, "Don't address me as honey or sweetie. [redacted]." The grievant apologized. A week or so later, the grievant slipped up and called [redacted] "honey," and [redacted] reminded her, "Do not address me as honey or baby." The grievant never did so again.

[redacted] testified that she always corrected anyone who addressed her in that manner because "I busted my ass to become an officer, so address me as officer."

Most significantly, the grievant admitted that she sometimes lightly slapped people on the buttock to convey a sentiment like "atta boy" (in her words).[7] The grievant demonstrated the slap on Union counsel. The parties and the witnesses sometimes referred to the gesture as a "tap," but it is more accurately described as a light, playful slap.

The grievant recalled doing this to [redacted] "at least twice." The first time was when she and [redacted] were joking around at the photocopier. The grievant testified that [redacted] did not seem at all offended:

> I'm pretty sure we laughed and joked about [the slap]. I believe I likely said, "I'm sorry, I didn't mean to offend you," you know, kind of thing. And then we just laughed and … she kept copying….

The grievant testified that she apologized because

> …basically [the E-18 station] was my home and I might have gotten too comfortable. … [E]verybody I thought was my family member, and it might have been…kind of like, oh, I brought my…outside personal[ity] into work and was probably like oh, I'm sorry.

The second slap was on August 5, 2014. Like [redacted], the grievant testified that the incident occurred later in the day.

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[7]Elsewhere, the grievant described it as a "Tom Brady, good job" gesture. The grievant follows professional sports, and in her younger years was something of a jock. She began playing softball in elementary school, and continued playing that and several other sports through high school.

The grievant testified that she was walking down the corridor from the kitchen when [redacted] came through the door to the front desk and walked toward her. They paused between the clerks' office and the community service office and the grievant asked [redacted] why she was still at work. [redacted] replied, "I'm probably leaving soon." The grievant said, "Oh, you should go home," and gave her a little slap on the rear end. They both laughed and went their separate ways.

F. Testimony of District E-18 Personnel

[redacted] worked behind the front desk with the grievant on a daily basis. She described the grievant as professional, helpful, and respectful. [redacted] testified that the grievant was physically demonstrative. [redacted] observed the grievant hug "a lot" of the uniformed and civilian personnel in E-18, including [redacted] herself. She recalled that the grievant once put an arm around [redacted] The grievant's behavior did not bother [redacted] nor did it bother anyone else, as far as [redacted] knew.

[redacted] testified that the grievant called many employees affectionate names like honey or sweetie, as in, "Hey, hon, how was your weekend?" [redacted] also confirmed that the grievant sometimes whistled at other employees. She described it as an "attention-getting" whistle.

[redacted] agreed that the grievant tended

to be "touchy-feely," but testified, "We got along fine, and I had no problem with Helen. That's just the way she was." She recalled that the grievant sometimes took her arm while they were having a conversation. The grievant also patted her on the rear end "once, maybe twice." It didn't bother her. Orion testified:

> We were having a conversation. I don't know what it was. We were in front of the [fishbowl] where they hold the drugs, and we were talking. Something happened and she was like, "Good job," or whatever it was, and she just tapped me on my behind.

[redacted] did not want the grievant calling her "honey" or "sweetie," but she testified that she did not think the grievant intended to insult her by using these forms of address. Nor did she think the terms had any sexual connotations. [redacted] testified, "I think that's her personality."

Finally, Capt. Armstrong, who worked with [redacted] for a year and a half, testified that he was "shocked" when he heard about [redacted] complaint. He had no idea that [redacted] had any problem with the grievant. He testified, "[The E-18 station] is not a big space, so there's not a lot of secrets … [redacted] and I spoke every day. I wasn't unapproachable."

G. The Internal Investigation

Capt. McLaughlin's report went up the chain to the Internal

Affairs Division (IAD).[8] In the meantime, on August 7, 2017, the grievant was placed on paid administrative leave.

In addition to the grievant and [redacted], the IAD investigators interviewed ten E-18 police officers, [redacted], and [redacted]. Eight of the twelve interviewees were female. All of the interviews were subject to Commissioner's Memorandum CM 10-007, requiring officers to be truthful in internal investigations, subject to termination as the "presumptive disciplinary action."

All the interviewees stated that they did not notice anything inappropriate in the grievant's treatment of Spencer, or in their relationship. [redacted], a community service officer, told the investigators:

> I thought that they were friends. Helen would do the mail and when [redacted] would come down, they were always laughing. [redacted] was at the front desk a lot of the time, too, hanging out with Helen.

Similarly, [redacted] reported that [redacted] and the grievant chatted at the front desk and were "pleasant with one another." [redacted] expressed surprise that [redacted] had never spoken to her about her problem with the grievant because she had a good relationship with [redacted] and talked to her

[8] The investigation was initially routed to the Anti-Corruption Division and the Sexual Assault Unit. It was reassigned to the IAD after [redacted] decided against pursuing criminal charges.

"all the time."

All the interviewees described the grievant as friendly and outgoing. Most had heard her call employees (including themselves) affectionate names. Many had seen her hug, put her arm around, or otherwise physically contact another employee. Several had received hugs from her. None of them found this conduct offensive. Their reactions to the grievant's behavior were almost identical: "That's just her way," "Those are just words that she uses," "It's her personality," and "She's just a very friendly girl." [redacted] confidante, told the investigators:

> I would say to [redacted] I don't understand, because I liked Helen. …
>
> Helen is that type of person that's extremely friendly. I'm old enough to be her mother, so if she touched my knee or something, I never was offended by it. I just thought Helen was that type of person.

[redacted] was the only interviewee who found the grievant's conduct a bit strange. She told the investigators she found it "odd" when the grievant called her "honey" or "sweetie," and also when the grievant winked at her once. She thought it could be interpreted as flirtatious, but she herself "just kind of brushed it off because again, she's never approached me, never tried to touch me." [redacted] also told investigators:

I think some of my friends, classmates and friends will call me sweetie and honey, too. So maybe that's why I don't take it too seriously.

On October 27, 2014, the IAD submitted a report on the investigation to Superintendent Frank Mancini. On January 8, 2015, Mancini recommended charges of violating Rule 102, §35; Rule 114, § 2; Rule 114, §2B; and Rule 102, §3.[9]

H. The Grievant's Termination

On March 30, 2015, the Department charged the grievant with fifteen specifications: six violations of Department Rule 102, §3 (Conduct Unbecoming), four violation of Rule 102, §35 (Conformance to Laws) and five violations of Rule 114, §2b (5 counts). There were four days of hearing on those charges in April and May, 2015. On July 29, 2015, Commissioner William Evans sustained the following eleven specifications:

SPECIFICATION I

Officer Bucelewicz made inappropriate comments to a civilian employee, including calling her honey, sweetie, cutie and/or beautiful, whistling at her, and blowing her kisses while in the workplace. Such conduct is in violation of Rule 102 §3 (Conduct Unbecoming).

[9] Lt. Detective Adrian Troy of the IAD had recommended against charging the grievant with violations of Rule 102, §35, on the grounds that the investigation "failed to prove or disprove" that the grievant had committed an indecent assault and battery under G.L.c. 265, §13H. In his recommendations, Troy observed, "It is clear…that Officer Bucelewicz did not consider tapping [redacted] as offensive or immoral but rather…good-natured, non-sexual gestures between friends." Superintendent Mancini did not accept this recommendation.

SPECIFICATION III

In or around July 2014, Officer Bucelewicz grabbed or touched the buttocks of a civilian employee while in the workplace. Such conduct is in violation of Rule 102 §3 (Conduct Unbecoming) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION IV

On or about August 5, 2014, Officer Bucelewicz grabbed or touched the buttocks of a civilian employee while in the workplace. Such conduct is in violation of Rule 102 §3 (Conduct Unbecoming) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION V

On another occasion in or around 2013/2014, Officer Bucelewicz grabbed or touched the buttocks of a civilian employee while in the workplace. Such conduct is in violation of Rule 102 §3 (Conduct Unbecoming) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION VII

In or around July 2014, Officer Bucelewicz grabbed or touched the buttocks of a civilian employee without her consent and causing her offense, in violation of M.G.L.c. 265 § 13H (indecent assault and battery on a person age 14 years or older). Such conduct is in violation of Rule 102 §35 (Conformance to Laws) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION VIII

On or about August 5, 2014, Officer Bucelewicz grabbed or touched the buttocks of a civilian employee without her consent and causing her offense, in violation of M.G.L.c. 265, §13H (indecent assault and battery on a person age 14 years or older). Such conduct is in violation of Rule 102 §35 (Conformance to Laws) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION IX

On another occasion in or around 2013/2014, Officer

Bucelewicz grabbed or touched the buttocks of a civilian employee without her consent and causing her offense, in violation of M.G.L.c. 265 §13H (indecent assault and battery on a person age 14 years or older). Such conduct is in violation of Rule 102 §35 (Conformance to Laws) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION XI

Officer Bucelewicz made inappropriate comments to a civilian employee, including calling her honey, sweetie, cutie and/or beautiful, whistling at her, and blowing her kisses without her consent, causing her offense and interfering with her work performance. Such conduct is in violation of Rule 114 §2B (Hostile Work Environment).

SPECIFICATION XII

In or around July 2014, Officer Bucelewicz grabbed or touched the buttocks of a civilian employee without her consent, causing her offense and interfering with her work performance. Such conduct is in violation of Rule 114 §2B (Hostile Work Environment) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION XIII

On or about August 5,2014, Officer Bucelewicz grabbed or touched the buttocks of a civilian employee without her consent, causing her offense and interfering with her work performance. Such conduct is in violation of Rule 114 §2B (Hostile Work Environment) of the Rules and Procedures of the Boston Police Department.

SPECIFICATION XIV

On another occasion in or around 2013/2014, Officer Bucelewicz grabbed or touched the buttocks of a civilian employee without her consent, causing her offense and interfering with her work performance. Such conduct is in violation of Rule 114 §2B (Hostile Work Environment) of the Rules and Procedures of the Boston Police Department.

The Commissioner terminated the grievant on these grounds effective July 30, 2015.

I. The Department's Sexual Harassment Training

All police personnel are expected to be familiar with the Department's rules. The grievant received a copy those rules, including Rule 114, the Department's sexual harassment policy, before she started her training at the Police Academy.

The grievant's training included a four-hour workshop on diversity, discrimination, and sexual harassment, which was presented by Jennifer Wexler, a senior human resources manager for the City of Boston. Wexler's PowerPoint presentation included the following:

> **Types of Harassment**
>
> ***Verbal…***
>
> - Demeaning language used to address or refer to females …
>
> ***Physical***
>
> - Unwelcome touching…
> - Patting, hugging …
>
> * * *
>
> **While the *intent* may not be to offend, if the *effect* is unwelcome and offensive it must be addressed.**
>
> * * *
>
> **Harassment is determined by a TOTALITY OF CIRCUMSTANCES**
>
> - Whether it was **unwelcome** (the employee didn't elicit or incite, regarded it as undesirable and offensive and indicated either verbally or non-verbally that it was unwelcome)…
> - **The effect of the conduct on the complainant** (not the intent of the harasser).
>
> * * *
>
> Workplace harassment is viewed from the perspective of the ***reasonable person of that group*** – not a hypersensitive individual overreacting to a minor incident.

At the end of the PowerPoint presentation were a series of hypotheticals that the recruits had to discuss and then designate as "fair" or "foul." All involved, or appeared to involve, harassers and harassees of different genders – for example, a male police officer who called female officers "honey" and "sweetheart."

II. Contentions of the Parties.

The City. The grievant was on notice of the Department's expectations regarding a workplace free of sexual harassment. She received extensive training in the Academy. Yet she engaged in an ongoing pattern of unwelcome, harassing, and sometimes criminal behavior toward [redacted] By her own admission, the grievant's repeated slapping of [redacted] buttock met all the elements of the felony of indecent assault and battery. It was only [redacted] reluctance to proceed that prevented the D.A.'s office from pursuing criminal charges. Under Massachusetts court precedent, an indecent act is one that, judged by common understanding and practices, violates social and behavioral expectations regarding what is immodest, immoral and improper. An assault and battery may be indecent if it involves touching private portions of the anatomy such as the buttocks or genital area. Whether the grievant grabbed, slapped, or tapped [redacted] buttock is irrelevant.

The crime of indecent assault and battery requires proof

that the victim did not consent. It is clear, both from [redacted] objection to each instance of inappropriate touching and the grievant's apology for the first instance, the [redacted] did not consent to the touching of her buttocks. [redacted] firmly told the grievant not to touch her on three occasions, the last time threatening to report her. Aside from its criminal nature, the grievant's behavior was simply inappropriate in the workplace. It is absolutely inappropriate for almost any employee, let alone a police officer, to touch a co-worker on the backside.

The grievant also admitted to engaging in a pattern of harassing [redacted] by addressing her with terms of endearment, whistling at her, and blowing kisses. All these behaviors were addressed during the grievant's extensive training; some of the examples of harassment were using language like "honey" or "sweetie" to address females; making kissing noises; and touching, patting, or slapping any private area. Nevertheless, the grievant engaged in that exact conduct with [redacted]. The grievant may not have intended to offend [redacted] but the perpetrator's intentions are irrelevant when evaluating a claim of sexual harassment.

The Union attempted to minimize the grievant's behavior by isolating each misdeed and examining them one-by-one. But the arbitrator must consider the totality of the circumstances.

This is not a case of a single offensive comment, but a continuous pattern of terms of endearment, blowing kisses, whistling, leering, and physical touching. Nor can the Union accuse [redacted] of hypersensitivity. The grievant's own co-workers acknowledged that they themselves would never engage in such conduct at work because it was inappropriate.

The grievant's pattern of sexual harassment, rising to the level of a felony, render her plainly unsuitable to continue her employment as a Boston police officer. The conduct of police officers must foster and preserve public trust. Felonious misconduct cannot be tolerated. The Department cannot be required to bear the risks associated with the grievant's behavior. The grievant's own testimony was tantamount to an admission of felonious conduct, which alone warrants her termination.

The Union. The City's case rests almost exclusively on the testimony of [redacted] But [redacted] fixation on the grievant's lesbianism caused her to distort the facts, misread the grievant's friendliness, and develop the delusion that the grievant was romantically pursuing her. These unreasonable perceptions tainted [redacted] testimony. Her claim that the grievant's whistle was sexually suggestive cannot be credited, nor can her uncorroborated assertions that the grievant intentionally invaded her personal space. The testimony of

other E-18 employees belied [redacted] belief that the grievant "targeted" her alone. The grievant was friendly with all her co-workers, called many people affectionate names, and hugged and had physical contact with a number of them.

[redacted] own conduct was inconsistent with her supposed discomfort with the grievant. [redacted] chatted with the grievant at the front desk about family, weekend plans, and hobbies. She asked the grievant for help completing various office tasks, and went out for coffee and ice cream with her.

[redacted] account of the August 5 incident was completely uncorroborated. Her assertion that she screamed, and that [redacted] "definitely" heard her, was contradicted by [redacted] Almost 30 people were scheduled to work that day, yet the City did not produce one witness who heard the scream, including [redacted].

The Arbitrator should credit the grievant's consistent, forthright account of events. The grievant was in a long-term relationship and had no romantic interest in [redacted]. She did not sexually assault [redacted] on August 5, but simply tapped her on the rear end and encouraged her to leave for the day. There was nothing sexual or indecent about that conduct. The grievant had no idea that [redacted] objected to her behavior, because [redacted] never told her.

The grievant admitted that she crossed the line between work behavior and home behavior, but it was not the Department's

training that taught her the difference. Her training on sexual harassment consisted of two short segments in the first weeks of the academy. The Department never cautioned, counseled, or warned the grievant that her behavior violated Department rules or policies. As a remedy, the arbitrator should sustain the grievance and order the Department to make the grievant whole for all lost wages, benefits, and other compensation, including overtime, paid details, and court time, and expunge her record of all references to this discipline.

III. Opinion.

Most of the critical facts in this case are not really in dispute. The grievant admitted that she called [redacted] affectionate names like "honey" and "sweetie," blew kisses at her, whistled at her, and sometimes peeked into her office to say hello. The grievant also admitted to occasionally lightly slapping her on the buttock. So it is not necessary to decide whether these things happened, because there is no doubt that they did. Rather, the question is whether they violated Department Rules 102, § 3 or § 35, or Department Rule 114 § 2B.

Many of seeming disparities in the witnesses' testimony are not factual disputes, but matters of interpretation of the known facts. [redacted] tended to take a

dark view of the grievant's behavior. She interpreted the grievant's whistles as salacious. She interpreted the grievant's invitation to help organize the supply closet as a covert sexual advance. The grievant's appearances at her office door "to say hi" made her uneasy.

I do not doubt that [redacted] genuinely believed that her interpretations were correct. But I must conclude that the evidence establishes that she completely misconstrued the grievant's behavior and motives. [redacted] belief, that the grievant was "targeting" her and treating her differently than everyone else, was plainly inaccurate. [redacted], and every employee interviewed by IAD confirmed that the grievant behaved this way toward everyone. Many had themselves been hugged, called "sweetie" or "honey," or even slapped on the buttock by the grievant. The grievant testified that she had engaged in these affectionate demonstrations with friends and family "forever." [redacted] seemed unaware of any of this, perhaps because she spent much of her time in her office at the back of the station.

More troublingly, the evidence shows that [redacted] ideas about the grievant appears to have caused certain distortions in her perceptions. She was certain that

everyone in the station noticed that the grievant was "coming on" to her, even though no one ever said anything about it. She interpreted their silence as a reluctance to acknowledge the obvious. She believed that [redacted] was expressing tacit incredulity at the grievant's inappropriateness when she "looked at Helen and looked at me." But according to [redacted] IAD interview, [redacted] had no such thought at any time.

Indeed, none of the witnesses or interviewees observed any tension between [redacted] and the grievant. To the contrary, they told the investigators that [redacted] hung out with the grievant at the front desk, talking and laughing. Moreover, except for [redacted], none of the E-18 personnel had any problem with the grievant's behavior, and none of them, [redacted] included, thought it had any sexual dimension at all. [redacted] objected to the grievant's nicknames not because she found them sexually suggestive, but because she considered them disrespectful to her hard-earned status as a police officer.

[redacted] misinterpretation of facts, behavior, and situations make her a problematic witness. That extends to the two factual matters that *are* in dispute: (1) whether [redacted] told the grievant not to touch her, and

(2) whether the grievant grabbed [redacted] buttock and slipped her hand between [redacted] legs on August 5, 2014.

I am frankly unconvinced that [redacted] ever told the grievant not to touch her, either expressly or indirectly. Several factors lead to this conclusion. First, when the grievant received [redacted] direct objection, she was immediately responsive. [redacted] told the grievant to stop calling her things like "honey," and the grievant apologized and complied (except for one inadvertent slip). That makes it likely that if [redacted] had indeed given another similar directive, the grievant would have stopped.

Second, according to [redacted], whenever she firmly told the grievant to keep her hands off, she and the grievant were at the front desk, and no one else was present. That is possible, but unlikely. The front desk is a busy area. It was staffed by [redacted] as well as the grievant. Personnel hang around the desk when they have a free moment, and officers from all over the city stop by to drop off their detail slips. Yet no witness heard [redacted] tell the grievant to keep her hands to herself.[10]

[10] Assuming [redacted] told the grievant "You know that's not cool, don't you?" when she found the grievant peeking in the door to her office, that statement was ambiguous. It did not necessarily convey that the grievant should stop visiting her. It could also have meant that the grievant should not startle her by appearing so suddenly.

Nor did anyone observe [redacted] express her disapproval indirectly. [redacted] testified that whenever the grievant did something inappropriate, she would cut off the conversation and walk away. But no one else saw this, nor (except for [redacted] were they conscious of [redacted] ill feelings. Capt. Armstrong testified that the E-18 station is relatively small, and there are "not a lot of secrets" among the personnel. I therefore find it implausible that for two years, no one would have noticed [redacted] aversion, had she expressed it in the manner she described.

This leads to the crucial factual dispute in the case, which is the incident of August 5, 2014. After considerable reflection, I am unable to credit [redacted] description of her encounter with the grievant in the hallway. There is no question that the grievant slapped [redacted] on the rear end after encouraging her to go home. The grievant admitted as much. But I do not believe that the grievant forcefully grabbed her buttock and "goosed" her, to use the colloquial term.

First, it is difficult to imagine how the grievant could have executed the maneuver described by [redacted]. [redacted] was passing the door of the clerks' office, heading toward her office. The grievant was turned

slightly in the opposite direction. On cross-examination, [redacted] testified that the grievant was heading for the front desk when she reached behind her and grabbed [redacted] buttock, while [redacted] kept walking. It is hard to picture how the grievant could have grabbed [redacted] by reaching backward, while [redacted] continued to walk away, or to imagine why, if the grievant was determined to do this, she would have chosen such an awkward approach.

Second, if [redacted] had screamed, surely someone would have responded. The parties devoted a great deal of testimony to the question of who may have been in the offices along the corridor, or anywhere else in the station, at the time in question. Ultimately, it was impossible to pin down those details, but the fact remains that [redacted] was in a police station. It is safe to assume that law-enforcement personnel were in the building, if not in their offices, [redacted] unrebutted testimony demonstrates that they would have heard a scream. [redacted] happened to have screamed in that corridor on a previous occasion, and personnel heard and responded. That no one did so on August 5 tends to show that there was no scream, which puts the rest of [redacted] description of the incident into question.

It is never pleasant to discredit the testimony of an

important witness. I do not believe that [redacted] knowingly and intentionally lied. But her predisposition against the grievant influenced her thinking and perceptions so strongly that that they are not reliable.

Given all of the foregoing, the Department's decision that the grievant violated Rule 114, § 2 by creating a "hostile work environment" must be reversed. A "hostile work environment" is one of two types of actionable sexual harassment under G.L.c. 151B and Rule 114, the other being so-called "quid pro quo" harassment. The necessary precondition for either type of sexual harassment is "unwanted sexual advances…and other verbal or physical conduct of a sexual nature…."

As HR Manager Wexler pointed out, whether these things existed must be evaluated from the point of view of a reasonable woman, not a "hypersensitive individual." Fortunately, the point of view of a reasonable woman is accessible to the male arbitrator in this case, because a number of women expressed their opinion of the grievant's conduct. Except for [redacted] and, briefly, [redacted], it does not seem to have crossed their minds that the grievant's conduct was sexual. [redacted] wondered if it might be, but then dismissed the possibility. The other [redacted] and

[redacted] and civilians [redacted] and [redacted] found nothing sexual at all in the grievant's behavior.

This was undoubtedly due in part to the grievant's gender, as well as her personality. The question of what constitutes sexual harassment is complex and fact-specific. The standards are not necessarily "unisex." To a reasonable woman, certain conduct that would be offensive from a man (being called honey, for example, or being complimented on her looks) is perfectly acceptable from another woman.[11] The grievant's sexual orientation did not affect the opinions of the women who worked in E-19: in their judgment, apparently, the grievant's gender and personality outweighed the influence of her sexual orientation.

In short, [redacted] conclusion that the grievant was sexually interested in her was not reasonable. I note that [redacted] formed this opinion quite early in their acquaintance, during first weeks of the grievant's probationary rotation. Because the grievant was on the

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[11]The City's guide to diversity and harassment, entitled "The Respectful Workplace," acknowledges that whether an epithet is offensive may depend on the genders of the persons involved:

> …[W]hen women use the term "girls" to refer to one another, it is often considered a term of friendship. But if a man says, "Can one of you girls take care of this?" many people would consider that the word…impl[ies] a subservient or second-class role….

Somewhat confusingly, the guide also states that gender "is not a point of distinction in sexual harassment cases," but this only illustrates the complexity of the subject.

street, she and [redacted] had had relatively little contact. Yet [redacted] was suspicious of what she termed the grievant's "over-friendliness." There were no grounds for that suspicion either then or subsequently.

In sum, the grievant made no sexual advances toward [redacted] and her conduct cannot reasonably be construed as "of a sexual nature." Therefore, she did not violate Rule 114, § 2 by creating a "hostile work environment."

I must also reverse the Department's decision that the grievant violated Rule 102, §35 by committing the criminal offense of indecent assault and battery under G.L.c. 265, § 13H. I have found that she did not grab [redacted] buttock or slip her hand into [redacted] crotch on August 5, 2014. The grievant did lightly slap [redacted] buttock on that and other occasions, and did the same to at least one other employee, [redacted] This was the grievant's manner of expressing approval or encouragement, perhaps carried over from her team sports days. It was not appropriate conduct, and the grievant should not have done it. But it was not a crime. If it were, Department personnel would have to arrest many amateur and professional athletes, who do the same to express appreciation for a job well done. In reaching this conclusion, I rely on the testimony of Capt. Armstrong,

who was asked whether it was ever appropriate for a police officer to touch a fellow employee on the rear end. He testified:

> I would have to view the conduct. I mean, you know, my daughter plays volleyball [in high school]. The girls are constantly…touching each other and no crime's ever committed.

That the grievant was not guilty of assault or sexual harassment does not end the case. The Department also charged her with conduct unbecoming an officer, and its decision that she violated Rule 102 §3 was well-founded. The Department has a great deal of latitude to regulate the conduct of its officers. The rule requires police officers to "conduct themselves at all times…in such a manner as to reflect most favorably on the Department," and to avoid conduct that even *tends* to indicate that the officer is "unfit to continue as a member of the Department."

It was well within the Department's authority to discipline the grievant for calling officers and civilians names like "honey," "sweetie," and "cutie and/or beautiful" (Specification I); whistling at them (Specification I); and touching their buttocks (Specification III, IV, V). A police station is not a locker room, a living room, or a coffee shop.

However, termination was far too severe a penalty. In my opinion, the grievant neither knew, nor should have known, that

she was doing anything wrong. As a new recruit, the grievant did not fully realize that part of the job of a police officer (or any employee, though perhaps to a lesser extent) is to modify her "outside personality," sometimes substantially. HR Manager Wexler's training materials were excellent, but they did not, and could not, address every possible factual configuration in this complex area. They did not put the grievant on clear notice that affectionate speech and conduct between females was prohibited. Nor did any of the grievant's supervisors, once she became a sworn officer. The grievant behaved in her characteristically demonstrative fashion quite openly for three years, without anyone expressing disapproval except [redacted] directive was a matter of personal preference, not a prescription for the grievant's general conduct. [redacted] did not care what the grievant called any other officer, as long as she herself received the respect she was due.

I am convinced that the grievant now understands the Department's expectations, and is willing and able to meet them. I will therefore order her reinstatement. The Department may issue a letter of reprimand to the grievant for conduct unbecoming, setting forth those expectations, and may require her to undergo such training in acceptable police demeanor as it may offer.

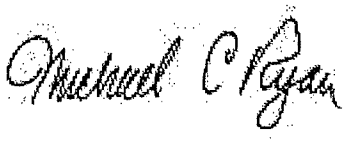
AWARD

There was no just cause for the discharge of Helen Bucelewicz.

The City shall reinstate Bucelewicz to her former position of patrol officer. The Department may transfer her to a different assignment, if it determines such transfer to be in the best interests of the Department.

The City and Department shall make Bucelewicz whole for all lost compensation and benefits, including seniority.

The City shall expunge all reference to the termination from Bucelewicz's personnel records. The Department may issue a letter of reprimand to Bucelewicz for violating Rule 102 §3, and may require her to undergo such training in acceptable police demeanor as the Department may offer.



Michael C. Ryan
Arbitrator
February 6, 2017