IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, STATE OF FLORIDA
CIVIL DIVISION

WEST CENTRAL FLORIDA POLICE ASSOCIATION, and RUSTY LONGABERGER

Petitioner,/Movants **Case No. 2014-CA-4689**

v.

CITY OF LAKELAND,

Respondent.

_____/

MOTION TO DISMISS OR STRIKE PETITIONER'S PETITION/MOTION TO VACATE ARBITRATION AWARD

Respondent, the City of Lakeland (hereinafter "the City" or "Lakeland") hereby moves the Court to dismiss or strike Petitioner's Petition/Motion to Vacate Arbitration Award (hereinafter "Petition/Motion") pursuant to Rule 1.140(a), (b) and (f), Fla.R.Civ.P. and as grounds therefore says:

I. STATEMENT OF THE CASE

Petitioners have filed this original proceeding in an effort to vacate an unfavorable arbitration award. Petitioner Longaberger was an officer of the Lakeland Police Department. He and others became embroiled in a scandal that had wide media coverage involving sexual acts between male and female employees of the Lakeland Police Department. After a thorough investigation, Longaberger's employment with the Department was terminated.[1] He filed a

[1] Petitioner Longaberger was far from the only person involved and disciplined. Several others employees resigned or retired, others were terminated and others, whose violations were less flagrant, received lesser discipline. (Exhibit D, Brief of The City of Lakeland, page 3. This and later references to the attachments to the Petition/Motion will be "Exhibit __, (title), page(s)___.

grievance which was denied and then sought arbitration in accordance with the Collective Bargaining Agreement (hereinafter "the CBA") between the City of Lakeland and Petitioner West Florida Police Benevolent Association. On April 16, 2014, this case was presented by the parties before arbitrator Barry J. Baroni (hereinafter "the arbitrator"). It was a less than one day hearing with testimony and evidence presented by only one witness, Police Chief Womack. Thereafter, the arbitrator, on August 29, 2014, ruled upholding the termination of Petitioner Longaberger. Following the decision, Petitioners timely filed this action.

II. THE FINALITY OF ARBITRATION AWARDS

Petitioners mere assertions that the arbitration award was reached in violation of §682.13, Fla. Stat., fail to meet the threshold standard to overturn the arbitrator's decision, and fail to even state a cause of action or present a valid motion. It is well established that a high degree of conclusiveness attaches to an arbitration award because the parties themselves have chosen to go this route in order to avoid the expense and delay of litigation. *Johnson v. Wells*, 72 Fla. 290, 73 So. 188 (1916). The arbitrator is the sole and final judge of the evidence and the weight to be given to it. *Bankers & Shippers Insurance Company v. Gonzalez*, 234 So.2d 693 (Fla. 3d DCA 1970). The proceedings before an arbitrator are not generally to be examined by the court for the purpose of determining how the arbitrator arrived at his award. *Weeki Wachee Orchid Gardens v. Florida Inland Theatres*, 239 So.2d 602 (Fla. 2d DCA 1970).

Any review of the arbitrators' decision to grant a certain award "is very limited, with a high degree of conclusiveness attaching to an arbitration award." *See Charbonneau v. Morse Operations, Inc.*, 727 So.2d 1017, 1019 (Fla. 4th DCA 1999) (*quoting Applewhite v. Sheen Fin. Res., Inc.*, 608 So.2d 80, 83 (Fla. 4th DCA 1992)). This limited review has an obvious purpose; it is necessary to "avoid a 'judicialization' of the arbitration process," and "to prevent arbitration

from becoming merely an added preliminary step to judicial resolution rather than a true alternative." *Charbonneau*, 727 So.2d at 1019 (*citing Chandra, M.D. v. Bradstreet*, 727 So.2d 372 (Fla. 5th DCA 1999)).

Section 682.13(1), Fla. Stat., provides limited grounds to vacate an arbitration award. *See Schnurmacher Holding, Inc. v. Noriega*, 542 So.2d 1327, 1328 (Fla. 1989). When an arbitration award encompasses the issues submitted to arbitration and the arbitrator has committed no conduct proscribed by the arbitration statute, the award operates as a final and conclusive judgment. *Id.* at 1328; see also § 682.15. Absent a basis to vacate, the trial court must confirm. *Id.* at 1328.

The Florida Arbitration Code specifically states when a court may vacate an arbitration award. Thus, § 682.13, Fla. Stat. (1973) provides:

> 682.13 Vacating an award.
>
> (1) Upon application of a party, the court shall vacate an award when:
> (a) The award was procured by corruption, fraud or other undue means;
> (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party;
> (c) The arbitrators or the umpire in the course of his jurisdiction exceeded their powers;
> (d) The arbitrators or the umpire in the course of his jurisdiction refused to postpone the hearing upon sufficient cause being shown therefore or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 682.06, as to prejudice substantially the rights of a party; or
> (e) There was no agreement or provision for arbitration subject to this law, unless the matter was determined in proceedings under 682.03 and unless the party participated in the arbitration hearing without raising the objection; But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

Petitioners have invoked only subsections b, c, and d of § 682.13(1) and have not challenged the CBA, nor have they claimed fraud or corruption. However, the allegations of the Petition/Motion fall far short of presenting any viable position for vacating this award.

III. ARGUMENT

A. The facts alleged are insufficient.

The Petition/Motion should be dismissed or stricken because it fails to allege supporting facts and instead relies wholly upon conclusory allegation and allegations shown to be false by the attachments to the Petition itself. Thus the Petition/Motion fails to meet requirements of Rule 1.110(b), Fla. R. Civ. P.

For example, while Petitioners did expressly invoke Fla. Stat. § 682.13(1)(c), no where in the allegations is any fact, ultimate or otherwise, stated that would suggest that the arbitrator exceeded his authority. Under § 682.13(1)(c), the arbitrator exceeds his power only when he exceeds the authority the parties granted him in their agreement to arbitrate. *Noriega*, 542 So.2d at 1329. As an example, an arbitrator may exceed his authority when he decides an issue that is not pertinent to resolving the issue submitted to arbitration. *Id.* at 1329. But the "facts" asserted in Paragraph 7 and elsewhere in the Petition/Motion do not approach or even hint that the arbitrator exceeded the authority the parties granted him in the CBA, and no fact is stated that would constitute a basis for vacating this award pursuant to § 682.13(1)(c).

To the contrary, Petitioners' assertions involve issues that were not raised during the arbitration and matters that were within the arbitrator's discretion. For example, Petitioners argue that the arbitrator based his decision on the conduct of others. *See* Paragraph 7(c) of the Petition/Motion. But no where does the Petition/Motion identify who, when, how, or where this occurred, leaving the Respondent and this Court to have to guess what Petitioners are really

alleging. Such vague and conclusory allegations fail to state a cause of action in this original proceeding. This failure to allege ultimate facts, *see* Rule 1.110, Fla.R.Civ.P., will be addressed *supra* in III (C) - (I).

B. The allegations are contradicted by the attachments.

Petitioners' allegations, supporting its assertion that the award should be set aside are nullified by the Petition/Motion's attached exhibits. These documents refute and contradict Petitioners' claims.

Exhibits attached to a pleading become a part of that pleading for all purposes. If an attached document negates a pleader's cause of action or defense, then the plain language of the document will control. *Health App. Systems v. Hartford*, 381 So.2d 294 (Fla. 1st DCA 1980). When exhibits are attached to a complaint, the contents of the exhibits control over the allegations of the complaint. *BAC Funding Consortium Inc. v. Jean-Jacques*. 28 So.3d 936 (Fla. 2nd DCA 2010). Thus, where the allegations of the Petition/Motion conflict with its Exbitits, the facts in the attachments control. *See also Harry Pepper & Assocs., Inc. v. Lasseter*, 247 So.2d 736, 736-37 (Fla. 3d DCA 1971) (holding that when there is an inconsistency between the allegations of material fact in a complaint and attachments to the complaint, the differing allegations "have the effect of neutralizing each allegation as against the other, thus rendering the pleading objectionable").

Petitioner's pleading has irreconcilable conflicts with the attachments.

In Paragraph 6, Petitioners set out generally three (3) of the five (5) subsections of §682.13(1) for attempting to vacate an arbitration award. Those three subsections were:

> b) There was evident partiality by the arbitrator appointed as a neutral or misconduct prejudicing the rights of the petitioners/movants.
>
> c) The arbitrator in the course of his jurisdiction exceeded his powers.

> d) The arbitrator in the course of his jurisdiction refused to hear evidence material to the controversy or otherwise conducted the hearing, contrary to the provisions of §682.06, FLA. STAT. as to prejudice substantially the rights of the petitioners/movants.

In Paragraph 7 Petitioners then purport to set out facts supporting their characterization of events. However, those allegations themselves are conclusory, devoid of ultimate fact and are flatly contradicted by the Exhibits. Each will be addressed below:

C. Paragraph 7a fails to present a valid claim for relief.

In Paragraph 7a, Petitioners allege:

> a) The arbitrator improperly limited the time available and improperly rushed the presentation of the PBA's and Longaberger's case, while not imposing similar restrictions on the City.

However, the record displays a very different set of circumstances and shows this allegation to be false:

1. The record does not display any undue time limitations. *See* the entirety of Exhibit C, Petitioner's Post-hearing Brief, where Petitioners did not address this issue at all and the entirety of Exhibit B, the Transcript, where Petitioner's repetitive and irrelevant questions to which objections were raised and some sustained were the only restriction. *See* Exhibit B, the Transcript, pages 71, 93, 94, 96, 98, 105, 109, 115, 116-117, 118, 120, and 126.

2. The record only shows that repetitive and futile examination was cut off properly by the arbitrator. *See* Exhibit B, the Transcript, pages 71, 93, 94, 96, 98, 105, 109, 116-117, 120, and 126. Not all objections were sustained and some, even where the questioning were irrelevant, was still allowed. *See*, for example, Exhibit B, the Transcript, pages 105 and 118.

3. The record shows that Petitioners had more than ample time and used substantially more time than Respondent. As documented by the hearing transcript, the City's

counsel conducted a direct examination that began on page 16 of the transcript and concluded on page 39, a total of 23 pages. *See* Exhibit B, the Transcript, pages 16:14 – 39:25. Petitioners' counsel subsequently conducted a cross-examination that filled the rest of the 129 pages of the transcript. *See* Exhibit B, the Transcript, pages 40:7 – 129:9, a total of 89 pages. Thus, Petitioners took almost four (4) times as much time and transcript. Furthermore, their allegation fails to present any ultimate fact in that they do not allege one single fact that they could and would have elicited had they had even hours of additional time. Instead, at page 129 counsel for Petitioners announced he had no more questions of Chief Womack and at page 131 he announced he rested without putting on any case. *See* Exhibit B, the Transcript, pages 129 and 131.

4. The record shows that Petitioners chose not present any witnesses to support their case. Rather, they made a judgment that in their opinion the City had failed to meet its burden when it rested its case and elected not to present any witnesses or exhibits to support their position. In fact, following the brief recess they requested after the City rested its case, Petitioners' counsel stated: "Mr. Baroni, after consulting with my client we have determined that we do not believe that the City has proven its case and that we do not need to put on any case, so we rest." (Exhibit B, the Transcript, page 131:4-12). By making this strategic decision, they irrefutably establish that their time was improperly restricted is blatantly false.

5. The record shows only one proffer by Petitioners of any question or any information that might have been elicited by questions. *See* Exhibit B, the Transcript, page 116. Otherwise, there is no hint in the record of any facts purportedly not established or any act, event, document, testimony or evidence barred by the arbitrator. Thus, Petitioners have failed to protect and preserve the record.

6. The record does show and establish that Petitioners are only raising a "sour grapes" argument commonly raised by the losing parties. The record does not reflect anything more dramatic than losing some objections, apparently resulting in an impression of bias often felt by the losing party. Petitioners have not pointed to any particular statement or event that reflects bias (other than "he ruled against us"), nor can they.

7. The Petition/Motion is unclear as to the portion of § 682.13(1), Fla. Stat. this assertion is based upon, but the City assumes Petitioners must be relying on § 682.13(1)(b) or (c), Fla. Stat. However, by failing to allege or address what evidence the arbitrator refused to hear, this Court and the Respondent are left to sift through 130 pages of testimony and objections to try to guess what that might be. Furthermore, the allegation in Paragraph 6(c) of the Petition/Motion also alleges "otherwise conducted the hearing, contrary to the provisions of § 682.13(1), Fla. Stat. as to prejudice substantially the rights of petitioners/movants." Nevertheless, Petitioners fail to identify what conduct was questionable, when it allegedly occurred, or any part of the transcript, Exhibit B, reflects this supposed misconduct. The allegation is so lacking in fact, ultimate or otherwise, that the Petition/Motion fails to allege any cause of action or right to relief. Finally, a review of the transcript shows a fairly conducted hearing where Petitioners made a strategic decision to offer no evidence or testimony, a decision that backfired. For that decision of theirs, they have no basis to blame the arbitrator.

D. Paragraph 7b fails to present a valid claim for relief.

In Paragraph 7b, Petitioners allege:

> b) The arbitrator improperly conflated Longaberger's off duty, harmless conduct with the conduct of other officers who engaged in on duty sexual misconduct resulting in the conclusion that he was part of the Lakeland Police Department sex scandal that adversely affected the public.

Again, it is unclear what on section of Fla. Stat. § 682.13(1), Petitioners rely in making this allegation and claim in paragraph 7 of their Petition/Motion. Respondent assumes it is Fla. Stat. § 682.13(1)(c), but that is far from certain given the vague allegations of the Petition/Motion.

Assuming Petitioners are basing their claim on § 682.13(1)(c), the allegation is wholly conclusory and amounts to nothing more than Petitioners attempting to re-weigh the evidence from their perspective using their biased viewpoint. A court might conclude that in a court of law the evidence presented to an arbitrator would have been insufficient to support the award. But the inescapable point is that the parties were not in a court of law. When parties agree to arbitration, they give up some of the safeguards which are traditionally afforded to those who go to court. One of these safeguards is the right to have the evidence weighed in strict accord with legal principles. *State v. First Floridian Auto and Home Ins. Co.*, 803 So.2d 771 (Fla. 1st DCA 2002.

Petitioners now appear to urge this Court to interpret Fla. Stat. § 682.13(1) to include a new subsection; one expanding § 682.13(1)(c) so that if an arbitrator departs from the accepted rule of law, then the arbitrator's award can be vacated on the ground that the arbitrator exceeded his or her power. However, an arbitrator exceeds his power under Fla. Stat. § 682.13(c) only when he or she goes beyond the authority granted by the parties or the operative documents and decides an issue not pertinent to the resolution of the issue submitted to arbitration. *See International Medical Centers, Inc. v. Sabates*, 498 So.2d 1292 (Fla. 3d DCA), review denied, 508 So.2d 14 (Fla. 1987); *Broward County Paraprofessional Ass'n v. McComb*, 394 So.2d 471 (Fla. 4th DCA 1981); *Dubbin v. Equitable Life Assurance Society of the United States*, 234 So.2d

693 (Fla. 4th DCA), *cert. denied*, 238 So.2d 423 (Fla. 1970). Petitioners have not alleged that, nor could they.

Furthermore the record displays a very different set of circumstances than Petitioners' allegations:

1. Petitioners in the Petition/Motion describe Petitioner Longaberger's conduct as "off-duty." The record demonstrates without dispute that it was not all off duty; but even if true it would not have been helpful to Petitioners That is simply false, Exhibit B, the Transcript, shows that the termination decision was based upon the admissions of Petitioner Longaberger himself, page 29, which included his admission that as a supervisor he had failed to "take any steps to even stop the behavior of this other employee." *See* Page 30. That is an affirmative responsibility he had as an officer in the Lakeland Police Department. He also admitted to making calls during work time to arrange sexual liaisons. Exhibit D, the Brief of the City of Lakeland, page 4. Some of those conversations were while Petitioner was in his office. Exhibit D, the Brief of the City of Lakeland, page 4. Petitioners' Petition/Motion falsely alleges only off duty conduct and that allegation is contradicted by Petitioners' own attachments. The attachments prevail. *BAC Funding Consortium Inc. v. Jean-Jacques*. 28 So.3d 936 (Fla. 2nd DCA 2010).

2. Petitioners characterize Longaberger's conduct as "harmless" when, in fact, his shameful immoral conduct was harmful to the Department. Former Chief Womack testified to this as "conduct unbecoming" which brought "the department in disrepute or disrespect." Exhibit B, the Transcript, page 29.

> "That was a very public situation. It was very public - - it was playing out very much so in the public. We had a lot of public outcry, a lot of public trust issues. There was a factor of whether or not, regardless

> of anything, could Sgt. Longaberger continue to function in the realm of that public trust."

Petitioner Longaberger's own admissions show the error of his present allegation. When asked during the pre-disciplinary hearing about his responsibilities as a supervisor, Petitioner Longaberger responded:

> "I probably shoulda(sic) said something to her that, um, obviously stopped it. Because I didn't know where – of course didn't ever think it will lead to that but if you don't stop something it can lead to that...." *See* Exhibit D, the Brief of the City of Lakeland, page 8.

Although Petitioner Longaberger claimed that the sexual relations occurred off-duty, he admitted during the pre-disciplinary hearing the he and Ms. Eberle had conversations in his office while he was working about meeting to have sex:

> "Or the proposition in the office? I'm working, yes ma'am. Something I would never do again. You're right. I was working at the time when she did that you're right. And I will not minimize." *See* Exhibit D, the Brief of the City of Lakeland, page 6.

What Petitioner Longaberger and Ms. Eberle did in having sex with each other while in Orlando for Department sponsored schools, as it affected other employees and the Lakeland Police Department, and as it affected the public through the disclosures of the sex scandal through numerous newspaper articles, justified fully the need for termination and was anything but 'harmless."

3. Petitioners' argument is also factually inaccurate based upon the record they have attached to their Petition/Motion. The decision, Exhibit A, reflects that Petitioner Longaberger was "a willing participant" "which adversely affected himself, as an officer, and the entire Lakeland Police Department." The arbitrator noted that Petitioner Longaberger "was also a supervisor and was involved in sex with a department employee subordinate in rank to himself." This is not a conflated holding, it is a personally direct finding addressing Petitioner

Longaberger for his own admitted misconduct. Additionally, in her testimony at the Arbitration hearing, former Chief Womack correctly distinguished between casual pleasantries at work and the multiple conversations between the Petitioner Longaberger and Ms. Eberle to arrange for their sexual escapades. Exhibit B, the Transcript, page 84.

A review of Exhibit A, the Arbitration Award, shows this was a very particularized and focused decision and that alone shows the falsity of this allegation of the Petition/Motion.

4. If Petitioners are trying to suggest that just because others are implicated in this scandal, that blame for the loss of public trust should not fall squarely on him, they are right. But neither does the fact that others were involved absolve Petitioner Longaberger, a supervisor, of blame for engaging is sex with a subordinate in rank and allowing the scandal to grow and worsen by irresponsible inaction.

Where a law enforcement officer engaged in off-duty misconduct, the interest of the law enforcement agency is particularly great in light of the damage to the image to the agency. For example, in *City of Saginaw*, 82-1 Arb. ¶ 8123 a police officer's grievance was denied, with the arbitrator reasoning:

> "Experience such as the Grievant's constitute a reflection upon the integrity of the Saginaw Police Department and its ability effectively to gain and maintain the respect of the community, an important element in the successful completion of the police mission, has been made more difficult by Grievant's action."

5. Petitioners again try to improperly delve into the mind of the arbitrator and argue that he improperly weighed evidence with their argument that the arbitrator "improperly conflated" Petitioner Longaberger's misconduct with that of others. In effect, Petitioners are saying nothing more than "we disagree with the way the arbitrator weighed the testimony and how we believe he considered the evidence." There is no legal authority for vacating an arbitrator's award because the moving party believes the arbitrator considered evidence, even

evidence that would be inadmissible in a judicial or administrative proceeding. *See City of Tallahassee v. Big Bend Police Benevolent Ass'n,* 710 So.2d 214, 215 (Fla. 1st DCA 1998) (holding that applying the wrong evidentiary standard is not a basis for vacating an arbitration award); *Tallahassee Mem'l Regional Med. Ctr. v. Kinsey*, 655 So.2d 1191, 1198 (Fla. 1st DCA 1995) ("Arbitrators are not constrained by formal rules of evidence or procedure. Rather, they enjoy wide latitude in the conduct of proceedings. Moreover, they are the final judges of such matters as the admissibility and relevance of evidence.").

E. Paragraph 7(c) fails to present a valid claim for relief.

In Paragraph 7c, Petitioners allege:

> c) The arbitrator based his opinion on a "death letter" from the State Attorney which did not even exist at the time of his termination but was issued because of the City's incompetence which the arbitrator chose to ignore.

But the record displays a very different set of circumstances:

1. The decision was not "based upon the "death letter" and no reasonable reading of Exhibit A, the Arbitration Award, could yield that conclusion. The impending death letter was considered by the arbitrator, Exhibit A, the Arbitration Award, pages 20-21, as it was considered by Chief Womack in reaching the decision to terminate the employment of Petitioner Longaberger. The arbitrator clearly knew the death letter had not been issued but was merely impending at the time the decision to terminate Petitioner was made. *See* Exhibit A, the Arbitration Award, pages 6-7.

2. Objecting to the decision of the arbitrator on this ground amounts to attempting to challenge the arbitrator's decision based upon an evidentiary objection. *Tallahassee Mem'l Regional Med. Ctr.*, 655 So.2d at 1198 ("Arbitrators are not constrained by formal rules of evidence or procedure. Rather, they enjoy wide latitude in the conduct of

proceedings. Moreover, they are the final judges of such matters as the admissibility and relevance of evidence.").

3. Petitioners allege in a wholly conclusory manner that somehow (unstated by them but clearly assumed) the City's "incompetence" (unidentified by them but clearly assumed) allowed the "death letter" to be issued. However, the record shows the death letter was impending because of Petitioner Longaberger's own actions and inaction, his own lack of forthrightness and honesty. Furthermore, the fact that the death letter was impending and issued is undisputed and it was issued by the Polk County State Attorney, not the City of Lakeland. *See* Exhibit A, the Arbitration Award, pages 20-21.

4. Petitioners, without alleging even one fact to support the purported "incompetence" of the City, and without offering even one word of testimony on Petitioner Longaberger's behalf, assume this alleged and unidentified incompetence was ignored by the arbitrator. Even if there had been evidence of such, and there was not, the proper weighing of the evidence is for the arbitrator, not the Court. *Tallahassee Mem'l Regional Med. Ctr.*, 655 So.2d at 1198 ("Arbitrators are not constrained by formal rules of evidence or procedure. Rather, they enjoy wide latitude in the conduct of proceedings. Moreover, they are the final judges of such matters as the admissibility and relevance of evidence.").

F. Paragraph 7(d) fails to present a valid claim for relief.

In Paragraph 7d, Petitioners allege:

d) The arbitrator based his decision on the conduct of others.

Aside from the fact that this is a purely conclusory and unsubstantiated allegation, and this alone fails to support this Petition/Motion, the record displays a very different set of circumstances.

1. The arbitration decision repeatedly cites to Longaberger's conduct which in itself was disreputable and harmful to the City. *See* Exhibit A, the Arbitration Award, pages 2, 3, 9, 10, 11, 13, 14, 16 – 23. There is no reading of the Award that shows the decision was based upon the conduct of any other officers.

2. The conduct of others was an issue injected through questioning by counsel for Longaberger as he tried to argue disparate treatment, that some officers were treated more leniently than he. Petitioners have thus waived this argument. *See* Exhibit A, the Arbitration Award, pages 16-19, Exhibit B, the Transcript, pages 107-114, 123-129, Exhibit C, Grievant's Post Hearing Brief, pages 30-31.

G. Paragraph 7(e) fails to present a valid claim for relief.

In Paragraph 7e, Petitioners allege:

> e) The arbitrator improperly shifted the burden of proof to Longaberger to show that his discipline was not consistent with others, where the Collective Bargaining Agreement clearly places the burden of proof on the City to show that discipline must be progressive, consistent and appropriate.

The record shows no basis for this objection to the decision.

1. The CBA does provide that discipline will be "progressive, consistent, and appropriate ... according to the seriousness of the offense," *see* Exhibit E, the CBA, pages 11; however, the CBA does not identify the burden of proof for parties on affirmative defenses, contrary to the allegation of Petitioners.[2] *See* Exhibit E, the CBA, pages 21-23.

2. The City overwhelmingly proved that its discipline was consistent for similarly situated persons and the arbitrator agreed. Petitioner Longaberger disagrees with the result, thus attempting to frame this argument to fit one of the three asserted subsections of §

[2] The only burden of the City was to show competent substantial evidence to support its position. *See* Exhibit E, the CBA, page 22, section 4.

682.13(1). That effort fails. The arbitrator is the sole and final judge of the evidence and the weight to be given to it. *Bankers & Shippers Insurance Company v. Gonzalez*, 234 So.2d 693 (Fla.3d DCA 1970). The proceedings before an arbitrator are not generally to be examined by the court for the purpose of determining how the arbitrator arrived at his award. *Weeki Wachee Orchid Gardens v. Florida Inland Theatres*, 239 So.2d 602 (Fla.2d DCA 1970).

3. The arbitrator carefully showed the requirement that disparate treatment requires misconduct and circumstances nearly identical to that of the grievant. The decision addresses each purported "comparator" and addresses why each was not "nearly identical." *See* Exhibit A, the Arbitration Award, pages 16-19. Comparing the Petition/Motion and its conclusory allegations with its Exhibits shows that this allegation has no merit and is a nullity.

H. Paragraph 7(f) fails to present a valid claim for relief.

In Paragraph 7f, Petitioners allege:

> f) The arbitrator concluded, without supporting evidence, that Longaberger's off duty conduct adversely affected himself, as an officer, and the entire Lakeland Police Department.

But the record displays a very different set of circumstances:

1. Petitioners here again fail to associate this alleged ground with any of the three alleged subsections under § 682.13(1), Fla. Stat., leaving Respondent and the Court to speculate and sift through the record. Certainly the allegations are so vague and conclusory that they offer no assistance. Presumably § 682.13(1)(b) or (c), Fla. Stat., are the intended grounds. As previously addressed, there is not one fact alleged suggesting partiality or bias beyond the loss of the decision. As to § 682.13(1)(c), this has also been previously addressed. *See* IIIa.

2. There was substantial evidence of harm to the Department. In fact, it is difficult to imagine how a former supervisor could even suggest that there could be no harm

from his having sex with a subordinate in rank and planning liaisons while on duty. When the fact the this same supervisor could have stopped the scandal earlier by performing his duty, and admitted it, the incredulity of this argument rises. Petitioners also ignore the "death letter" and the effect it would have inevitably had on Petitioner Longaberger's ability to perform his job. As the arbitrator said, mainly based upon the admissions of Petitioner Longaberger, "[i]t was proven that grievant was, indeed, a "willing participant" in sex with Ms. Eberle, which adversely affected himself, as an officer, and the entire Lakeland Police Department." Petitioner Longaberger cannot deny, and, in fact, admitted, that the scandal of which he was a "willing participant" reflected "upon the integrity of the Lakeland Police Department and its 'ability to effectively gain and maintain the respect of the community ....'" *See* Exhibit A, the Arbitration Award, page 22.

3. Petitioner Longaberger's failure to offer any evidence to attempt to argue otherwise is itself an admission of the fact that there was harm and clear evidence of harm.

4. Furthermore, the arbitrator is the sole and final judge of the evidence and the weight to be given to it. *Bankers & Shippers Insurance Company v. Gonzalez*, 234 So.2d 693 (Fla.3d DCA 1970). The proceedings before an arbitrator are not generally to be examined by the court for the purpose of determining how the arbitrator arrived at his award. *Weeki Wachee Orchid Gardens v. Florida Inland Theatres*, 239 So.2d 602 (Fla.2d DCA 1970).

I. Paragraph 7(g) fails to present a valid claim for relief.

In Paragraph 7g, Petitioners allege:

> g) The arbitrator failed to take into consideration Longaberger's superlative record which he was required to do by reason of the Collective Bargaining Agreement.

But the record displays a very different set of circumstances:

1. The evidence was before the arbitrator. The absence of any comment on it and Petitioners assumption that he did not consider it enough to outweigh the damage to the Department is not a basis to vacate an arbitration award. As previously noted, the arbitrator is the sole and final judge of the evidence and the weight to be given to it. *Bankers & Shippers Insurance Company v. Gonzalez,* 234 So.2d 693 (Fla. 3d DCA 1970). The proceedings before an arbitrator are not generally to be examined by the court for the purpose of determining how the arbitrator arrived at his award. *Weeki Wachee Orchid Gardens v. Florida Inland Theatres*, 239 So.2d 602 (Fla. 2d DCA 1970).

2. The arbitrator correctly noted that there was substantial evidence that Petitioner Longaberger attempted to cast himself, a supervisor, as a victim and displayed "little or no remorse" for his willing participation in these acts of misconduct. The other observation in the conclusion of the Arbitration Award shows that the arbitrator had more than sufficient evidence to provide a solid basis to disregard Petitioner Longaberger's prior record.

3. On this basis (Petitioner Longaberger's record), to have overruled Chief Womack's decision to terminate the employment of Petitioner Longaberger would have been an act beyond the arbitrator's authority and would have potentially provided grounds to vacate an award in favor of Longaberger. Article 12, Section 4 of the CBA prohibits the arbitrator from ignoring substantial competent evidence. ("The Employer's action shall be upheld if it is based upon competent substantial evidence."). Petitioners also ignore the undisputed fact that while they argue in Exhibit C, Grievant's Post Hearing Brief, page 30, that this was "one offense" by Petitioner Longaberger, it was an offense that persisted for a substantial period of time, involved multiple breaches of the Code of Conduct, and had a severe impact on himself, others and the Department as a whole. That "one offense" inherently warranted more severe discipline.

4. The CBA specifically provides that "[t]he arbitrator's decision shall be final and binding upon both parties." That is the law in Chapter 682, Fla. Stat., the agreed upon language in the CBA, and itself adequate grounds to dismiss this Petition/Motion.

IV. CONCLUSION

Petitioners have failed to allege any facts, ultimate of not, that were not contradicted by the Exhibits to the Petition/Motion. Furthermore, the very restricted circumstances under which an arbitration award may be vacated have not been alleged or supported. Petitioners' Petition/Motion should be dismissed.

Respectfully submitted this 11th day of December, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of December, 2014, a true and correct copy of the foregoing has been furnished E- Mail to:

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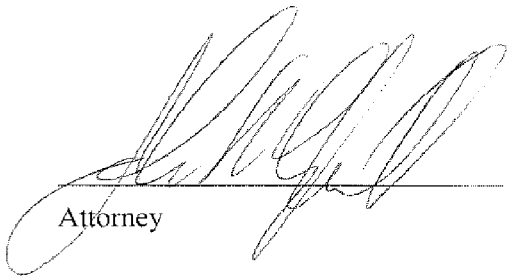

Attorney