American Arbitration Association
Arbitration Pursuant to Agreement of the Parties
Before Timothy J. Brown, Esquire

In the matter of:

Fraternal Order of Police, Lodge 5	**:**	
	:	**AAA Case No. 01-20-0000-6910**
and	**:**	**(P/O Ernest Green 30-day**
	:	**Suspension)**
City of Philadelphia	**:**	

Decision and Award

Appearances:

On behalf of FOP, Lodge 5:
Jessica Caggiano, Esq.
Willig, Williams & Davidson
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Philadelphia, PA 19103

On behalf of City of Philadelphia:
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Assistant City Solicitor
City of Philadelphia
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Introduction

This arbitration arises pursuant to a July 1, 2017 through June 30, 2020 collective bargaining agreement (the Agreement) between Fraternal Order of Police, Lodge 5 (the FOP or Union) and the City of Philadelphia (the City or the Employer). In its underlying grievance, the FOP challenges the City's 30-day disciplinary suspension of Police Officer Ernest Green (Grievant). The parties were unsuccessful in resolving the dispute through their grievance procedure and the Union thereafter filed a timely demand for arbitration. The parties selected the

undersigned arbitrator through the processes of the American Arbitration Association to conduct a hearing on the grievance and render a final and binding arbitration award. The matter was heard by the undersigned on October 26, 2021 via the Zoom virtual platform. The FOP and the City were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Grievant was present via Zoom for the entire hearing and testified on his own behalf. A transcript of the hearing was taken. Following the hearing the parties elected to submit written post-hearing briefs, upon the receipt of which by the AAA, the dispute was deemed submitted at the close of business January 18, 2022.

This decision is made following careful consideration of the entire record in the matter as well as my observations of the demeanor of all witnesses.

Issues

The parties stipulated that: (1) there are no procedural bars to the arbitration of this matter, (2) the matter is appropriately before the arbitrator, (3) the arbitrator has the authority to render a final and binding decision and award in the matter, and (4) the issues presented by the subject grievance may accurately be described as:

> Did the City have just cause to issue Police Officer Ernest Green a 30-day disciplinary suspension, and if not what shall be the remedy?

Facts

Grievant has nineteen years of service with the City as a police officer and has no active discipline on his record. The Grievance involved herein dated January 23, 2020 challenges a 30-day, disciplinary suspension of Grievant. The related Notice of Suspension informing Grievant of the Commissioner's Direct Action discipline provided in relevant part:

You are hereby notified that you are suspended without pay from the above position for a period of Thirty (30) calendar days covering the period from the beginning of business February 19…and March…19, 2020 at the close of business for the following reasons…:

CONDUCT UNBECOMING, SECTION 1-§021-10 (Any incident, conduct, or course of conduct which indicates that an employee has little or no regard for his/her responsibility as a member of the Police Department.)

Internal Affairs initiated an internal investigation, IAD#19-1077.166, after receiving information alleging that employees of the Philadelphia Police Department were posting offensive and inappropriate materials and/or comments to social media, specifically on the Facebook social media site. As part of the investigation, an analysis was conducted of Facebook post and/or comments in the Plainview Project database. The analysis displayed a course of conduct, where no fewer than ten (10) times, you posted, shared, and/or commented on video, photographs/pictures, and articles, using racial slurs, profanity, dehumanizing, defamatory, and/or discriminatory language, and/or language that condoned, glorified, or encouraged violence, and/or language that was insensitive and mocked individuals, due process, and the criminal justice system.

As a member of the Philadelphia Police Department, you are expected to strive to maintain public trust and confidence, not only in your professional capacity but also in your personal and on-line activities. Your posts and comments in question are devoid of any professional expectations and standards.

NEGLECT OF DUTY, SECTION 5-§011-10 (Failure to comply with any Police Commissioner's orders, directives, memorandums, or regulations; or any oral or written orders of superiors.)

Internal Affairs investigation #19-1077.166 determined that you posted or shared material, statements, or comments on Facebook that are in direct violation of Directive 6.10, Social Media and Networking. An analysis of Facebook posts and/or comments collected in the Plainview Project database was conducted during this investigation indicated that you violated policy. Directive 6.10 specifically states that while engaging in social media, "Employees are prohibited from using ethnic slurs, profanity, personal insults, material that is harassing, defamatory, fraudulent, or discriminatory, or other content or communications that would not be acceptable in a City workplace under City or Agency policy or practice." The

> directive further states that "each member must strive to maintain public trust and confidence, not only in his or her professional capacity, but also in his or her personal and on-line activities. Moreover, as police personnel are necessarily held to a higher standard than the general public, the on-line activities of employees of the police department shall reflect such professional expectations and standards."

The Plainview Project

The "Plainview Project," referenced in Grievant's Notice of Suspension, is a database of Facebook posts made by current or former officers of various police departments in the United States and posted on the web in the late spring of 2019. The Plainview data base included posts from over 300 members of the Philadelphia Police Department. Grievant's Notice of Suspension referenced ten (10) Facebook posts or comments under the name of "Ernest Green" as the basis of his discipline. The ten posts/comments included the following:

[redacted] shared a link.

December 9, 2013 ·

WWW.OPPOSINGVIEWS.COM

Iraq War Vet James Vester Lured To His Death By Craigslist Ad For iPad

Share

[redacted] **Ernest Green** Soooo sad! Those brothers should be shot to death

4y

[redacted] a quick death is too good for trash like that 1

4y

[redacted] Very sad E...he survived overseas only to be killed here 2

4y

[redacted] shared 6abc Action News's photo.

July 18, 2014 ·

Nice job dad

6abc Action News

July 18, 2014 ·

Like Page

A Daytona Beach father beat an 18-year-old man unconscious after finding him sexually abusing his 11-year-old son early Friday morning, police said. Read more --> http://6abc.cm/1mXZ2Rt

Share

13

Ernest Green Michael Heston He should of killed him 2

3y

[redacted] Yes he should have, At least he isn't getting charged 2

3y

[redacted] Should have done more but some ahole will say that was wrong...

3y · Edited

[redacted]
May 13, 2016 · Philadelphia, PA ·

This bathroom controversy has done it. It's time to round up liberals & place them in internment camps. Anyone wanna give me a reason not to?

Share

26

[redacted] Brion I had enough gather them all up and put them in a gas chamber!!

1y

[redacted] I'll help!

1y

[redacted] I agree Brion. Its getting ridiculous!!!!

1y

[redacted] Absolutely ridiculous....make America great again....I might move to Canada if this happens...we are a joke....I dont care how you dress or what you look like but if you have a penis piss in the damn urinal...I dont want my daughter's sharing bathrooms with MEN even if they look like a girl....shouldn't even be an issue

1y

[redacted] So if I dress like a girl I can go in the girls locker room....yeah people won't take advantage of that....I'm sick to my stomach

1y

[redacted] Really!

1y

[redacted]

1y

Ernest Green

1y

[redacted] What about fake balls?

1y

[redacted] Agree Getting way out of Hand.

1y

[redacted] you wanna solve the problem....tell your boys, to go tell the principle, that they or girls, get all the boys to do it. See what happens...In Texas our Govern told the Obama Administration to bite one

1y

[redacted]don't mess with TX!!! Hoping to make the baseball tourney Scooter!

1y · Edited

[redacted] great

[redacted]

October 11, 2013 ·

How the hell does someone beat a 2 yr old so bad that he dies? Hope that POS gets ass raped every night by the entire cell block

Share

14

View 1 more comment

Ernest Green That's soooo horrible! He should be shot in the face

4y

[redacted] The toddler did die?? Ug last I read it he was in critical condition. That's such a nightmare.

4y

[redacted] Yeah few hrs ago

4y

[redacted] So sad rotten bastard!!!!!

4y

[redacted]
February 11, 2014 ·

Pieces of shit

ABCLOCAL.GO.COM

Robbery victim shot 4 times after handing over wallet in Oxford Circle

Police are searching for two armed bandits who robbed and shot a man in th…

Share

7

View 4 more comments

[redacted] It seems like the growing trend to eliminate the witness. I will say that if they ever get the unfortunate chance trying to rob me they will be destroyed without prejudice. Scumbags! 5

4y

Ernest Green Pos animals should be shot to death SMDH 2

4y

[redacted] Hopefully this poor guy makes it. Scumbags. 1

4y

[redacted]

November 20, 2013 ·

Hopefully this happens to everyone that plays this "game"

YOUTUBE.COM

Teen Playing The Knockout Game Gets Shot Twice

Visit My Website:http://www.adviseshow.com DONAT…

Share

5

Ernest Green Little fucker got exactly what he deserve 1

4y

[redacted] Cuz if I get hit,I got some hot shit for they ass lol

4y

[redacted]

November 20, 2013 ·

This is just recently being reported for whatever reason but it shows the wrong person was picked to be a victim...Now this game is well known and people are tired of seeing innocent, unsuspecting and defenseless people targeted....The next time the aggressor might end up dead instead of 2 bullet holes and jail time...The guy speaking at the end of the video is right...These punks do not want to go to a gym and beat up on each other, they want someone who will not strike back

YOUTUBE.COM

Teen Playing The Knockout Game Gets Shot Twice

Visit My Website:http://www.adviseshow.com DONAT…

Share

16

1 Share

[redacted] Only was a matter of time. Even after someone gets killed, it probably won't stop.

4y

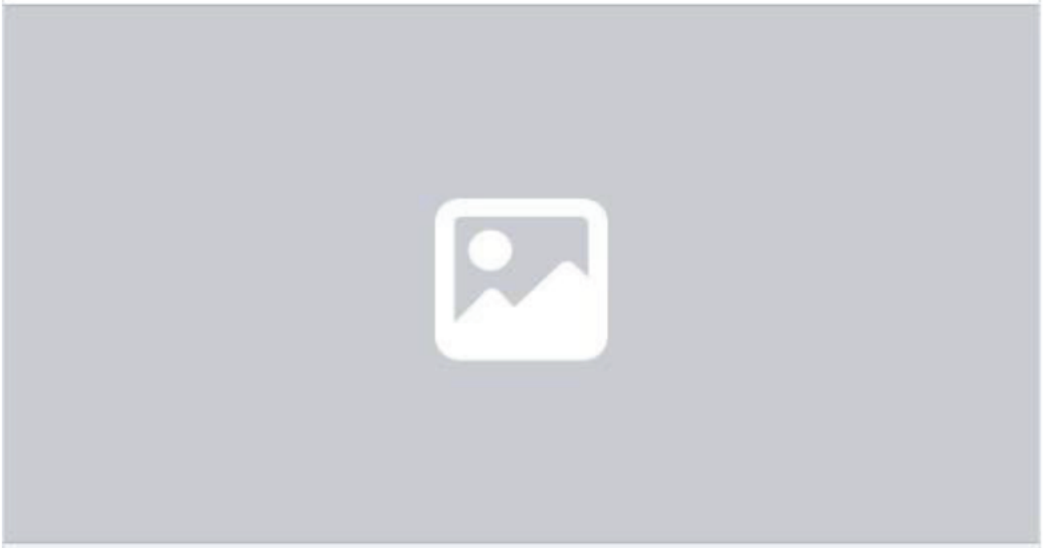
Ernest Green This should happen to every little fucker who does this shit

4

4y

[redacted] shared a link.

November 21, 2013 ·



MYFOXPHILLY.COM

Dangerous Knockout Game Hits Philadelphia Transit

This is a very dangerous trend spreading across the Internet and apparently ...

Share

3

2 Shares

View 6 more comments

[redacted] Big E your the man. If this dude was in the 7th you would of caught his dumbass already!

1

4y

Ernest Green Lol [redacted] these little kids should be shot in the face! Thanks also

1

4y

[redacted] If Big E was around they'd be afraid to do this dumb shit lol

1

4y

[redacted] If big E was around, i'd be afraid to spit on the sidewalk...

1

4y · Edited

[redacted] shared a link.
November 24, 2013 ·

NBCPHILADELPHIA.COM

Cyclist Beaten in "Knockout Game" Attack

A cyclist is recovering after being beaten in what detectives believe is a...

2 8 Comments

Share

[redacted] How was this NOT part of the game.. Because he was on a bike? Because they KEPT beating him when he was down? I'm so disgusted.
1
4y

[redacted] Great....it's officially come to philly huh. Smh.
4y

[redacted] They are going to meet their match one day and I hope that makes the news
1
4y

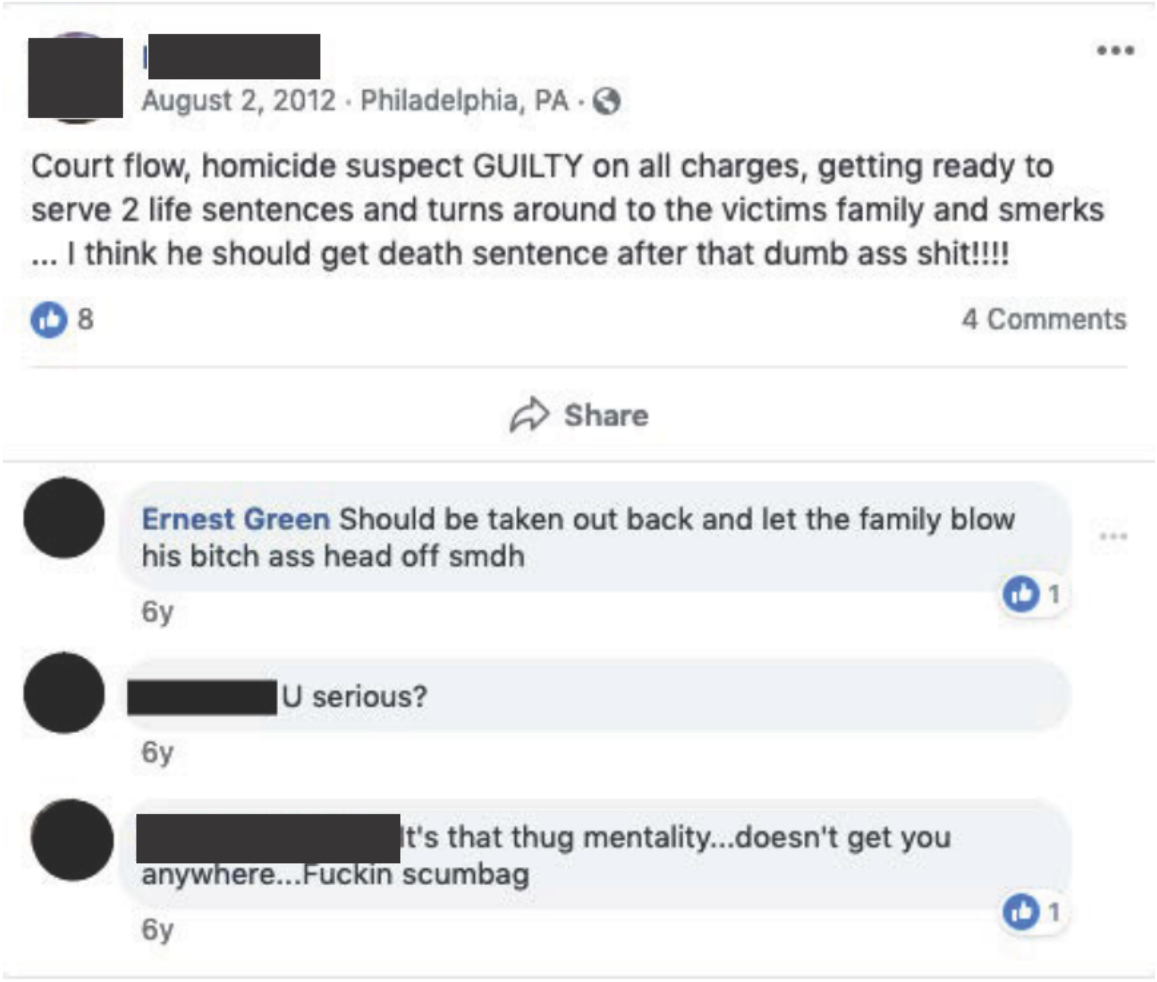
[redacted] It's been going on for years
4y

[redacted] Lonee you're right but unfortunately when that happens, these kids and their parents will cry that they're the victim
2
4y

[redacted] Bon you're right, flash mobs were around a few years ago
4y

Ernest Green Hope one of these kids get shot in the face
4y

[redacted] Haha big E!
4y



Following the posting of the Plainview Project on the web, the Department determined that 19 of the postings or comments in the Project's published data base appeared to be attributable to Grievant. The Department assigned the investigation into Grievant's posts to then-Sergeant, now Lieutenant, Quiana Richardson-Coulter.

Richardson-Coulter testified that she conducted approximately 30 investigations of officers who had made posts published by the Plainview Project. She conducted interviews of each of the officers she investigated. Richardson-Coulter testified her investigations were similar; with the same process of showing the officers paper copies of posts attributable to each and asking each officer the same set of questions. In addition to introductory questions

and reminders of non-disclosure obligations during the course of the IAD's investigation, each officer was shown paper copies of the posts identified by the Department as the officer's, told to take his or her time to review the posts and initial each page of the copied posts. The officers were then asked; (a) to confirm if the posts were on their Facebook accounts; (b) if they made the posts; (c) if they made the posts while on duty; (d) if they had ever noticed any posts attributed to themselves or their accounts that they did not make; (e) if they had any other social media accounts and (f) if there was anything they would like to add to their statements that had not been covered by prior questions.

Grievant was put off duty on June 7, 2019 and his weapons confiscated. Richardson-Coulter testified that her investigation of Grievant was conducted in the same manner as her investigations of other Plainview-related investigations. During her investigation of Grievant, she did not electronically review the actual posts on line. She did not view videos or articles in the various posts. Nor during her interview of Grievant did she ask Grievant what he meant by his posts or comments or what his thought process may have been. She also did not investigate any other social media activity by Grievant. Her investigation was limited to the 19 posts/comments of Grievant found in the Plainview project.

Richardson-Coulter interviewed Grievant on June 12, 2019. Grievant was shown the paper copies of the 19 posts at issue and Grievant initialed each page of the copied posts that contained any comment/post by him. In response to the pre-determined questions asked Grievant, Richardson-Coulter testified, Grievant admitted that the posts attributable to him (including the ten copied above and subject of the instant discipline) were his. When asked, Grievant informed Richardson-Coulter that he could not recall whether he made any of the posts while on duty, and, Richardson-Coulter testified, she did not pursue that issue further.

Richardson-Coulter testified that based upon the information disclosed during her investigation, she concluded, with the concurrence of Internal Affairs Captain Darnel Angelucci, that Grievant had violated the Department's Social Media Policy in that his posts or comments, "expressed discriminating or harassing behavior based on race, color, gender, religion, national origin, age ancestry, sexual orientation, disability, or gender identity, or other content or communications that would not be acceptable in a City workplace under City or agency policy or practice."

Deputy Police Commissioner Robin Wimberly testified that following the download of the Plainview Projects Facebook posts, the Department determined that over 300 officers or employees of the Philadelphia Police Department had made posts. Once individuals were identified, the Department had the posts reviewed for First Amendment purposes by outside legal counsel. Ten of Grievant's posts were determined not to be protected by the First Amendment.

Wimberly testified that Grievant was issued a 30-day suspension for violation of the Department's Social Media Policy and for Conduct Unbecoming. Grievant violated the Social Media Policy, Wimberly testified, by posting on his Facebook page posts that were "egregious in nature" and showed a negative light as far as black men and violence. Grievant engaged in Conduct Unbecoming, Wimberly explained, by engaging in a course of conduct in making his posts.

Wimberly testified that Grievants post stating; "So sad, those brothers should be shot to death," or "he should be shot in the face" or "POS animals should be shot to death" or "a defendant "should be taken out back and let the family blow his bitch-ass head off;" amounted to vigilante-type, violence based responses in violation of the Policy. Such comments are

detrimental to policing Wimberly explained when one considers that the officer has the power to take someone's life and responds to learning of a crime by saying the person should be shot. Similarly, when Grievant posted that "he should have killed him," Grievant violated the directive. In regard to Grievant's post of a picture of two restroom doors on May 13, 2016, the post was derogatory of the LGBTQ community.

Grievant made four posts relating to the "knock out game" during the period November 20 to 24, 2013. The knock out game involved kids randomly selecting a member of the public and attempting to knock them out with a single punch. Grievant's comments included; "Little fucker got exactly what he deserved;" "This should happen to every little fucker who does this shit" and "These kids should be shot in the face." Wimberly testified that Grievant's knock-out game related comments violated the policy by promoting "vigilante type violence," and that two of the posts also violated the policy by using offensive language.

All of the posts at issue were made while Grievant was a Philadelphia police officer, and the posts impact Grievant's ability to perform his job as a police officer because, Wimberly explained, policing is a service-oriented job and when you have officers who have been identified as having certain biases, it impacts the Department's legitimacy. Philadelphia is filled with neighborhoods of people from all ethnicities and all backgrounds, and the Department cannot stand for this type of conduct and must show the public that the Department will not continue to allow such conduct to happen. On direct examination Wimberly explained that people of color live everywhere in the City and Wimberly testified:

> So when we are looking at these posts, it's very interesting that everything is about people who look like these quotes. And it's very concerning. It's very concerning for the Department because we have a large African-American community.

> And in looking at these posts and being part of the team that had to make calls, it's very concerning as you look at it, that -- the biases that are in these posts.

Notwithstanding her testimony on direct examination that Grievant's posts shown a negative light as far as Black men and violence; and the presence of a large African-American community in the City, on cross examination Waverly confirmed that Grievant's discipline was not based upon racial bias or racial or discriminatory motivation.

Wimberly explained that she took the investigation results of officers who were responsible for the most egregious posts downtown and presented them to the Department's executive team; a team then composed of Deputies Paterson, Wilson, Sullivan and Coulter and then Commissioner Ross. The team determined that Grievant's posts were egregious and that in an effort to have Grievant understand how important the implicated interests are, and to make an effort to change Grievant's behavior, the team determined that a 30-day suspension was appropriate.

Wimberly testified that the executive team consider only the content of the posts presented in determining the question of discipline of Grievant. The team did not, Wimberly testified, consider Grievant's prior performance reviews; Grievant's commendations in his personnel file: Grievant's prior discipline, the fact that Grievant had no previous discipline, or that Grievant had letters of thanks from the community in his file. According to Wimberly, such would not have changed the team's decision because such considerations would not have changed what Grievant posted. The Plainview Project posts created an outcry in the city because of how the posts affected people, Wimberly testified. The posts also affected the Department internally. The team considered what was in front of them and Wimberly explained:

> The posts were made. The posts were detrimental. And the posts gave the Department a black eye.

Grievant was responsible for knowing the Department's directives and it is not an excuse that he didn't know the directive; he should have known, Waverly testified. Waverly identified Directive 7.16-5 requiring employees to be aware of the contents of Directives. In this regard, she continued, whenever directives come out, whether a new directive or an amended directive, each officer signs his or her training record to show the information is provided. Waverly confirmed that the Social Media Directive, Directive 6.10, was originally issued on or about May 26, 2011 and was last revised in July 2012. The 2012 revisions, Waverly testified included the provision that:

> Employees are prohibited from using ethnic slurs, profanity, personal insults, material that's harassing, defamatory, fraudulent or discriminatory or other content or communication that would not be acceptable in a City workplace or City agency or policy or practice.

According to Waverly, directives and revisions are typically disseminated to officers soon after they are issued, but that she could not, six years after the revision, testify that the revision went out on July 2, 2012. The directive and revision "should" also have been discussed at roll call, according to Waverly.

Waverly testified that calls for violence, such as; "these kids should be shot in the face," a criminal defendant "should be taken out back and let the family blow his bitch head off," "POS animal should be shot to death" and "shoot them in the face" were determined to not be protected speech.

In regard to determinations by the Department on whether to charge an officer for Conduct Unbecoming, Wimberly also testified as follows on cross examination:

> Q. And we had talked about, in some of the prior cases, Chief Inspector Werner and how he handled charging for these cases. And you recall, you know, that there's been some testimony in the past cases, right, that he used -- because of how many cases there were, he used kind of a framework for charging for non -- for officers that didn't hold a supervisory role.
> Was not ten posts or more grounds for getting a Conduct Unbecoming charge added onto the Neglect of Duty charge?
>
> A. He had a rubric. I don't know what his rubrics was, but it possibly was. I know that the cut off for supervisors was a smaller number. So if it was five versus ten, that's possible.

The parties agreed to the admission of the transcript of prior testimony presented by the City of **Dr. Quaiser Abdullah** in the arbitration matter of former police officer [redacted] Abdulla in an Associate Professor teaching courses relating to mediation, conflict resolution and conflict theory. He is also a Philadelphia Police Department Chaplain and a Muslim student advisor at Temple University. Humanization, he explained, is recognition of the things that connect us; a recognition that a person is worthy of respect, communication and empathy. When one dehumanizes another, these three human connections are broken and one can engage the other in any way one likes. One who dehumanizes can engage in verbal aggression, thereby communicating that the object of the aggression is something "less than" the aggressor. Studies have shown that it is a small step from verbal aggression to physical aggression, Abdullah testified. When the verbal aggressor is a police officer, one already imbued by society with certain power, with power of the state, the subject of the verbal aggression is not going to feel safe and is not going to trust; verbal aggression does psychological harm.

The parties also agreed to the admission of the transcript of prior testimony presented by the City of Police Department **Inspector Francis Healy** who participated in the drafting of Directive 6.10 on social media. Healy identified the Directive and testified that the Directive not only institutes prohibitions against sexist and racist comments, but also presents an overall policy to ensure the integrity of the Department. On duty comments are easier to address, Healy testified. But, off-duty comments are also concerning because officers may be viewed as speaking for the Department. Without the community's trust, he explained, "we really can't do policing," and police personnel are held to a higher standard than members of the general public. Healy confirmed that the Directive was originally issued in May of 2011 and was modified in July 2012 by the additions of Subsection 4I and 4J. On how officers were informed of the 2012 changes to the Directive, Healy testified that officers;

> …are routinely, like all other directives, at roll call. Roll call – we call it roll training. The officers were advised and would have been provided the teletype notice that the directive was available.

Healy explained that officers are required to sign that they received such directives by the end of the year. In addition, all new directives and changes to directives are reiterated to the officers at NPO training.

According to Healy, the original training given officers on the Directive and Directive changes was acceptable for officers to gain an understanding of what type of social media speech might cause them to get in trouble. In contrast, the 2019 training after the Plain View Project was made public, was to have officers understand that as government employees they did not have an absolute First Amendment right to speech.

Grievant testified that he began working for the Department in 2003, that all his performance evaluations have been good and that he has had no prior discipline. He began

using Facebook in or about 2009. He had his account set to "private" and never posted what he does for a living. He never posted that he was a police officer, Grievant testified. He estimated that he would post once or twice a week and that he spent most of his Facebook time commenting on other's posts.

Grievant testified that he knew Directive 6.10 was "out there;" he was aware of it. But, he testified, he never got a copy of it. He testified that although officers are required to sign for all 40 to 60 Directives issued during a year at the end of the year, officers never get everything they sign for. He admitted he signed for Directive 6.10, but testified he did not receive a copy of the Directive. He also admitted that officers can access directives on the Department's website. He testified that he didn't learn of the contents of Directive 6.10 until his June 2019 training on the Directive after being placed on restricted duty. He testified that the Directive was not subject to any annual training before that time.

Grievant testified that he was placed on restricted duty on June 7, 2019 and interviewed by Richardson, on June 12, 2019. During the interview, he was asked to review a number of posts and initial the pages where he made comments. He was shown only paper copies of the posts, was not allowed to view any videos or articles referenced in any of the posts, and was not asked why he said the things he said or what he meant by what he said.

Grievant testified that the comments he made in the ten posts for which he was subject to discipline, amounted in most cases to his "venting" his anger about conduct of others. He stepped into the shoes of victims, felt what it must have felt for them and vented his anger. He was not intentionally promoting vigilantism or violence, and he was not literally saying individuals were pieces of shit or animals; he was venting. As for his one post relating to bathroom doors, he was just expressing his opinion. He admitted that the use of

the term “balls” would not be acceptable in a City workplace.

Positions of the Parties

City Position

The City of Philadelphia had just cause to terminate Grievant because he violated Section 1-021-10 of the Disciplinary Code (Conduct Unbecoming) by engaging in a course of conduct showing that he has no regard for his responsibility as a member of the Police Department, and because he violated Section 5-011-10 by failing to comply with Police Directive 6.10 relating to usage of social media. Under the bargained-for disciplinary code, the first violation requires a 30-day suspension or discharge, and the second reprimand to 5 days.

The City asserted that the ten posts it has identified as being in violation of Directive 6.10 amounts to a course of conduct over a span of years. Through his posts, Grievant made a series of inflammatory posts or comments calling for and glorifying extrajudicial police violence, and Grievant thereby, the City argues, showed little regard for the communities and individuals he swore to protect and serve as a member of the Department.

The City argued that it has satisfied the often-cited, seven-factor test of just cause. Grievant cannot credibly claim he was somehow immune from having knowledge of Directive 6.10 and notice of the consequences of violating the Directive or engaging in a course of conduct or engaging in any act that indicates an employee has little or no regard for his responsibility as a member of the Department. Members of the Department are notified of Directives and required to review them when they are issued. Grievant had instantaneous electronic access to both the original and amended Directive 6.10. Grievant was required by Department policy to be aware of

what the social media policy stated. Grievant had clear notice in the bargaining Agreement of the Disciplinary Code and potential discipline for violation of the sections contained in the code. His attempt to abdicate his responsibility and create an excuse for his conduct by claiming the Department should have given him personal treatment and reviewed the directive with him should be seen for what it is; a failure of Grievant to accept responsibility for his actions.

The City has shown that it conducted a full and fair investigation, provided Grievant due process and had substantial evidence to support the findings made. Grievant was given an opportunity in the presence of a representative of the Union to review the posts and comments alleged to be his, acknowledge if each was his, and was given whatever time he needed to provide further information he felt appropriate. Where, as here, Grievant admitted to the conduct, there was little more that was required of an investigation. The City had substantial reason to conclude that Grievant engaged in the misconduct alleged.

Grievant engaged in conduct unbecoming; a violation of the Disciplinary Code requiring a 30-day suspension or termination. As testified by Dr. Abdullah, verbal aggressions can rapidly progress to physical aggression and violence. Grievant's conduct demonstrated a pattern of dehumanization of criminal suspects that could have deadly consequences. It does not excuse, and it cannot be the endorsement of the Department, to permit officers to engage in outrageous and disrespectful, public violence-inciting conduct of Grievant if done because he puts himself in the shoes of victims of violence or because he feels a need to vent. As provided in Directive 6.10, Grievant is held to a higher standard than the public and is to act like an ambassador of the Department. Grievant's social media conduct did harm to the community's confidence in the Department.

Grievant's was an egregious violation of policy and the bargained for penalty for conduct unbecoming is not subject to mitigation as a result of Grievant's tenure with the Department, good work record or lack of prior discipline. Just Cause recognizes that significance discipline may be appropriate under such circumstances.

Contrary to the argument of the Union, its offered "comparators" who received no or lesser discipline than Grievant, were not similarly situated to Grievant and do not show the City has acted inconsistently. Posts by other employees that were determined by outside counsel to be protected speech under the First Amendment were not subject to discipline. The City did not consider all of Grievant's because many were determined to be First Amended protected. And, the City added, notwithstanding that some of Grievant's comments may have been about individuals who engaged in crime, his related comments were not protected because they advocated for violence. Similarly, one of the Union's comparators involved a case where the subject-employee received a 12-day suspension for making a single post, not a course of conduct over years as did Grievant. The Union's other comparators were subject to a Police Board of Inquiry and not Commissioner's Direct Action as was Grievant, or were not charged with engaging in a course of conduct.

The more severe the infractions the more sever the discipline. Here, Grievant established himself as one of the more egregious offenders identified by the Plainview Project and put himself in a position of being found to have violated a section of the discipline code carrying the stiffest of penalties; a thirty-day suspension or dismissal. The City imposed the lesser penalty available and has given him the opportunity to correct his conduct.

Having satisfied all of the elements of just cause the City has meet its burden of showing just cause for the 30-day suspension of Grievant. The grievance should be denied.

Union Position

Grievant is a veteran officer of 16 years, with an excellent work record, including an officer-of-the-year award and 20-plus officer-of-the-month recognitions, and no prior discipline, who has given a 30-day suspension for making ten Facebook posts made from mid-2012 to early 2016 – most of which were in or prior to 2013 – when he was unaware that there was any restriction on speech when he was off duty, and under circumstances where there was plainly confusion among members of the Department as to the breadth of an officers' First Amendment rights relating to social media.

The record establishes that when Grievant started his Facebook account he initially set his account to private, and that thereafter he did not post about work and did not identify himself as a Philadelphia police officer. Grievant never received a written copy of Directive 6.10 and was not aware of the Department's rules governing social media until trained in 2019. As confirmed by the Department's representative who developed the 2019 training, "there was confusion as to officers having unfettered First Amendment rights like a normal citizen." Despite his post, the Department never received any complaints about Grievant's Facebook activity.

Contrary to the requirements of just cause, the Department's investigation was not full or fair. During his approximate 24-minute investigatory interview, Grievant was not given the opportunity to review any underlying content shared or associated with his comments. Nor was he asked what he meant by his comments or what he intended to communicate. Nor was he asked if he was aware of the contents of Directive 6.10 or given a context for his interview. Nor was he asked only to comment upon posts not protected by the First Amendment - as even at the time of the interview the Department did not have a clear understanding of what comments may or may not have been so protected. The extent of the investigation was the pulling of 19 posts associated

with Grievant from the Plainview data base, showing the paper copies of the posts to Grievant and asking him if they were his posts and his admission that they were. After nine of his posts were determined to be protected by the First Amendment, Deputy Commissioner Wimberly determined Grievant's should be grouped with a group of other officers whose posts she determined were "egregious" and presented to the Department's Executive Team for Commissioner's direct action. In doing so, in predetermining that Grievant's conduct was egregious, the Department precluded a fair consideration of the conduct.

The City failed to give Grievant notice of the rules at issue by failing to provide him a copy of the social media directive. The directive itself does not provide what discipline could result from an officer's failure to comply with the directive. The City did not conduct a full and fair investigation. Grievant was not given a real opportunity to present his side of the story as he was not provided the actual and full substance of the involved posts, and was thus denied due process. It does not meet the due process standard of fairness to say, as the City does here, that Grievant "should just know" the details of directives. As is plainly established by the record, the Department's social media policy was not adequately disseminated or explained to officers, as some 330 Philadelphia Police Officers were identified and making posts of comments in the Plainview project.

The Department has failed to show that it has fairly enforced it social media policy. Many of the Plainview posts overall, and all of Grievant's were years old. Yet, the Department did not caution, or discipline any employee for violation of the social media policy at the time of any such posts. There is no just cause where an employer fails to actively enforce a work rule over many years and then determines to impose severe discipline on an employee for a "course of conduct" without warning or opportunity to correct his or her conduct.

Nor did the City show that Grievant violated the directive at issue. Many of the comments identified by the City as support for the discipline of Grievant were protected by the First Amendment. In this regard, as explained by Deputy Commissioner Wimberly she understood comments were protected if the officer was commenting about specific individuals who engaged in crime. Grievant's comments were focused upon such individuals. Moreover, the First Amendment protects public employee speech on matters of public concern, and here, had the City made even a rudimentary inquiry as to Grievant's intentions, it would have readily concluded that his comments were so protected.

Even, for purposes of argument, should the arbitrator find all ten posts to have been in violation of policy, the City has failed to meet its burden of showing it has been consistent and fair in its discipline relating to matters involving social media. Grievant was not fairly assessed discipline compared to other officers involved in the Plainview matter. Some officers were given only a one-day suspension for neglect of duty; one officer was given a two-day suspension, one officer was given a 30-day suspension for multiple posts but had already received prior discipline relating to Directive 6.10, and a number of officers were given the benefit of a PBI and none received discipline.

The City's treatment and discipline of officers has been wholly inconsistent. Just cause recognizes that discipline should be proportional to the violation found, and should have a goal to correct rather than punish. Grievant has no prior discipline and is entitled to progressive discipline and its corrective goal. Considering his long tenure, excellent work record and lack of prior discipline, the sever discipline imposed here runs afoul of the contractual obligations of the City.

The City has failed to meet its burden of showing just cause for the termination of Grievant. The grievance should be sustained and Grievant be made whole.

Discussion

Introduction

It is the City's burden to show that its decision to terminate Grievant satisfies all of the requirements of just cause. Both parties correctly identified the elements of just cause. In a general sense, just cause requires consideration of all of the circumstances to determine whether the issuance of discipline was "fair." Considering the record as a whole, including all evidence and argument offered by the parties as well as my observation of the demeanor of all witnesses, I find that the City has failed to meet its burden of showing just cause for the 30-day suspension of Grievant, but has satisfied its burden of showing cause for a five-day suspension.

Of the several factors often considered by arbitrators when applying the just cause standard, I find that the City has here failed to meet it burden of showing that: (1) Grievant engaged in Conduct Unbecoming and (2) the discipline of a 30-day suspension for the violation of Directive 6.10 I have found herein was appropriate given the relative gravity of the offenses shown, Grievant's disciplinary record and considerations of progressive discipline.

Neglect of Duty

I find that the City has satisfied its burden of showing that Grievant engaged in Neglect of Duty. Although the Union asserts that Directive 6.10 (in either its original version or as amended) should not apply to Grievant because he was not given a copy or copies of the Directive(s), I find that Grievant should have known of the content of the Directive. In this regard, the City submitted sufficient evidence to establish that Grievant was given notice of the Directive and its amendment and that Grievant had an affirmative obligation to keep himself

informed of the contents of the Directive. Because Grievant may not have been handed a paper copy of the Directive does not exculpate Grievant from complying with the Directive. Grievant had knowledge that the Directive and amendment had been issues, had access to the Directives and may not rely upon his failure to comply with his duty to review directives as a defense.

Similarly, I am not persuaded that the entirety of the Directive is so complicated and nuanced that it requires exhaustive training of individuals qualified to be police officers. The Policy begins in a straightforward manner by notifying and reminding officers that: "all existing laws, rules, regulations, and directives that govern on- and off-duty conduct are applicable to conduct associated with social media and networking;" that they "have no reasonable expectation of privacy when using social media" and that they are "prohibited from using ethnic slurs, profanity, personal insults; material that is harassing, defamatory, fraudulent, or discriminatory, or other content or communication that would not be acceptable in a City workplace…" Nor is there any language in the Policy that removes or reduces the standards of officer conduct already established, such as those contained in the Police Department Disciplinary Code requiring Honor, Service and Integrity. In this regard, the Code's introduction provides that: "Service with honor means providing police service respectfully and recognizing the dignity of every person" and that "it is not enough to espouse honor, service and integrity. Each of us must live these values in our professional and personal lives." (Emphasis added.)

I find that the City's Social Media Policy is reasonably related to the orderly, efficient and safe operation of the Department and performance expected of Philadelphia Police officers, and provides sufficient guidance that upon reading, a reasonable officer would understand that he or she may not stand up in the public square of social media and spew profanity, racial slurs,

promote discrimination based upon race, religion, ethnicity or national origin, or fan the flames of violence.

The record establishes that Grievant posted the comments and posts at issue and admitted to such during the City's investigation. Venting may be a helpful practice in some circumstances. But, if an individual chooses to vent in public, the individual is responsible for his or her words. I am not persuaded that extra-judicial calls by a public employee for death-causing violence against individuals are protected by the First Amendment. Grievant's posts, regardless of his personal motivations, were public statements that on their face violated Directive 6.10. That they may have been motivated by a desire to vent does not exculpate. I find that nine of Grievant's posts inappropriately suggested violent responses to suspects outside of due process and the rule of law, and that his restroom-door post and three others additionally used offensive language in violation of Directive 6.10.

Unbecoming Conduct

The City identified the form of "Unbecoming Conduct" for which Grievant received a 30-day suspension as that described in Section 1-021-10 of the Disciplinary Code for; (1) "a ***course-of-conduct***" that (2) "indicates that an employee has ***little or no regard*** for his/her responsibility as a member of the Police Department." (Emphasis added.) The City failed to satisfy its burden of showing either element.

Having carefully reviewed the record, I am still at a loss as to the standard applied by the City for finding Grievant's ten posts – seven of which were made prior to 2014 – amounted to "a course of conduct" within the meaning of the disciplinary code. A "course of conduct" in a literal sense may be defined as a pattern of conduct composed of two or more acts evidencing a

continuity of purpose. However, the evidence here discloses that the City applies its own varying definitions of what constitutes a course-of-conduct, and that the City applied differing standards to charge and find a course-of-conduct relating to social media posts of different officers.

Relying upon the testimony of Wimberly quoted on the issue above, I find that there was a cut-off number of posts used by the Department to find Course-of-Conduct. But, the City has offered no explanation as to why one number or another number should not be considered a course of conduct or why one or another number should; or why numbers for finding a course of conduct may differ depending upon the rank of the employee. Nor has the City shown to the satisfaction of the arbitrator why any particular number should be determinative of finding a course-of-conduct without consideration of content, timing and context.

Similarly, even if a course-of-conduct was established here, the record is not clear as to the standard applied by the City for concluding that Grievant's narrow, long ago comments reached a threshold of showing that he now has little or no regard for his responsibility as a police officer. Unlike other cases involving Plainview posts where I have found Conduct Unbecoming, Grievant's posts and comments do not reveal a broad disregard and hatred for a wide portion of the members of the public to which Grievant is required to police,[1] or animosity toward a group or groups of people.[2] As the City acknowledged, Grievant was not disciplined because his posts were race-based. Nor is there any basis for finding his posts were motivated by religion, national origin, immigrant status, sex, color or other protected class. With a lone exception relating to genitalia on restroom doors and his use of the word "balls",[3] Grievant's

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[1] [redacted].

[2] [redacted] and [redacted]

[3] In this regard, I am not wholly convinced that Grievant's restroom posts, on its face, amounts to an adoption of the vitriolic and patently offensive communications of others in the chain of posts, and find he should not be taken to account for the comments of others.

posts narrowly focused upon individuals who had appeared to have engaged in violent behavior against members of the public. On their face, as I have found above, Grievant's posts inappropriately suggested violent responses to suspects outside of due process and the rule of law or used unacceptable language. Grievant's was wrong and his behavior should be corrected. However, I do not find that his posts pulled back the curtain to reveal some indelible prejudices or deep-seated animosities held against groups or communities in the City; or would otherwise show – contrary to his significant and long standing performance record - that he has little or no regard for his responsibilities as an officer of the City.

I find that the City has failed to meet its burden of showing that it was justified in concluding that Grievant engaged in the form of Conduct Unbecoming for which he was charged.

Progressive Discipline

Just Cause requires the use of progressive discipline and its corrective potential in all but the most egregious circumstances. Progressive discipline requires proportionality; an amount under the circumstances that can reasonably be expected to correct the behavior involved. The parties' bargaining agreement requires that discipline be progressive and consistently applied. Grievant has no prior discipline and a long employment history of satisfactory, and at times exceptional, service to the City. Considering the allegation established, Grievant's lack of prior discipline, his long and good employment history with the City, I find that the City has failed to show that a 30-day suspension is appropriate relative to the gravity of Grievant's offenses. However, relying primarily upon the underlying violent nature of Grievant's posts, I find the City has met its burden of showing just cause for a suspension of 5-days for Grievant's violation of Directive 6.10.

Conclusion

Based upon the full record in this matter, I find the City has failed to meet its burden of establishing just cause for a 30-day suspension of the officer, but has shown just cause for the five-day suspension of the officer. I will order that Grievant's 30-day suspension for Conduct Unbecoming be rescinded and that his discipline be reduced to a five-day suspension for Neglect of Duty, and that he be made whole for his lost wages, benefits and seniority resulting from his thirty day suspension, less such losses associated with his five-day suspension. I will retain jurisdiction over the matter for purposes of remedy only.

American Arbitration Association
Arbitration Pursuant to Agreement of the Parties
Before Timothy J. Brown, Esquire

In the matter of:

Fraternal Order of Police, Lodge 5	:	
	:	**AAA Case No. 01-20-0000-6910**
and	:	**(P/O Ernest Green 30-day**
	:	**Suspension)**
City of Philadelphia	:	

AWARD

The City has failed to meet its burden of establishing just cause for the 30-day suspension of Grievant, P/O/ Ernest Green, but has shown just cause for a 5-day suspension of the officer.

The City is ORDERED to:

- Rescind its Grievant's 30-day suspension of Grievant for Conduct Unbecoming;

- Expunge any and all records of his 30-day suspension from Grievant's personnel and discipline files;

- Reduce Grievant's 30-day suspension to a 5-day suspension for Neglect of Duty; and

- Make Grievant whole for his lost wages, benefits and seniority resulting from his 30-day suspension, less such losses associated with 5-day suspension.

The undersigned shall retain jurisdiction over the matter for purposes of remedy only.

DATED: February 11, 2022