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. 01-19-0002-2847**
and	:	**(Discharge of P/O Edward J McCammitt)**
	:	
City of Philadelphia	:	

Decision and Award

Appearances:

On behalf of FOP, Lodge 5:
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On behalf of City of Philadelphia:
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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 disciplinary discharge of Police Officer Edward J. McCammitt (Grievant). The parties were unsuccessful in resolving the dispute through their grievance procedure and the Union thereafter filed a 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 parties initially agreed to bifurcate the matter and presented to the undersigned their respective cases on the question of whether the matter was arbitrable. By Decision dated June 11, 2021 the matter was found to be arbitrable, and the parties then proceeded on the merits of the case. The matter was heard on the merits by the undersigned on December 1 and 3, 2021 at the offices of the AAA in Philadelphia, Pennsylvania. 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 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 February 8, 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) the matter is appropriately before the arbitrator, (2) the arbitrator has the authority to render a final and binding decision and award in the matter, and (3) the issues presented by the subject grievance may accurately be described as:

> Did the City have just cause to discharge Police Officer Edward J McCammitt, and if not what shall be the remedy?

Facts

The Plainview Project

Grievant has 32-plus years of service with the City as a police officer, a good work record and no previous discipline. The Grievance involved here challenges the City's decision to discharge Grievant because of ten of his posts and comments included in the Plainview Project data base. The "Plainview Project," 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 members of the Philadelphia Police Department.

City Witnesses

Deputy Police Commissioner Robin Wimberly testified that following the download of the Plainview Project Facebook posts, and the Department determining that some approximately 325 officers or employees of the Philadelphia Police Department had made posts. In response, the Department put together a team to conduct investigations of officer posts and placed approximately 70 officers, including Grievant, on restricted duty. The investigations were assigned to investigators in the Internal Affairs Division. It was decided that each investigation would be conducted in the same manner; each officer would be shown paper copies of his or her posts and comments attributable to the officer in the Plainview database; the officer would be asked if the posts were the officer's, asked to initial the posts and asked if he or she had anything to add. Wimberly testified that besides the prepared questions, the investigators did not ask any other questions; the investigation was focused upon what the Department had in front of it; the paper copies of the posts.

Wimberly explained that when the Plainview project first went public, the hate and

bias expressed in some of the posts caused a "firestorm" in the City, and the Police Commissioner had to have a series of meetings with different Muslim, Black, LGBTQ and other communities in the City. The Department determined that in regard to whether discipline should issue, it was not necessary to determine the motive or mindset of officers making the posts. The posts themselves were enough on their face, Wimberly testified, to determine questions of discipline.

The investigation into Grievant's postings was conducted by **Lieutenant Enrique Mella.**[1] Pursuant to the Plainview-related investigation process determined by the Department, at his investigatory interview, Grievant was presented with the 26 Plainview-Facebook posts associated with him. Grievant was not told at that time which of his posts were potentially violative of Department policy or which were protected speech under the First Amendment. Lt. Mella asked Grievant the standard prepared questions, and did not ask Grievant to clarify any posts, or explain why he may have made the posts. Grievant initialed all 26 posts and confirmed that they were his.

Wimberly testified that the Department had the posts of officers 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 initially, a group of officers who had been determined by IA to have made the most egregious, non-protected posts were presented to the Department's Executive Team for purposes of Commissioner's Direct Action. Grievant's was one such case. The Executive team determined that through his posts, Grievant had engaged in Conduct Unbecoming, a violation under the Police Disciplinary Code requiring a 30-day suspension or discharge, and had violated a Department Directive

[1] The testimony of Mella was introduced into the record by stipulation of the parties.

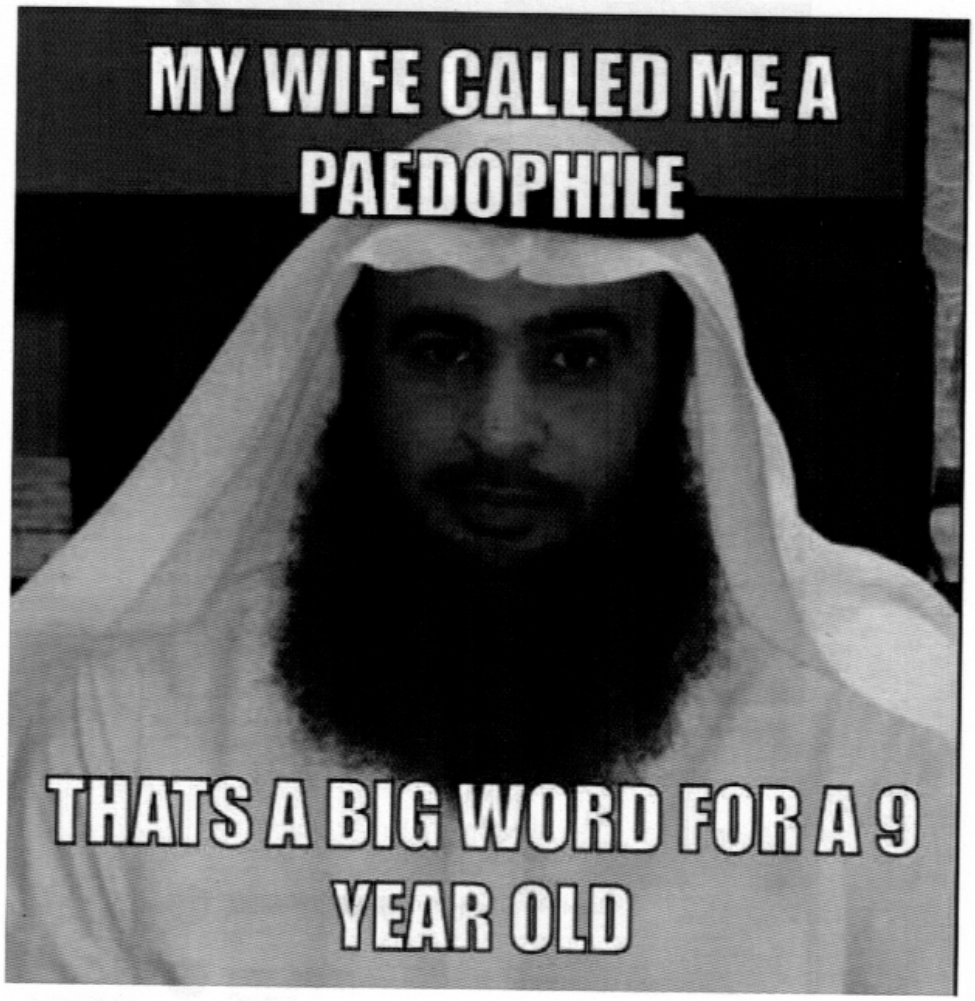
(i.e.; Directive 6.10 on Social Media) warranting a reprimand to 5-day suspension under the Code. The team determined that Grievant had engaged in Conduct Unbecoming and because of the egregious nature of Grievant posts, (She defined "egregious" as being "offensive") of the two levels of discipline available for cases of Conduct Unbecoming — Grievant should be discharged.

Wimberly testified that Department Directive 6.10 on social media clearly prohibits certain types of social media posts and that Grievant would have received the Directive at the command level and signed for the Directive.[2] The Directive establishes prohibitions relating to both on and off duty social media use. The Social Media and Networking Policy reminds officers of the standards they were presented in the Police Academy; that each should consider himself or herself to be an ambassador of the department, must strive to maintain the public trust and confidence, and that police personnel are held "to a higher standard than general members of the public," and that "the on-line activities of employees of the police department shall reflect such professional expectations and standards."

Wimberly identified the following Facebook posts (numbered 1 through 10) as having been identified by Grievant as his and having formed the basis for the Executive Team's determination to discharge:

[2] The evidence establishes that when directives are initially issued or amended, officers are informed of such at the command level. The officers are not necessarily given paper copies of the directives. Directives are available to officers through the Departments intranet or via vehicle MDTs. Officers sign that they have received notice of individual department directives, but do so on an annual or semi-annual basis. Grievant admitted during his testimony that he received notice of Directive 6.10 and had access to the directives, that he signed for the directive, but added that he did not receive a paper copy of the directive.

Ed McCammitt shared [redacted]'s post.
December 16, 2015 ·



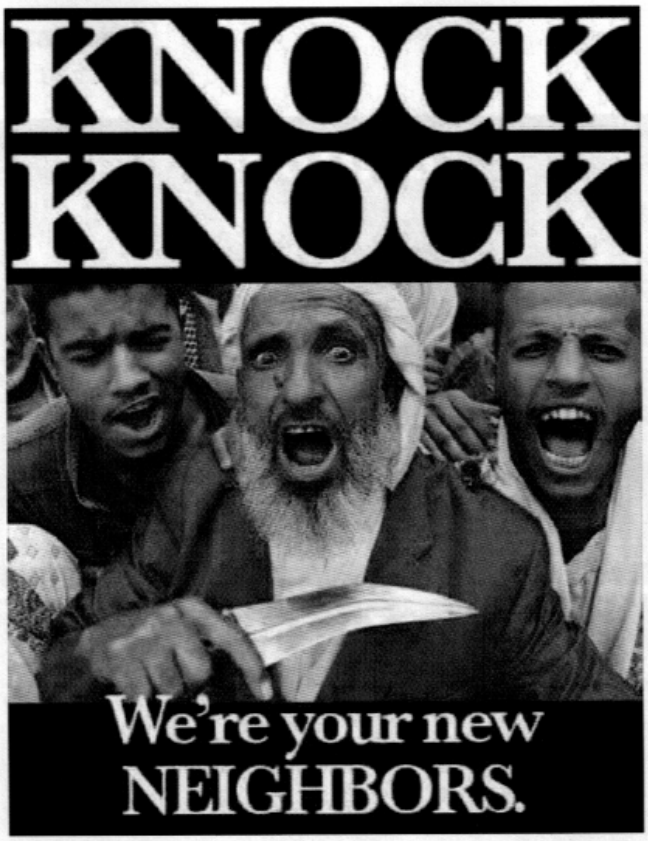
[redacted]
December 14, 2015 ·

Share

3

1

Ed McCammitt shared Red White Blue News's photo.
November 17, 2015 ·



Red White Blue News
November 15, 2015 ·

Like Page

Share

2

[redacted] No, they are my new fertilizer.
2y

[redacted] Wow, how dumb? This fool brought a Knife to a Gun fight
1
2y

Ed McCammitt What if you live in a gun free zone Haha
2y

[redacted] When the Zombies or the Muslims attack my neighborhood they'll learn what Gun Free Zone really means.
1
2y

Ed McCammitt Do all zombies vote democrat ?I wonder
2y · Edited

2


Ed McCammitt
February 16, 2017 ·
LOUDER CROWDER.com
MUSLIMS:
"DEATH TO AMERICA!"
AMERICAN LIBERALS:
LET THEM IN
RACISM
LET THEM IN
No #MuslimBan
"LET THEM IN!"
Like
Comment
Share
2
3 Shares
[redacted] Stupid americans
Like · Reply · 1y


Ed McCammitt
March 6, 2017 ·
when you get shot in the groin by a rubber bullet
and your made-up gender doesn't protect your willie
Like
Comment
Share

4

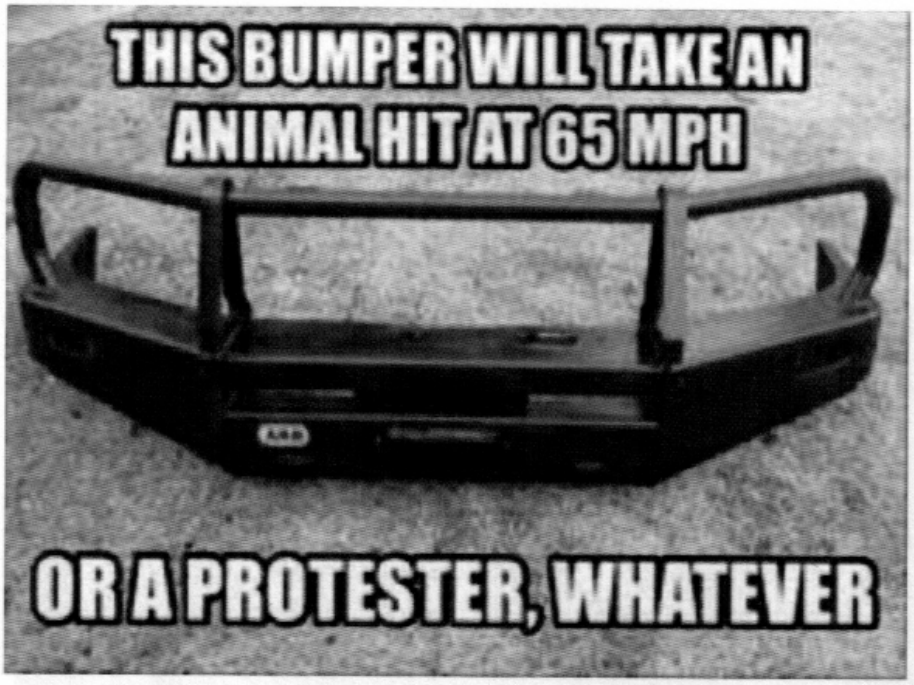

Ed McCammitt
December 23, 2017 ·
Do I have permission to frisk you?
No, I want a female officer to search me.
Lucky for you, I identify as a female.
Like
Comment
Share
6
2 Shares
Like · Reply · 13w

5


Ed McCammitt
May 7, 2017 ·
HOW PROTESTERS SEE THEMSELVES
HOW I SEE THEM
Like
Comment
Share
10
2 Shares

6

Ed McCammitt
July 28, 2017 ·



Like Comment Share

9

[redacted] Hahaha my truck fits in this category, it's been proven it works too. That deer knew exactly what hit him. Lol

Like · Reply · 34w

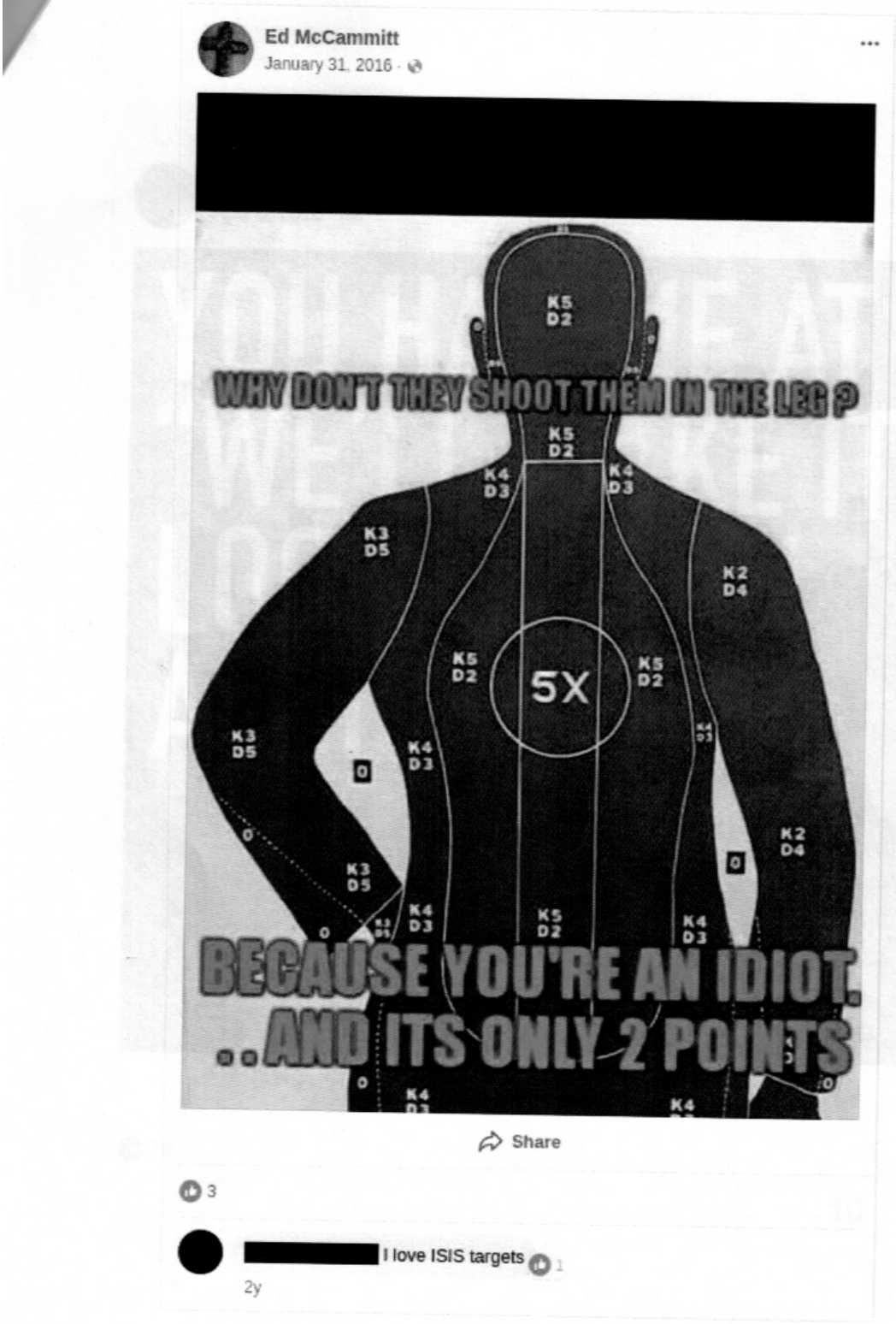
[redacted] so did that person loll

Like · Reply · 34w

7


Ed McCammitt
December 4, 2017
PARTICIPATION TROPHIES
NOW IN LIQUID FORM!
Like
Comment
Share
5

8


Ed McCammitt
January 31, 2016 ·
WHY DON'T THEY SHOOT THEM IN THE LEG?
BECAUSE YOU'RE AN IDIOT.
..AND ITS ONLY 2 POINTS
5X
Share
3
I love ISIS targets
1
2y


Ed McCammitt
April 5, 2016 ·
YOU HAD ME AT "WE'LL MAKE IT LOOK LIKE AN ACCIDENT"
@REBEL CIRCUS
Share
10

10

Wimberly testified that post number 1 shows Grievant's bias toward Muslims, and stereotypes of Muslim men as pedophiles. Officers cannot buy-in to negative stereotypes, she explained. And, she continued, it doesn't matter that the post is dated December 2015, one's heart is always the same.

Similarly, posts 2 and 3 show Grievant's bias toward Muslims; number 2 suggesting that Muslims are there to kill people and number 3 showing negative stereotypes of Muslims and liberals. Wimberly testified that there are Muslim communities in the City and there are Muslims working in the Police Department. Following the Plainview download the department contracted with outside providers to conduct healing forums to address potential internal problems resulting from anti-Muslim posts.

According to Wimberly, posts number 4 and 5 Show bias and lack of understanding of the LGBTQ community. 6 and 7, Wimberly testified, advocates violence Against protestors and not what police should be viewing it as; people using their First Amendment rights. Number 8, appears to advocate the possible use of excessive force, and number 9 is offensive as it advocates violence and makes a joke out of how officers are taught to shoot. A joke about the point structure relating to the shooting range is in bad taste. Number 10 is concerning as police officers have power, and if it's a joke, it's a bad joke, Wimberly testified, because if you are good at making something look like an accident, such is contrary to one of the major pillars of being a police officer; your integrity.

Wimberly explained that Grievant's group of posts was considered by the Executive Team to be a single incident within the meaning of Conduct Unbecoming in the Disciplinary Code, and that "any incident" or a single incident may be egregious enough to establish

conduct unbecoming. The numbers were not considered by the Executive Team.[3] Nor was the use of progressive discipline considered an option for the team. There is no training, Wimberly testified, or anything else the Department could do to change who Grievant is. He cannot be a Philadelphia police officer. The Department had been working to build bridges with communities in the City and when this happened (Plainview) some of the levees broke. His posts would interfere in his ability to testify. That would be a problem for Grievant to be a Philadelphia Police officer, Wimberly testified.

Wimberly testified that there were no complaints from the public or other officers about Grievant's posts. She explained that the Executive Team did not discuss charging; it directly determined Grievant's violation. That Grievant had 33 years of service with no discipline didn't matter. No officer's history was considered and the team did not consider or compare the discipline issued Grievant to other discipline received by other officers; Grievant's posts were egregious. Wimberly explained that the Department charging officer had a matrix relating to the number of Plainview posts of officers that he used to determine how officers would be charged; a matrix used for officers who were subject of a PBI, but did not apply to officers who were the subjects of Commissioner's Direct Action.

Relating to comparators offered by the Union, Wimberly testified that officer [redacted] had ten posts considered by the Executive Team to be in violation of policy 6.10, and that the team assessed a 30-day suspension against the officer. Wimberly testified:

> As I explained to you before, the decision

[3] Grievant's July 10, 2019 "Statement of Charges Filed and Action Taken" from Chief Inspector Christopher Werner quotes the Conduct Unbecoming section, ("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,") and goes on to specify that the analysis of the results of the investigation ***"***displayed a ***course of conduct,*** where ***no fewer than ten times,*** you posted…." (Emphasis added.) The specification does not contain language that I can fairly interpret as suggesting the action taken against Greivant was based upon a single incident or conduct.

was made by the unit, the executive team unit.
So when the executive team reviewed
it, along with the Commissioner and myself, the
decision was made that Officer [redacted] would receive 30
days. Can I tell you what went into that right
here, right now? No.
But the discussion -- and that's what
the end result was. The discussion with the officer
that's here today, the end result was dismissal.

Wimberly confirmed that [redacted], who was not subject to Commissioner's Direct Action, was found to have six posts in violation of policy and received a 30-day suspension and disciplinary transfer. [redacted] had ten posts in violation of policy, Wimberly testified, and was issued a 30-day suspension. In all cases of Commissioner's Direct Action, Wimberly testified, the team did not look at the number of posts, they considered the egregiousness of the posts made by an officer.

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 is 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 Plainview Project was made public, was to have officers understand that as government employees they did not have an absolute First Amendment right to speech.

FOP Witnesses

Grievant testified that he has worked for the Department since 1986, that all his performance evaluations have been excellent and that he has had no prior discipline. He began using Facebook after he got an I-phone in or about 2015, primarily using his account to connect with family and reconnect with old friends. He had his account set to "private." However, at some point he changed his setting to public to aide his sister's effort to research their family's ancestry. He testified that, at first, he did not identify himself as a police officer, but that he later identified his status as a policy officer because he wanted to join police organizations that required him to do so.

At the time of his posts at issue here in 2015, 16 and 17, Grievant testified that he understood the rules relating to his off-duty conduct allowed him to say anything he wanted to say on Facebook as along as he did not reveal police strategies or pictures of crime scenes.

Grievant testified that he first became familiar with Directive 6.10 when the Department identified the 72 officers taken off the street because of Plainview posts and sent them to training on the social media policy. During that summer of 2019 training, the Department went through the Directive step-by-step and provided the officers do's and don'ts. Grievant testified that he did not receive any annual training on the social media policy prior to 2019 and does not recall ever receiving roll-call training on the subject. He testified that after he received the 2019 training he has "changed everything" about his Facebook use. He does not post or comment as frequently and second guesses himself on everything he considers posting. He understands that some things may strike him as funny and not be intended to be derogatory of anyone and not offend him, but could be interpreted negatively by others. He does not want to offend anyone; that is not in his nature.

Grievant attended the interview with Lt. Mella, during which he identified all of the 26 posts shown him and confirmed they were his. He was not asked what he meant by any of his posts. He testified that he only recently learned of which 10 posts were considered by the Department to be violations of policy. As to the ten posts at issue, he offered the following:

No. 1 He thought it was funny because the word "paedophile" reminded him of when his son had a hard time pronouncing words like "yellow" and "spaghetti." He asserted that there was nothing in the picture to indicate the man shown was Muslim.

No. 2 He made the post in the context of Mayor Kenny's effort to make Philadelphia a sanctuary city. He testified he had a problem with immigration because, for example Cuba emptied its jails and sent their criminals over as boat people, and with the caravans come the human traffickers, drug dealers and weapon traffickers; and the mayor wants to welcome them into our city. He testified he does not have any specific issue focused on people coming who are from countries that are Muslim as opposed to other religions.

No. 3 He testified he noticed the words "Death to America!" but did not notice the words "Muslims" and "Muslim" in the pictures. He testified that he has never treated anyone differently because they were Muslim.

No. 4 Grievant testified that it reminded him of the show "America's Funniest Videos" and he thought it funny. He testified he has never treated LGBTQ people differently and he has friends who are lesbians and a neighbor who is gay.

No. 5 The frisking posts struck him as funny, Grievant testified.

No. 6 Grievant testified he posted the post with a picture of protestors and a picture of speed bumps because that is how he thinks about protestors if they get into the street. Speed bumps slow down traffic just like protestors can.

No. 7 In regard to the post of a bumper, Grievant testified he does not recall why he made the post. It is not acceptable, he testified, to hit a protestor with a bumper.

No. 8 As for the "Participation Trophies" post, Grievant testified that he believes the woman in the photo is attacking the officer. Also he doesn't like the idea of participation trophies; as they don't teach kids the value of defeat.

No. 9 In regard to the post about the shooting range target, Grievant testified that they are not taught to shoot in the leg; they are taught only to shoot when it is a last resort, and then to shoot center-mass.

No. 10 Grievant testified that after one of his friends posted; "Hey let's go to the bar and get crazy," and another answered; "that's a horrible idea. I'll pick you up in an hour," he then posted; "you had me at "we'll make it look like an accident."

Grievant testified that if given the opportunity he would take back the posts because he obviously offended someone and he didn't want to do that. He can see how certain communities would find some of his posts offensive. He understands that police officers are held to a higher standard than members of the public. Since the 2019 training he has better understood the potential consequences of his posting conduct and has reduced his posting. As for his discharge, he testified that he has spent his whole life in public service, and has never treated people differently than he would like to be treated.

Grievant confirmed that after being notified of his discipline, he retired with a service pension after 33 years of service.

Sergeant [redacted]

Sargent [redacted] has served in the Traffic Unit with Grievant since [redacted]. He worked with Grievant and observed Grievant working with the public on a daily basis for 11 years.

He was responsible for writing Grievant's evaluations and consistently rated Grievant high. He never had an issue with Grievant, never any complaints about Grievant from the public, including protestors, and he never observed Grievant treating anyone differently.

John McGrody

The parties agreed to the admission of the transcript of prior testimony presented by the Union of FOP Vice President John McGrody in the arbitration matter of former police officer [redacted] In that matter, McGrody testified that the hurried investigations by the Department after the Plainview Project website became active was inconsistent with the due process rights of officers involved. He testified that he is not aware of any social media training provided officers prior to Plainview. He further testified that officers were provided Radical Islam Training and that there were some on the MOPEC board (of which he was a member at the time) that had concerns that the training was too broad and could be interpreted as anti-Islam.

McGrody testified that the job of a Philadelphia police officer is very stressful and cops talk and vent among themselves. Cops talk a lot. Venting sometimes comes in the form of "dark humor." Venting relieves stress and things said privately between cops should not be taken as serious. The suicide rate is high among police officers and if they are not talking, it can be a problem. If officers had been properly trained on social media, they would know not to assume that only their friends are viewing their posts.

McGrody also testified in the instant matter that during his time when he was active in the Department, he both signed and had signed by other officers the acknowledgements of notification of directives. He testified that they may be signed "in bulk" maybe once or twice a year.

Positions of the Parties

City Position

The City of Philadelphia had just cause to terminate Grievant because it has met its burden of proof establishing just cause for the thirty-day suspension and dismissal issued Grievant because of his conduct demonstrating a lack of regard to members of the community he served as a Philadelphia police officer. In his hateful Plainview posts, Grievant disparaged several groups of people including Muslims, members of the transgender community and protesters exercising their First Amendment rights.

The City has shown that Grievant had notice of the Department's Social Media Directive as he signed for both the original version of the Directive in 2011 and the amended version in 2012. The City has shown that the Directive was readily available to Grievant and that Grievant had the responsibility to read the Directive. Contrary to the argument of the Union, the City conducted a full investigation, Grievant was shown the posts the City's investigation determined were attributable to him and he confirmed they were from his Facebook account and that they were his posts. He was given the opportunity to add anything he thought related and chose not to do so. Grievant's posts were evaluated for purposes of determining if any were protected by the First Amendment and thereafter the Department's Executive Team considered only those posts of Grievant not protected by the Amendment. The Team, based upon the posts themselves, determined that Grievant had engaged in Conduct Unbecoming and Neglect of Duty. The former violation carries a bargained-for penalty of a thirty-day suspension or dismissal; and the second a penalty range of reprimand to five-day suspension. The team determined that progressive discipline was not an option as there is no training the Department could provide Grievant "to change who he is." Grievant identified himself as having such hate and distain, his posts impact

his ability to be a police officer, his ability to make arrests and his ability to testify based upon his bias toward certain individuals.

Grievant's posts show he has little or no regard for the communities and individuals he swore to protect and serve; his primary responsibility as a member of the Department. The City has shown that it has satisfied the elements of just cause. Grievant was aware of the rules; the rules are reasonably related to the orderly, efficient and safe administration of the Department and the performance that may properly be expected of Grievant. The Department conducted an investigation which resulted in Grievant admitting to the conduct at issue. The Department issued discipline that was proportional to the egregious conduct in which Grievant engaged; conduct that the parties negotiated would result in either a thirty-day suspension or dismissal. Here, the City has shown that a thirty-day suspension would not be appropriate because one cannot "correct" bigotry. Grievant's attempts to explain away his posts should not be credited. Grievant's average performance reviews and lack of formal discipline do not contradict or rebut the Islamophobia, denigration of the transgender community or his advocacy of police violence engaged in by Grievant over a three-year period. There is no correction, there is no training that can change who Grievant is.

The City has acted consistently in its discipline and the Union's proposed comparators must fail because critical distinctions between those cases and the case of Grievant. [redacted] received a 12-day suspension for a single post, and although [redacted] received 30-day suspensions, there is no evidence that the Executive Team determined those officers could no longer hold positions as Philadelphia police officers. Grievant should not be reinstated as such would harm the fragile and hard won trust between the Department and the

citizens it served. Grievant was treated fairly and he received the penalty his conduct necessitated.

Union Position

Grievant was unaware that there was any restriction on speech when he was off duty, and the Department never informed him of its social media policy and never trained him otherwise. He is an officer with 33 years with the Department who has always received excellent evaluations and been rated satisfactory in his relationships with people.

The City did not satisfy the elements of just cause.

Contrary to the City's argument, it may not rely upon its claim that Grievant should have known of the details of the social media directive. He was never provided the directive and the Department's practice of having officers sign for all of the directives issued throughout a year or six-month period should not be mistaken for notice of the contents of the directives. Grievant did not even have his Facebook account at the time the directive was issued and amended. Neither Grievant or other officers were trained on the directive prior to the Plainview project, as is evidenced by the large number of Philadelphia officers whose posts were included in the project. Additionally, the City communicated that the directive was not of import as it did not actively enforce the directive for years. As reflected by the City's own witness Healy, there was plainly confusion among members of the Department as to the breadth of an officers' First Amendment rights relating to social media.

Contrary to the requirements of just cause, the Department's five to six-minute investigation was not full or fair. Grievant was honest and admitted the posts were his. But, he was not asked for clarification of any of his posts or what he meant by his posts or why he made the posts. Importantly, it should not be a burden placed upon Grievant to explain his posts and

clear up any ambiguity that they may contain. It is the City's burden to show that the posts were intended to communicate the messages the City now insists they did. It is unfair for Grievant to place the burden on him.

The discipline issued Grievant was disproportional to any violation of the social media policy found. It is basic to concepts of fairness that an employee should not be punished for conduct taking place years before, in the absence of any recent reoccurrences, all within the context of inadequate training and notice to the employee.

Grievant was charged inconsistently with how other officers were charged. Whereas Chief Inspector Werner determined appropriate charges based upon the number of posts made by a particular officer, Grievant was not subject to such a matrix because, according to Wimberly, Grievant's posts were egregious and it was "obvious" what his discipline would be.

The City did not consider Grievant's 33 years of service and lack of prior discipline. The City did not attempt to correct Grievant as required by just cause and progressive discipline. Additionally, the City admitted that it did not consider the penalty imposed upon Grievant within the context of penalties imposed upon other similarly situated officers. Other officers were found by the City to have posted similar numbers of posts and were not discharged, and in at least one case an officer with prior discipline under the social media policy was nevertheless given a 30-day suspension rather than dismissal for her posts contained in the Plainview project.

Importantly, wholly inconsistent with the City's assertion that Grievant cannot respond to corrective discipline, although the City claims Grievant's posts establish he will treat individuals differently for impermissible reasons, the City has offered no evidence whatsoever that in 33 years Grievant ever treated anyone differently. Additionally, the record establishes that the late and after-the-fact training offered Grievant resulted in a prompt correction/modification of

Grievant social media conduct. The record does not support, and the City has failed to show, that Grievant tis irredeemable.

The Plainview project impacted the City and Police Department. But, such does not give them *carte blanche* under just cause to impose disproportionate discipline to individual officers. The City has failed to show just cause for the discharge of Grievant. The grievance should be sustained, the discharge rescinded and Grievant be made whole. The Union request that the arbitrator retain jurisdiction for purposes of remedy.

Discussion

Introduction

An analysis of whether or not Grievant's discharge was for just cause requires consideration of all of the circumstances in determining whether the issuance of discipline was "fair." Some of the several factors often considered when applying the just cause standard in the public sector include whether or not: (1) the rules or policies being enforced are reasonably related to the orderly, efficient and safe administration of the employer and the performance that may properly be expected of an employee; (2) there was prior notice to the employee of the rule and the consequences for its violation; (3) the disciplinary investigation was adequately and fairly conducted and the employee was afforded an appropriate level of due process under the circumstances; (4) the employer was justified in concluding that the employee engaged in the conduct as charged; (5) the rule has been consistently and fairly enforced and (6) whether or not the discipline issued was appropriate given the relative gravity of the offense, the employee's disciplinary record and considerations of progressive discipline.

It is well recognized that in arbitrations of cases presenting questions of discipline or discharge for cause, it is the employer's burden to show that its discipline satisfies all of the requirements of just cause. In the instant matter, 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 discharge of Grievant, but has satisfied its burden of showing cause for a 30-day suspension.

Elements of Just Cause Established

Of the Just Cause factors identified above, I find that the City has shown that its negotiated Disciplinary Code and policy relating to social media are reasonably related to the orderly, efficient and safe administration of the Department and the performance that may properly be expected of an employee. Although the City has arguably not done a praiseworthy job of providing training on social media, I find it provided the minimally required prior notice to Grievant of the rules and the consequences for their violation. In such regard, the Disciplinary Code and controlling Directive 6.10 were made available to Grievant, Grievant had an obligation to review the Directive and the Code and Directive are relatively straightforward communications. As for the adequacy of the City's investigation, I find the investigation was adequate for purposes of determining which of the Plainview posts were posted by Grievant and the content of the posts on-their-face. However, as the City chose to limit its investigation, and did not inquire as to the intent of the employee's posts, I find that where particular posts may fairly be subject to more than one interpretation, there is no presumption that the City's interpretations of such posts are correct.

The City was not Justified in Concluding that Grievant Engaged in all of the Conduct as Charged

As a consequence of the City's decision to conduct a narrow investigation of Grievant's posting activity, where a post may fairly be viewed as having more than one meaning on its face, and where Grievant has offered a non-violative and not wholly unreasonable explanation for a post, I have found that the City has failed to meet its burden of showing that the post violated the Department's policies. In this regard, I have found as not wholly unreasonable Grievant's: (a) explanation of his May 7, 2017 "speedbump" post as meaning that protestors in the street can snarl traffic; (b) explanation that he believed the officer in his December 4, 2017 posts was being attacked; (c) claim that his January 31, 2016 posts relating to target practice was a confirmation that officers are trained to shoot only as a last resort and then to shoot center mass; and (d) explanation of a benign context for his April 5, 2016 "we'll make it look like an accident" post. I am not persuaded that the principles of fairness underlying Just Cause permits the City to base its findings of violation of its policies upon assumptions it made relating to these four posts. I agree with the argument of the Union that it is the City's burden in circumstances of ambiguous posts to show that the City's interpretation of the meaning of such posts was the intended meaning. The City did not do so, and as a result, I find the City has not shown it was justified in concluding that the Grievant engaged in the conduct as charged relating to these four posts.

Grievant did Engage in Conduct in Violation of the Department's Social Media Policy

I find that the six remaining posts of Grievant violated Directive 6.10. Grievant's explanations of why he made the posts do not convince and consequently do not exculpate. Joking about pedophiles; making anti-immigrant and anti-Muslim public statements; belittling

members of the LGBTQ community and joking about their poor treatment; or suggesting that hitting protestors with a specialize vehicle bumper is okay, are violations of the duty an officer owes the public and violate Directive 6.10.

Conduct Unbecoming

Notwithstanding that the City has struggled with a definition for Unbecoming Conduct in this and other arbitrations I have had relating to the Plainview project, I am persuaded that on this record, the City has shown such relating to Grievant. In this regard, I find that Grievant's six violative posts reveal animosity toward groups of people Grievant is required to police. Such groups include Muslims, immigrants, members of the LGBTQ community and members of the public expressing their First Amendment right to protest. I find the City has established that Grievant's posts may be fairly considered Unbecoming Conduct.

Was the Discipline of Discharge Appropriate Under Just Cause?

The evidence establishes that the Executive Team did not consider the discipline issued Grievant within the context of discipline issued other officers who had posts downloaded to the Plainview site. Nor did the Team consider Grievant's long employment with the City, service performance record and absence of discipline. Instead, the record establishes that the Executive Team looked only at Grievant's posts and admission that they were his and determined, in a relatively Just-Cause free vacuum, that he should be discharged. Just Cause does not contemplate wholly customized disciplinary standards for individual employees. It requires consistent treatment among employees and progressive discipline for all but the most egregious violations of policy. Grievant's posts on their face were not so numerous, offensive, broadly encompassing, widely disseminated and long standing as to warrant such an egregious violation

finding.[4] As a consequence, the City was required to consider if discharge was appropriate given the relative gravity of Grievant's offense, his disciplinary record and considerations of progressive discipline.

Progressive Discipline and Consistent Application

The parties' bargaining agreement requires that discipline be progressive and consistently applied. Just Cause requires consistent enforcement of rules and in all but the most egregious circumstances, the use of progressive discipline or proportionality; a level of discipline under the circumstances that can reasonably be expected to correct the behavior involved given the employee's work and disciplinary history. In the instant matter, considering the schedule of discipline agreed upon by the parties for cases of Conduct Unbecoming – a 30-day suspension or discharge – it is the City's burden to show; (1) that the lesser discipline of a 30-day suspension could not fairly be expected to correct Grievant's behavior and (2) that discharge is consistent with discipline issued other similarly situated employees. The City has failed to show either.

I am not persuaded by the City's arguments that Grievant cannot correct his conduct and be a productive member of the Department. Grievant has no prior discipline and a long 33-year history of satisfactory service to the City. He credibly testified that he significantly modified his social media conduct after receiving the Department's 2019 training and expressed his regret for having offended others. Additionally, the record establishes that the City issued 30-day suspensions to a number of officers who were responsible for significantly concerning posts contained in the Plainview data base. Where, as here, Grievant's posts were not so numerous, longstanding, broadly disparaging, hateful and widely disseminated as to - on their collective

[4] As was the circumstance in [redacted]

face - warrant termination, it is not enough for the City to distinguish its harsher treatment of Grievant, as it has here, by simply asserting that such is what the Executive Team concluded.

Based upon such considerations, I find the City has failed to meet its burden of showing that discharge was within the bounds of fairness contemplated by the just cause standard, but has shown that a 30-day suspension is proportional to the offense found considering Grievant's long tenure and disciplinary history.

Conclusion

Based upon the full record in this matter, I find the City has failed to meet its burden of establishing just cause for the Dismissal of Grievant, but has shown just cause for the 30-day suspension of the officer. I will order that Grievant's discharge for Conduct Unbecoming be rescinded, that his discipline be reduced to a 30-day suspension, and that he be made whole for his lost wages, benefits and seniority resulting from his discharge, less such losses associated with his 30-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. 01-19-0002-2847**
and	:	**(Discharge of P/O Edward J McCammitt)**
	:	
City of Philadelphia	:	

AWARD

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

The City is ORDERED to:

- Rescind its discharge of Grievant;

- Expunge any and all records of the discharge from Grievant's personnel and discipline files;

- Reduce Grievant's discharge to a 30-day suspension for Conduct Unbecoming; and

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

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

DATED: February 23, 2022