

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration :
 :
 between : AAA Case No.
 : 01-19-0002-4434
 :
FRATERNAL ORDER OF POLICE, LODGE NO. 5, : Opinion & Award
 :
 “Union” : Re: Sergeant Mark Palma -
 : Discharge
 - and - :
 : Hearing: July 6, 2022
CITY OF PHILADELPHIA :
 :
 “City” :
 :
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APPEARANCES

For the Union

WILLIG, WILLIAMS & DAVIDSON
Jessica C. Caggiano, Esq.

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Elizabeth U. Okakpu, Esq., Assistant City Solicitor

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The City discharged Sergeant Mark Palma, effective August 5, 2019. It took this action in response to nine Facebook posts that he had made in 2012 and 2016- 2017, which it learned of in 2019 through the Plain View Project. The Department determined that these posts violated its Social Media Policy, Directive 6.10, and, in turn, constituted violations of its Disciplinary Code: (1) Article I - Conduct Unbecoming, Section 1-§021-10; and (2) Article V – Neglect of Duty, Section 5-§011-10. More specifically, it concluded that the posts displayed a course of conduct involving the use of dehumanizing, defamatory and/or discriminatory language, which encouraged violence and reflected insensitivity as to race and religion.

The Union contends the City lacked just cause to discharge Palma. It asks that he be reinstated to his former position with the Department and be made whole for all pay and benefits lost as a consequence of his discharge. It also requests that the City be directed to revise his personnel records to expunge all reference to his discharge to the extent consistent with governing law.

The relevant facts of this case, which are largely undisputed, may be set forth succinctly.

Palma's Employment History

At the time of his discharge, Palma had completed approximately thirty years of service with the Department.

During his tenure, the Department promoted him twice. In 2004, he received the rank of Corporal. Approximately four years later, the Department elevated him to the

rank of Sergeant. Since that promotion in 2008, the Department assigned him to the 6th and 17th Districts, Highway Patrol and East Police Division. In testifying, he described these posts as very diverse, requiring him to interface with varied racial and ethnic communities, as well as the LGBTQ community.

Throughout his tenure with the Department, he has received annual evaluations from his superior officers rating his performance as satisfactory, which also included comments reflecting positively on his service. (Union Exhibit 1.)¹ In addition, the Department has awarded him numerous commendations for his actions on the job. (Union Exhibit 2.)²

He has no record of prior discipline. In testifying, he stated further that he has never been counseled or reprimanded at any time due to inappropriate conduct.³

Department Directive 6.10

In 2011, the Department adopted Directive 6.10, detailing its policy regarding the use of social media and social networking by both police officers and civilian personnel. (Joint Exhibit 5.) As background, the Directive states: “[I]t must be formally and universally recognized that the personal use of social media has the potential to impact

¹ Most recently, in 2018, his rating officer commented: “You have been short man-power most of the year but 3 squad continues to have the lowest backlog in the unit. This is a result of the solid leadership you provide. Thank you for a job well done.” (Union Exhibit 1.) Other rating officers commended his work ethic and dedication and described his supervisory work as exceptional. (Union Exhibit 1.)

² Palma’s personnel file includes nine commendations of merit and a letter of appreciation from the Pennsylvania Attorney General relative to his work on a joint narcotics operation. (Union Exhibit 2.) In his testimony, Palma reported receiving 16 commendations of merit, as well as the medal of bravery, six Union awards and other citations recognizing his meritorious service. (Union Exhibit 17.) He also referenced his efforts in having a mural installed at the 6th District headquarters honoring Police Officer Daniel Faulkner, who had been killed in the line of duty in 1981. (Union Exhibit 18.)

³ Retired Chief Inspector Keith Sadler testified regarding Palma’s eleven years of service as his aide during his tenure as Captain and Chief Inspector. He described Palma’s work performance as “exemplary.” According to Sadler, he never had any reason to doubt Palma’s ability to interface with the diverse communities they served, trusting he would not treat people differently based on race, religion or any other characteristic. In this regard, he recalled an instance in the 17th District in which Palma worked effectively to defuse a period of deep racial unrest. On cross-examination, he acknowledged that a person need not be a racist or anti-Islam to make remarks that are racially disparaging or Islamophobic.

the [D]epartment as a whole, as well as individual members serving in their official capacity. As such, this policy provides information of a precautionary nature as well as prohibitions on the use of social media by [D]epartment personnel.” (Joint Exhibit 5.)

It also references:

As members of the Philadelphia Police Department, employees are embodiments of its mission. It is, thus, essential that each member accept his or her role as an ambassador of the [D]epartment. In doing so, 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 general members of the public, the on-line activities of employees of the police department shall reflect such professional expectations and standards.

(Joint Exhibit 5.)

In regard to policy, the Directive specifies 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.” (Joint Exhibit 5.) In addition to proscribing posting while on duty and using City or Department property to post, whether on or off duty, it prohibits:

[U]sing 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.

[D]isplaying sexually explicit images, cartoons, jokes, messages or other material that would be considered in violation of the City Policy Preventing Sexual Harassment in City Government.

(Joint Exhibit 5.)⁴

The Directive also instructs:

⁴ The Department added these specific prohibitions when it updated the Directive as of July 6, 2012. (Joint Exhibit 5.)

There is no reasonable expectation of privacy when engaging in social networking on-line. As such, the content of social networking websites may be obtained for use in criminal trials, civil proceedings, and departmental investigations.

(Joint Exhibit 5.)

In his testimony, Palma recalled receiving Department Directive 6.10 when it was adopted in or about May 2011. He denied receiving any training regarding the Directive until after he had been placed on restricted duty in 2019 in connection with the IAD investigation of his Facebook posts at issue here. As part of that training, he confirmed receiving a pamphlet, which included a summary of relevant case law, law enforcement code of ethics, a flow chart depicting First Amendment analysis of government employee speech per United States Supreme Court decisions and the Department's Mission, Values, Ethics and Code of Conduct. (Union Exhibit 19.)⁵

Plain View Project

The Plain View Project refers to a database established by a private organization and made public in June 2019, which contains Facebook posts made by current and former police officers of various police departments in the United States, including the Philadelphia Police Department. The Plain View Project's website includes a disclaimer that states:

The Facebook posts and comments in this database concern a variety of topics and express a variety of viewpoints, many of them controversial. These posts were selected because the viewpoints expressed could be relevant to important public issues, such as police practices, public safety, and the fair administration of the law. The posts and comments are open to various interpretations. We do not know what a poster meant when he or she typed them; we only know that when we saw them, they concerned us. We

⁵ In a prior arbitration between the City and the Union, Inspector Fran Healy testified that this training was conducted in Summer 2019 after the publication of the Plain View Project's database of social media posts. The training, he averred, included a review of Directive 6.10 and explained the scope of First Amendment protected speech. (Joint Exhibit 7.)

have shared these posts because we believe they should start a conversation, not because we believe they should end one.

The posts and comments included in the database comprise portions of a user's public Facebook activity, and are therefore not intended to present a complete representation of each person's Facebook presence, or each person's view on any given subject. Inclusion of a particular post or comment in this database is not intended to suggest that the particular poster or commenter shares any particular belief or viewpoint with any other posters or commenters in the database. Links to the original page from which each post was obtained are provided so you can see the context of the post if you wish.

(Joint Exhibit 9.)

Internal Affairs Division ("IAD") Investigation⁶

██ testified that the Department first learned of the Plain View Project in or about February 2019. At that time, she said, a representative of the Plain View Project advised that Department employees were posting offensive or inappropriate material to their Facebook accounts. The representative, she averred, identified seven officers involved, which included Palma, but did not provide copies of the referenced posts.

In response, she said, IAD opened an investigation of all seven officers. The assigned investigator conducted a search of their public Facebook posts, but did not find any posts that violated Directive 6.10. The investigator also interviewed these officers, except for one who was on leave due to an in line of duty injury. (Joint Exhibit 10.)

During his March 22, 2019 IAD interview, Palma confirmed having a Facebook account that included photographs and other items identifying him as a member of the Department (e.g., police events, commendations). He also acknowledged receiving Directive 6.10 and being familiar with its requirements. When questioned, he denied

⁶ The parties stipulated to the admission of the IAD Investigation report regarding Palma's Facebook activity, as disclosed by the Plain View Project.

posting or commenting in a manner that conveyed bias, used dehumanizing language, promoted violence or undermined due process. (Joint Exhibit 10.)

Subsequently, when the Plain View Project released its database containing the actual Facebook posts from members of the Department, the IAD investigation necessarily expanded. According to [REDACTED] it triggered the investigation of approximately 325 police officers for Facebook posts possibly violative of Department Directive 6.10.

Explaining the IAD's investigative process, she recounted that a common practice was followed with each officer, including Palma. The officer, she said, was asked to: (1) confirm the Facebook page produced by the Plain View Project was his/her page; (2) verify that no one else used his/her account to post; and (3) acknowledge he/she posted each of the postings attributed to him/her by the Plain View Project. The officers, she stated, were not questioned as to the reason for the posts or asked to explain them. In Palma's case, he verified that all forty-three posts attributed to him by the Plain View Project were, in fact, posts he made to his Facebook account. (Joint Exhibit 10.)

As to Palma, the IAD investigation concluded that he had posted material, statements or comments that directly violated Directive 6.10. In particular, IAD found that his posts included racial slurs, profanity, dehumanizing, defamatory or discriminatory language, content that condoned or encouraged violence and/or statements that were insensitive and mocked individuals, due process and the criminal justice system. (Joint Exhibit 10.)

Palma's Discharge

[REDACTED], whose responsibilities include overseeing IAD, testified that the release of the Plain View Project database provoked a public outcry as to many of the posts attributed to the Department's officers. In expressing outrage, she said, members of the community demanded swift discipline of the offending officers and expressed having experienced biased treatment by Department members. In addition, she averred, the matter produced substantial negative media coverage of the Department and adversely affected morale among officers.

In response, she recounted attending community meetings with then [REDACTED] to hear and address the public's concerns.

Addressing the IAD investigations of the 325 officers identified in connection with the Plain View Project, she related that all substantiated violations of the Department's Social Media Policy were referred to an outside law firm, which assessed whether the offending post constituted constitutionally protected speech. Any posts found protected, she said, were disregarded for disciplinary purposes.

Of the remainder, she averred, the "most egregious" cases were referred to then [REDACTED] and her executive team for review.⁷ Included among these, she said, were nine of Palma's posts. (Joint Exhibits 8 & 10.)

These posts, which Palma made between January 19, 2012 and August 30, 2017, consist of the following:

1. **August 17, 2017.** The post references the vandalizing of a Police Officer's home following the removal of a protection detail. In response to a comment from another poster (i.e., "Rocky's next Mike Palma, remember he beat up 2 black guys in his movies), Palma replied, "Oh

⁷ In addition to Wimberly, the executive team included Deputy Commissioners Myron Patterson, Joseph Sullivan, and Dennis Woodson.

Dam (sic.) let's smoke a cigar.”

2. **August 30, 2017.** The post includes three frames with photographs depicting ANTIFA protesters, SWAT Officers wearing tactical gear and a surgical team, which are captioned, respectively: “Whenever these people in mask show up;” “they should be greeted by these people in mask;” and “who should send them to see these people in mask.”
3. **August 24, 2017.** The post consists of a video showing protesters at the home of an officer who had been involved in a line of duty shooting. In the comments, Palma refers to the protesters as “scum” and “fuckheads.”
4. **August 19, 2017.** The post contains a video from CBS News in Boston of a Free Speech Rally. In the comments, Palma states, “It’s getting out of hand people. Put them all on planes and send them over to third world countries.”
5. **June 8, 2017.** The posted photograph depicts three men in Islamic clothing struggling over a gun with the caption, “When your fifth wife eats grass from another guys (sic.) hand.”
6. **May 23, 2017.** The post includes a photograph of a Muslim male, followed by: “BREAKING! This is the Islamic scum that killed 22 in Manchester, AND HE WAS ARRESTED FOR TERROR AND LET GO BY UK . . .”
7. **February 17, 2017.** The post contains a Fox 29 news video and the statement: “HEARTBREAKING ... BRUTAL ... AND JUST WRONG” A mom’s friend is accused of striking her 7-year-old son on the head, shoulders, legs and buttocks at least 62 times in 5 minutes. Police say the beating knocked the child to the pavement.” In the comments, Palma remarked, “The adult needs to get hit with a 2 x 4.”
8. **January 12, 2012.** Palma posted, “A bunch of little thugs jumped and beat the shit out of a 64 year old Vietnam vet on 5th st. What the fuck is wrong with these kids.” In the comments, Palma stated, “Nothing but savages and should be thrown in a wood chipper.”
9. **January 1, 2016.** In response to a post of an elderly woman shot and robbed in North Philadelphia, Palma commented, “He needs to be shot in the throat.”

(Joint Exhibits 8 & 10.)

According to [REDACTED] [REDACTED] and the executive team determined that these posts by Palma constituted egregious violations of Directive 6.10, as they exhibited racism and bigotry and promoted violence. In particular, she highlighted: (1) two of the posts exhibited anti-Muslim bias, by suggesting Muslims are violent and primitive and labeling them as “scum;” (2) others advocated violent responses and/or the use of excessive force by law enforcement, such as suggesting that SWAT, in responding to ANTIFA events, should injure protesters, requiring them to seek medical care; and (3) some reflected racism, including a post stating that protesters at a free speech rally should be sent to third world countries.

For these offenses, she said, the executive team determined, consistent with the Department’s Disciplinary Code, that dismissal was the appropriate response.

Adopting this recommendation, [REDACTED] discharged Palma by a Commissioner’s Direct Action, as opposed to proceeding through a Police Board of Inquiry. (Joint Exhibit 6.)⁸

Palma’s Testimony Regarding His Facebook Posts

In testifying, Palma reported establishing a Facebook account in or about 2007. He related using the account to communicate with family and friends and to post regarding benefits and other events for Department members. According to Palma, he understood that the account had been set to “private,” although he has since learned that subsequent updates caused the account to be made public.

⁸ [REDACTED] signed the Commissioner’s Direct Action confirming Palma’s dismissal on July 18, 2019. (Joint Exhibit 4.) On August 5, 2019, the Department issued the charges to Palma and imposed a 30-day suspension with an intention to dismiss. (Joint Exhibit 4.) Prior to the effective date of discharge, Palma elected to retire. In testifying, he explained taking this action solely for financial reasons, noting he had no prior plan to do so.

Addressing the nine Facebook posts for which he was discharged,⁹ Palma stated:

- (1) **August 17, 2017** – he confirmed: (a) posting this news report regarding the vandalizing of a police officer’s home; and (b) responding to a subsequent comment from another poster (i.e., “Rocky’s next Mike Palma, remember he beat up 2 black guys in his movies), by writing, “Oh Dam (sic.) let’s smoke a cigar.”
- (2) **August 30, 2017** – (a) he denied being aware this post violated Directive 6.10; and (b) he intended to convey the need for police officers to defend themselves from harm.
- (3) **August 24, 2017** – (a) he reported posting this content to express concern with protesters shouting obscenities at a police officer and his family and call for a response from the Department; and (b) he disputed the posting violated Directive 6.10.
- (4) **August 19, 2017** – he denied that his comment regarding the protesters violated Directive 6.10.
- (5) **June 8, 2017** – (a) he considered the post to be a joke; and (b) he did not perceive it violated Directive 6.10.¹⁰
- (6) **May 23, 2017** – (a) he considered this posting regarding a mass killing by a Muslim to be informational; and (2) he maintained the post did not violate Directive 6.10.
- (7) **February 17, 2017** – (a) his comment reflected an expression of frustration over an act of child abuse; (b) he did not intend it to be an actual call for violence.
- (8) **January 19, 2012** – (a) here again, his comment reflected outrage over a violent crime against a vulnerable individual; and (b) the comment was not intended to encourage a violent response against the offender.
- (9) **January 1, 2016** – (a) once more, he was expressing an emotional reaction to violent criminal activity, which, in this case, had been perpetrated against friend’s mother; and (b) he did not intend it to represent a call for violence.

⁹ According to Palma, he first learned of the Facebook posts triggering his discharge upon hearing Deputy Commissioner Wimberly’s testimony at the July 6, 2022 hearing in this case.

¹⁰ On cross-examination, he acknowledged that the post could be offensive to some persons.

Palma stated further that with his current knowledge, he would limit any future Facebook activity to communicating regarding family matters and sponsored parties and events. Doing so, he said, would ensure his conformance with Directive 6.10.

Procedural History

On August 5, 2019, the Union filed the instant grievance contesting Palma's pending discharge. (Joint Exhibit 2.) When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. (Joint Exhibit 3.) Pursuant to the procedures of their collective bargaining agreement (the "Agreement"), the parties selected me to hear and decide this case. (Joint Exhibit 1.)

I held a hearing in this matter on July 6, 2022. At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the hearing, the record was held open to allow the parties to submit supporting authorities. Following receipt of those submissions, I declared the hearing record closed as of July 22, 2022.

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to discharge Sergeant Mark Palma, effective August 5, 2019?
2. If not, what shall be the remedy?

Positions of the Parties

Both parties made detailed closing arguments. Their respective positions are summarized below.

City's Position. The City contends that its discharge of Palma was for just cause. It maintains that the evidence conclusively demonstrates that he violated Department Disciplinary Code Sections 1-§021-10 and 5-§011-10, by the nine identified Facebook posts, which contravened the Department's Social Media Policy set forth in Directive 6.10. These posts, it stresses, reflected anti-Islamic and racist sentiments, expressed calls for violence and contained profanity.

In determining whether the offending posts violated Directive 6.10, it insists, Palma's intent is not germane. In fact, it notes, his intent cannot be discerned from examining the posts. As such, it concludes, the posts must be evaluated on their face, which compels a finding that they violated the Department's Social Media Policy.

It also points out that under the circumstances here, his posts cannot be excused as mere police banter. Access to his posts, it explains, was not limited to police officers. Rather, they were freely available to the public. As such, they must be evaluated in that context.

It asserts further that IAD thoroughly reviewed the posts and confirmed all nine violated Directive 6.10. This finding, it points out, was affirmed by [REDACTED] and the other members of [REDACTED] Executive Committee.

The Department, it submits, has a duty to root out officers making public social media posts that violate Directive 6.10. Maintaining the public's trust and confidence and ensuring solidarity among the members of the Department obligates that it do so.

In the instant case, it avers, Palma's offending posts were so egregious that they called for the penalty of discharge notwithstanding his lack of prior discipline. Simply

put, it argues, his offending posts represented such a disregard for his responsibility as a member of the Department, they disqualified him from continued service.

Accordingly, for all these reasons, the City asks that Palma's discharge be sustained and the grievance be denied.

Union's Position. The Union, on the other hand, argues that the City lacked just cause to discharge Palma based upon the nine identified Facebook posts. It contends that the City has failed to meet its burden of proof in this regard.

In applying the just cause standard here, it avers, the focus must be on the specifics of Palma's conduct and his overall record, and not the totality of the posts identified by the Plain View Project. To proceed by weighing the latter, it maintains, would plainly violate this fundamental principle.

For this reason, it asserts, Palma's work history cannot be ignored in deciding the issue presented. His thirty years of service without prior discipline, exemplary evaluations and record of numerous commendations, it states, must be given due consideration, which the City failed to do. As a consequence, it states, the City cannot meet its burden of establishing just cause for Palma's discharge

In addition, it argues, the City's failure to give Palma contemporaneous notice of his purportedly improper Facebook posts cuts against finding just cause for his discharge. Had it done so, it asserts, the matter could have been rectified sooner and without the need for such serious discipline. In support, it cites Palma's testimony that he would have responded appropriately had such corrective measures been taken.

Moreover, it notes, in discharging Palma, the City treated him less favorably than other officers who committed the same or similar offense. In particular, it cites [REDACTED]

██████████, who despite two violations of Directive 6.10, received progressive discipline (i.e. one-day and thirty-day suspensions), rather than dismissal. (Union Exhibits 11-12.) The same, it asserts, holds true for the Department's response to such misconduct committed by other officers, such as ██████████ (i.e., one-day suspension) and ██████████ (i.e., thirty-day suspension and transfer). (Union Exhibits 6 & 8-9.)

Palma's status as a ranking officer, it avers, cannot justify his being disciplined more severely than police officers committing the same offense. ██████████ it points out, acknowledged that the Department did not consider Palma's rank in deciding to discharge him. Further, it highlights, ██████████ was unable to explain the lesser discipline issued other ranking officers for comparable Directive 6.10 violations.

Finally, as to the matter of notice, it contends that the City failed to properly inform Palma that a violation of the of the Department's Social Media Policy could result in summary discharge. It asserts that the City cannot escape this fact by lumping all of Palma's posts together in an effort to elevate the gravity of his offense, and, in turn, justify his discharge. An employee, it reasons, cannot be expected to abide by a rule that has not been effectively communicated to him/her. Just cause, it states, requires that the employee receive clear notice of both the employer's expectation and the range of penalties for non-compliance.

In sum, it concludes, the City has not demonstrated that it had just cause to discharge Palma, thereby requiring a reversal of his discharge. Alternatively, at most, it avers, the City has established cause to impose some lesser level of discipline.¹¹

¹¹ In support, the Union cites five arbitration awards reviewing discipline meted out to other officers for Directive 6.10 violations brought to light by release of the Plain View Project's database. In all but one

Accordingly, for all of these reasons, it submits that the grievance should be granted and the requested relief awarded.

Opinion

There can be no dispute that the City's Police Department has a legitimate interest in setting standards governing the off-duty conduct of its officers. Indeed, its obligation to maintain the public's trust in effectively fulfilling its mission commands as much. In setting such expectations, it may properly hold its officers as members of law enforcement to a higher standard than applies to the general public consistent with its core values of honor, service and integrity. (Joint Exhibit 6.)

For this reason, conduct that undermines public confidence in an individual officer or the Department in general is an appropriate subject to be addressed. Plainly, the scope of such conduct extends to social media use. The need is obvious. Social media posts have the potential to reach a very wide audience, and, as such, when improper, their negative impact can be far ranging and severe. Such effect was evident from the release of the Plain View Project's database of posts from members of law enforcement, including the Department's officers.

Consequently, I am satisfied that the Department's Directive 6.10 defining the permissible use of social media and networking by its officers, while allowing for First

case, the discipline was mitigated based upon such factors as insufficient proof of the most serious charge (i.e., conduct unbecoming), inadequate investigation, disproportionate penalty, and disparate treatment. See AAA Case No. 01-20-0000-6910 (T. Brown 2022) (Police Officer Ernest Green – 30-day suspension adjusted to a 5-day suspension); AAA Case No. 01-19-0002-2847 (T. Brown 2022) (Police Officer Edward McCammit – discharge mitigated to a 30-day suspension); AAA Case No. 01-19-0004-2311 (D. Reilly 2022) (Corporal Tanya Grandizio – modified duration of suspension from 30 to 15 days); AAA Case No. 01-19-0002-2846 (T. Brown 2021) (Police Officer Christian Fenico – reduced discharge to a 30-day suspension). In the one case sustaining the discipline imposed, the arbitrator reasoned that the penalty was appropriate given the breadth of the grievant's expressed hatred, biases and prejudices and the unlikelihood that any lesser penalty would be corrective. AAA Case No. 01-19-0002-2851 (T. Brown 2020) (Police Officer Daniel Farrelly).

Amendment protected speech, is reasonably related to the orderly, efficient and safe administration of its law enforcement mission. To that end, the Policy proscribes, among other matters:

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.

(Joint Exhibit 5.)

An officer who breaches the standards set by this Directive can and should expect that discipline will follow.

The City, of course, bears the burden of proof, where, as here, it charges an officer with disregarding such responsibilities. In particular, it must establish through the weight of the credible evidence that Palma is guilty of the charged offenses. It must also demonstrate that the level of discipline imposed is appropriate.

The Union, on other hand, bears no parallel burden. It need not disprove the charges against Palma. Indeed, he is entitled to the presumption of innocence.

After a careful and thorough review of the record and the parties' respective arguments, I am convinced that the City has failed to meet its burden. More specifically, although I am persuaded that Palma committed the charged violations of the Social Media Policy, I do not find on the record here that the City had just cause for the level of discipline imposed; namely, discharge. My reasons for this conclusion follow.

The Department's decision to discharge Palma stems from nine posts that he made to his Facebook account in 2012 and 2016-2017. These posts reportedly violated Directive 6.10 and, in turn, triggered the cited charges under the Department Disciplinary Code – (1) Section 1-§021-10 - Conduct Unbecoming; and (2) Section 5-§011-10 –

Neglect of Duty.¹² As I understand, the Neglect of Duty charge rests upon the alleged violations of Directive 6.10; while the purportedly egregious nature of Palma's posts provides the basis for the more serious Conduct Unbecoming charge.¹³

Addressing the issue of whether Palma's posts violated the Department's Social Media Policy, I am persuaded from my review of the record that the answer is yes.

By its terms, the Policy proscribes making posts or sharing content on social media that contains material that is discriminatory or harassing or would not be acceptable in a City workplace under established policy or practice. This restriction thus precludes social media activity that demeans, intimidates or ridicules persons based on any classification protected by applicable anti-discrimination statutes, including race, ethnicity and religion. In addition, the Policy bars social media posts that encourage or endorse acts of violence.

In examining the nine posts on which the Department relied in discharging Palma, I find that all but one, on their face, fall into the category of prohibited content per the Policy. Stated otherwise, in contravention of the Policy, these eight posts demean or ridicule persons, as a group, based on race, ethnicity and religion, use profanity and/or encourage or endorse acts of violence against individuals or member of a group.

More specifically, in reaching this conclusion, I note the following as to Palma's posts:

¹² The Disciplinary Code defines Conduct Unbecoming for purposes of Section 1-§021-10 as: "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;" whereas, it identifies Neglect of Duty under Section 5-§011-10 as: "failure to comply with any Police Commissioner's orders, directives, memorandums, or regulations; or any oral or written orders of superiors." (Joint Exhibit 1.)

¹³ The prescribed discipline for a first offense of Conduct Unbecoming per Section 1-§021-10 is a 30-day suspension or dismissal. In contrast, a first offense of Neglect of Duty per Section 5-§011-10 carries potential discipline ranging from reprimand to a 5-day suspension. (Joint Exhibit 1.)

August 17, 2017. In initiating this post, Palma reported the vandalizing of a police officer's home following the removal of a protective detail. This message, I am satisfied, plainly does not violate Directive 6.10. Indeed, I do not understand the City to contend otherwise.

Instead, the alleged violation concerns Palma's response to another individual's comment to his post. This person remarked, "Rocky is next Mark Palma remember he beat up 2 black men in his movies . . .," to which Palma replied, "Oh dam lets smoke a cigar."

On review, the "Rocky" comment arguably promotes racial division by suggesting a fictional movie character would be targeted based upon his boxing victories over two African-American men. Palma's reply, however, is simply too ambiguous for me to construe it as being racially discriminatory or harassing, and thus, violative of Directive 6.10.

August 30, 2017. This post, by which Palma shared third-party content, plainly endorses the use of excessive force by law enforcement. Indeed, the sequence of captioned images suggesting that SWAT officers, in responding to ANTIFA protests, should injure the participants causing them to require medical attention, permits no other conclusion.

Palma's claim that he intended the post to convey the need for police officers to defend themselves from harm is unavailing. Nothing in the post reflects that the endorsed use of force by SWAT officers represents a proportional response to shield them from harm.

To the contrary, it is apparent to me that the post disparages ANTIFA protesters as a group by suggesting that they are properly subject to an aggressive and escalated physical response by SWAT officers regardless of the circumstances. Plainly then, the post represents an obvious violation of the Policy.

August 24, 2017. As with Palma's August 17, 2017 post, his alleged violation of Directive 6.10 in this instance does not stem from his initial post, but rather his subsequent comment. Here, he began the thread by posting a video of protesters at the home of a police officer who had fatally shot a suspect while on duty.

Obviously, sharing a video depicting a public protest does not run afoul of Directive 6.10. As such, if Palma had stopped at posting the video, the Department would have had no basis to charge him with violating the Social Media Policy.

However, he did not do so. Rather, referencing the Commissioner's decision to release the names of police officers involved in on duty shootings, he remarked, "Its going to get someone hurt, now these fuckheads are at the cops [sic.] house." As such, I am compelled to conclude he violated Directive 6.10. Such use of profanity to disparage this group of protesters is a per se violation of the Policy.

Palma's stated intent in making this comment does not cause me to conclude otherwise. His concern over the protesters purportedly shouting obscenities at the police officer and his family simply does not absolve or excuse his clear-cut violation of the Policy.

August 19, 2017. In this instance, Palma posted a television news video of a free speech rally and then commented, "Put them all on planes and send them over to

third world country.” I find unpersuasive Palma’s bald denial that this comment did not violate the Social Media Policy.

Quite the opposite, I am convinced that his remark represents a well-recognized trope that is uttered to disparage certain racial or ethnic groups. It serves to classify them as others and not real Americans, such that they can and should be properly sent out of the country.

Plainly then, on its face, this post constitutes a violation of Directive 6.10.

June 8, 2017. By this post, Palma shared a photograph depicting a man in Islamic clothing holding a gun and being restrained by two other similarly dressed men, which is captioned, “When your fifth wife eats grass from another guys (sic.) hand.” While the caption’s meaning is not entirely clear, I am satisfied that the post disparages Muslims as a group by suggesting that they are inherently violent and Islam is a backwards religion.

Palma’s claim that he considered the post a “joke” offers him no defense. The fact remains that the post was insulting to Muslims as a group. The purported use of humor to convey that message renders it no less offensive or inappropriate. In fact, on cross-examination, Palma conceded that the post could be offensive to some persons.

As such, I am compelled to find that Palma violated the Social Media Policy by this post.

May 23, 2017. This post contains a photograph published by an internet news service of a suspect from a terrorist attack in England, followed by the heading, “Breaking! This is the Islamic scum that killed 22 in Mancster, AND HE WAS ARRESTED FOR TERROR AND LET GO BY UK”

The use of the term “Islamic scum” in this context equates all Muslims with terrorists. As such, by republishing this news report, Palma perpetuated this erroneous assertion and acted to defame and diparage Muslims as a group. Plainly then, I am convinced that this post violated Directive 6.10.

Even if Palma shared this news report for informational purposes, as he claims, it does not change this outcome. Simply put, in posting this media account, Palma takes ownership of its obvious discriminatory content and, as such, cannot escape the consequences of disseminating it publicly on his Facebook account.

February 17, 2017, January 19, 2012 and January 1, 2016. In each of these posts, Palma shared information regarding a violent crime committed against a particularly sympathetic or vulnerabe victim (i.e. seven-year old child; sixty-four year old veteran; elderly woman) And with each post, he offered a comment suggesting some violent response against the alleged perpertrator. These included: (1) “the adult needs to get hit with a 2x4;” (2) “nothing but savages and should be thrown in a woodchipper;” and (3) “he needs to be shot in the throat.”

Such endorsements of violence, no doubt, violate the Social Media Policy. Palma’s assertion that he was not actually seeking or supporting such a violent response, but only expressing his frustation and outrage at these senseless crimes, provides context, but does not absolve his obvious violation of the Policy.

Regardless of his actual intent, his open expression of support for such violent responses nonetheless undermines the trust in law enforcement by some members of the

public. For this reason, his words matter and cannot be excused or explained away by his stated intent, which was obviously unknown to those reading these posts.¹⁴

My findings as to these eight violations of Directive 6.10 are undisturbed by the Union's claim that Palma lacked sufficient notice of, and would have complied with the Social Media Policy if the Department had given him prior notice and afforded him an opportunity to do so.¹⁵ In his testimony, Palma conceded receiving the Policy. As such, he was responsible for familiarizing himself with its contents. In that regard, I am satisfied that if he had done so, it would have been apparent to him that it proscribed his eight posts, as analyzed above.

Having found that the City proved that Palma violated the Department's Social Media Policy by eight of the nine identified posts to his Facebook account, there remains the issue of whether the level of discipline imposed was an appropriate response.¹⁶ I conclude that it was not.

In beginning this analysis, I note that a basic tenet of just cause mandates that the penalty must be proportionate to the offense committed.

Under this standard, it is well recognized that certain offenses so undermine the employment relationship that they call for summary discharge, even for a first offense.

¹⁴ However, as discussed below, Palma's intent in posting these comments is due proper consideration in determining the appropriate penalty for his transgressions.

¹⁵ I note in this regard that the Department lacked prior notice of Palma's offending Facebook posts prior to the release of the Plain View Project's database. Therefore, the Department lacked an opportunity to raise the issue with Palma at an earlier date. Of course, it could have acquired such knowledge if it had monitored its officers' social media activity for violations of Directive 6.10. However, I find no basis to impose such an obligation on the Department. Stated otherwise, I am satisfied that notwithstanding the absence of such a monitoring process, the Department retained the authority to enforce the Policy upon learning of violations from complaints or otherwise.

¹⁶ These demonstrated violations of the Social Media Policy, I am satisfied, serve to substantiate the charges here -- (1) Article I - Conduct Unbecoming, Section 1-§021-10; and (2) Article V - Neglect of Duty, Section 5-§011-10. The violations, on their face, reflect a neglect of duty for purposes of Section 5-§011-10, inasmuch as they constitute a violation of a Commissioner's directive. Further, when taken together, they also confirm a course of conduct by which Palma exhibited little regard for his duties as a police officer, and thereby establish the Section 1-§021-10 charge.

The charges here, however, do not fall into that category. Indeed, the parties have so agreed. Under the Department's Disciplinary Code, which has been negotiated and incorporated into the Agreement, the Conduct Unbecoming charge (i.e., Section 1-§021-10), the more serious of the two, does not mandate dismissal for a first offense. Instead, it defines the permissible range of discipline as a thirty-day suspension or discharge.

Accordingly, determining the proportionate response here requires consideration of the totality of the relevant circumstances.

As an initial matter, I take note that Palma's misconduct was no minor matter. It occurred repetitively over a period years. Moreover, by his offending posts, which demeaned and ridiculed religious, racial and ethnic groups and endorsed violence, he breached the public trust. In doing so, he cast doubt on his ability to perform his duties without bias and consistent with the Department's core values of honor, service and integrity. Plainly, his offenses called for substantial discipline.

I am persuaded, however, that a penalty short of discharge is the appropriate response.

In reaching this result, I have weighed Palma's length of service and record of performance, factors that the Department declined to assess. I am convinced that they mitigate against dismissal.

As the evidence shows, Palma has thirty years of service with the Department, without record of prior discipline. Further, his annual evaluations reflect exemplary performance, which is further substantiated by the numerous commendations that the Department issued him for his on-duty actions.

These factors cause me to conclude that Palma should be afforded an opportunity to demonstrate that he can and will reform his social media activity in order to comply with the requirements of Directive 6.10. His unblemished work record, which confirms his compliance with all other Department directives and requirements, indicates that he is capable of doing so. I do not find the gravity of his Social Media Policy violations to suggest otherwise.¹⁷

Finally, in regard to proportionality of penalty, the just cause standard obligates the Department in meting out discipline to do so even-handedly absent reasonable justification to distinguish between employees guilty of the same or similar offense. Stated otherwise, notwithstanding convincing proof of both the offending conduct and the proportionality of the discipline imposed, just cause must be found lacking when there is credible evidence of unjustifiable disparate treatment.

Applying this standard to the evidence presented here, I find the Department has not been consistent in the level of discipline imposed for violations of its Social Media Policy. This fact is evident from a comparison of Palma's discharge to the discipline other officers received for similar violations of the Policy.

In particular, the treatment of five other officers stands out. They are [REDACTED] [REDACTED].¹⁸ In response to Facebook posts revealed by the Plain View Project in 2019, which violated Directive

¹⁷ For example, I credit his testimony that his posts endorsing a violent response against certain criminal perpetrators represented an expression of frustration and outrage at the offenses reported, and not an actual call for violence. As such, I am satisfied that Palma is capable of refraining from publicly sharing such emotional reactions in the future.

¹⁸ In support of its disparate treatment claim, the Union identified the Department's response to Social Media Policy violations committed by several other officers. However, on review, I find that they are not appropriate comparators or there is insufficient evidence to conclude there was disparate treatment.

6.10, [REDACTED] each received a thirty-day suspension, whereas, the Department issued [REDACTED] a two-day suspension.

On review, I find no rational basis to justify the far more lenient response taken as to these officers for violations comparable to those committed by Palma. Indeed, their posts included a wide variety of offensive content, which included endorsement of violence and material that was demeaning or harassing based on race, sex/gender, religion, ethnicity and national origin, some of which were possibly more egregious than any of the material shared by Palma. (Union Exhibits 4, 7, 9, 12 & 16.) In addition, Amato had been disciplined two years earlier for violating Directive 6.10 based upon forty offending posts laced with profanity and offensive content that maligned the City's mayor and responded to other posters with racially harassing and threatening remarks. (Union Exhibit 11.)

On the record here, no basis exists for me to disregard such lesser discipline in assessing whether the City had just cause to discharge Palma. Indeed, it compels me to conclude that just cause exists only for a penalty of less than dismissal.

In sum, giving due consideration to the mitigating circumstances discussed above and such disparity in Department's disciplining of other officers for violating Directive 6.10, I am convinced that the appropriate penalty for Palma's offending posts is a thirty-day suspension.

Accordingly, for all of these reasons, the Union's grievance is granted in part and denied in part. I direct the City to promptly reinstate Palma to his former position with the Department without loss of seniority. The City shall also make payment to him for all wages and benefits lost as a consequence of his discharge, including overtime, through


the date of his reinstatement, less the period of the thirty-day suspension.¹⁹ In addition, I instruct the Department to revise Palma's personnel record, to the maximum extent permitted under governing law, to reflect the reduction of his August 5, 2019 discharge to a thirty-day suspension.

¹⁹ The record does not include evidence of Palma's damages. As such, the parties will need to meet and confer to determine the amount due him or return to me for a ruling in the event they are unable to do so. In addressing the matter of lost overtime, I note that the make whole award requires proof that is more than speculative. Instead, it necessitates showing to a reasonable degree of certainty that but for Palma's discharge, overtime would have been offered to him and he would have worked such overtime.

AWARD

1. The grievance is granted, in part, and denied, in part.
2. The City had just cause to discipline Mark Palma for violating the Department's Social Media Policy by his offending Facebook posts, but the penalty of dismissal was excessive. His discharge shall be converted to a thirty-day unpaid disciplinary suspension.
3. The City will promptly reinstate Mark Palma to his former position with the Department without loss of seniority, and revise his personnel records, to the maximum extent permitted under governing law, to reflect that his August 5, 2019 discharge has been adjusted to a thirty-day suspension. In addition, the City will make him whole for all wages and benefits lost as a consequence of his discharge, including overtime, through the date of his reinstatement, less all outside wages and other earnings received by him as to this period and the period of a thirty-day unpaid disciplinary suspension. I will retain jurisdiction of this matter to resolve any dispute as to the monies to be paid to Mr. Palma based on this award, including the issue of whether he satisfied his obligation to mitigate his damages.

September 15, 2022




David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

September 15, 2022



David J. Reilly, Esq.
Arbitrator