

AMERICAN ARBITRATION ASSOCIATION

-----X
In the Matter of the Arbitration :
 :
 between : AAA Case No.
 : 01-17-0003-1483
 :
FRATERNAL ORDER OF POLICE, LODGE NO. 5 : Opinion & Award
 :
 “Union” : Re: Emanuel Folly -
 : Discharge
 - and - :
 :
CITY OF PHILADELPHIA, : Hearing: September 9, 2022
 : and November 30, 2022
 :
 “City” :
 :
-----X

APPEARANCES

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Cara E. Leheny, Esq., Divisional Deputy City Solicitor
Lindsey Cordes, Esq., Assistant City Solicitor

For the Union

WILLIG, WILLIAMS & DAVIDSON
Richard G. Poulson, Esq.
Joseph B. Salamon, Esq.

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The City discharged Police Officer Emmanuel Folly, effective May 22, 2017. It imposed this penalty upon finding he had engaged in conduct unbecoming by the commission of a felony, and thereby violated Article I, Section 1-§026-10 of the Department's Disciplinary Code.¹ More specifically, it determined that he had downloaded images and videos to his personal laptop that constituted child pornography.

The Union contends the City lacked just cause to discharge Folly. 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 all references to the discharge be expunged from his personnel file to the maximum extent permitted by law.

The relevant facts of this case, including the areas of dispute, may be set forth succinctly.

Folly's Background & Employment History

In testifying, Folly related growing up in the Kensington section of Philadelphia, which he described as a high crime area. (Tr. 252.)² He reported avoiding that path by following the advice of relatives, as well as by joining the Rock Ministry, where he

¹ Department Disciplinary Code Article I – Conduct Unbecoming, 1-§026-10 reads: “Engaging in any action that constitutes the commission of a felony or misdemeanor which carries a potential sentence of more than one (1) year. Engaging in any action that constitutes an intentional violation of Chapter 39 of the Crimes Code (relating to Theft and Related Offenses). Also includes any action that constitutes the commission of an equivalent offense in another jurisdiction, state or territory. Neither a criminal conviction nor the pendency of criminal charges is necessary for disciplinary action in such matters.” (Joint Exhibit 1.) The Notice of Dismissal issued to Folly also references that a search of his laptop revealed images and videos of him interacting on duty with members of the public and other police officers, which were recorded by a device attached to his uniform. (Joint Exhibit 8.)

² References to the transcript of the September 9 and November 30, 2022 hearings in this case will be identified as “Tr.” followed by the applicable page number(s).

became involved in boxing.³ According to Folly, his dedication to the sport enabled him to achieve success, first as decorated amateur and later as a top professional prospect.

(Tr. 253-254.)

Folly joined the Department as a police officer in 2014. (Tr. 254.) He averred being inspired to pursue a career in law enforcement by his godfather, who had been a member of the Department. (Tr. 253.)

During his tenure, he served first in the 25th District, and after approximately six months, was transferred to the 18th District. (Tr. 254-255.) He has no record of prior discipline.

Special Victims Unit

████████████████████, an investigator in the Department's Special Victims Unit ("SVU") since 1998, confirmed the Unit's responsibilities include internet crimes against children, such as the possession, production and trafficking of child pornography. (Tr. 49.) Investigations of such conduct, he averred, can originate in several ways, including citizen complaints, cyber tips and peer-to-peer networking investigations. (Tr. 50.)

Peer-to-peer networks, he said, refer to internet sites that allow users to file share. In some instances, he explained, these sites serve as a means by which persons share and download child pornography. (Tr. 51.) One such site, he stated, is Ares, as to which he has received considerable training. (Tr. 52.)

Describing the operation of Ares, he related: (1) the user downloads the Ares

³ Pastor Mark Osborn, founder of Rock Ministry and Folly's boxing coach for 11 years, testified to Folly's reputation as a law abiding and truthful citizen. (Tr. 45-46.) Folly's brother, Jamar Folly described him as a warm and caring person. He also expressed being shocked and devastated upon learning Folly had been charged with possession of child pornography. (Tr. 249-250.)

software and installs it on his/her computer; (2) as required by Ares, the user establishes a shared folder on his/her computer's desktop, which is used to receive requested downloads and may be searched by other Ares users; (3) the user performs searches on Ares for his/her desired content by entering relevant search terms, such as a movie title or term relating to or describing the content sought; (4) once a search is initiated, it will continue to run without further action, until completed or terminated by the user; and (5) using the designated search term(s), Ares searches the shared folders of all of its users for responsive content and then downloads all files satisfying the search to the requesting user's shared folder on his/her computer's desktop. (Tr. 53-55.)⁴

In conducting peer-to-peer investigations relative to child pornography, ██████████ averred, law enforcement officials use an alternate version of Ares. This version, he explained, allows investigators access to Ares, but without maintaining a shared folder. As a result, he said, law enforcement can monitor Ares activity, while only appearing to share, as actual sharing would result in the possession and distribution of child pornography. (Tr. 56-57.)

Through this monitoring process, he reported being able to identify Ares users within the City who appear to be downloading child pornography. According to ██████████ he does so by using "known hash values" that correspond to such illegal content. (Tr. 57-58.)

The users flagged in this manner, he continued, are identified only by their IP address. As a result, he related, the next step involves working with the FBI to obtain the user's physical location. Doing so, he said, requires issuing a subpoena to the user's internet provider. (Tr. 61-62.)

⁴ The desktop of a computer refers to the computer's main screen.

Once the physical address is known, he reported, the process proceeds by obtaining as much information as possible regarding the persons residing there. (Tr. 62.) This work involves accessing various government and law enforcement databases. (Tr. 80-84.)

According to [REDACTED] at this point, the investigator obtains a warrant and conducts a search of the residence, seizing all computers and other digital storage devices that could possibly contain the suspected child pornography downloaded through Ares. (Tr. 63.) All devices taken, he stated, are delivered to the Regional Computer Forensic Laboratory (“RCFL”) for forensic review.⁵ (Tr. 63-64.) There, an analyst, creates a forensic copy of the hard drive or storage medium on each device and prepares a report of their content. (Tr. 64-65.) On the basis of this information, he averred, a determination is made whether the user’s devices contain any illegal content warranting his/her arrest. (Tr. 65.)

SVU Investigation of Emanuel Folly

Employing the peer-to-peer investigative process, [REDACTED] confirmed identifying a Philadelphia location in 2016, at which an Ares user was downloading content he suspected was child pornography.⁶ As a result, he engaged fellow SVU [REDACTED] to pursue the matter further. (Tr. 66.)

In his testimony, [REDACTED] confirmed taking over this investigation from [REDACTED] in or about September 2016. (Tr. 152.) Following established procedure, he

⁵ The FBI operates the RCFL and provides computer forensic support services to state and local law enforcement. The Department details officers to the RFCL to assist with this work.

⁶ In support of this conclusion, [REDACTED] reported seeing such search terms as “nine-year-old preteen child porn,” and “PTHC,” meaning pre-teen hard core, as well as many others commonly associated with child pornography. (Tr. 71-72.) He also related that through the Ares law enforcement program, he observed 4-10 videos and images depicting child pornography that had been downloaded by this user. (City Exhibit 2.)

recounted, working with the FBI to subpoena and obtain this Ares user's physical address, which was 3346 North 16th Street in Philadelphia. (Tr. 153.) With that information, he recalled using various databases to identify and check on the persons residing there. (Tr. 153-155.)

According to [REDACTED] on November 17, 2016, he executed a search warrant at this address, a private residence, which he had learned was owned by Folly's father, Irvin Folly. (Tr. 155-156.) In doing so, he seized a desktop computer from the living room and an Asus laptop and a surface tablet, which he found in a second floor bedroom. (Tr. 157-158.) After observing a Department uniform hat and plaque with a police prayer, he reported speaking with Irvin Folly, who was present for the search, and learning that Emanuel Folly also resided at the home and occupied the bedroom from which the laptop and tablet had been seized. (Tr. 160.)

All of the devices taken in the search, he averred, were delivered to RCFL for review. (Tr. 160-161.) In connection with that work, he learned the RCFL analyst required a password to access the laptop, as well as the power cord for the device. These items, he averred, were obtained from Folly's attorney and [REDACTED], a friend of Folly's. (Tr. 161-163; City Exhibits 5-6.)

RCFL, he said, produced a forensic image of the storage medium on each device and issued a report confirming that the laptop's hard drive contained videos and still images that constituted child pornography. (Tr. 164; City Exhibit 4.)⁷ The report, he

⁷ The RCFL report contains numerous spreadsheets detailing the Ares searches and downloads performed, as well as the shared files received, by the laptop's user. The data reflected there reveal a massive number of searches and downloads that obviously relate to child pornography. (City Exhibit 4.) In addition, RCFL extracted a jump list from the laptop, which allows the user quick access to recently or frequently accessed files. This list indicates that files frequently accessed by the laptop's user included those containing child pornography videos and images downloaded using Ares. Inasmuch as no dispute exists that the laptop was used to obtain and download child pornography, I will, for brevity sake, dispense with a detailed recounting

stated, also reflected that the hard drive contained: (1) boxing photographs of Folly; (2) videos depicting Folly engaging in sexual intercourse with several different females; (3) videos of Folly while on duty; and (4) Department documents (e.g., incident reports, mug shots). (Tr. 165-166.)

According to ██████████ the laptop did not contain any data suggesting that a minor had used it. He noted in this regard that it did not contain any searches or pictures of cartoons or other items consistent with use by a minor. (Tr. 166.)

He reported concluding that Folly owned the laptop and was responsible for its content. In support of this finding, he noted that access to the laptop required a password, which Folly possessed. Further, he opined that the videos of Folly engaged in sexual intercourse was not material he would want others to view, adding to his conclusion that Folly had sole access. (Tr. 166-167.)

Internal Affairs Division (“IAD”) Investigation

With the subject of ██████████ and ██████████ investigation having been revealed to be a police officer, IAD, per Department procedure, assumed responsibility for it. (Tr. 187.) ██████████ testified to being assigned the matter in January 2017. (Tr. 180.)

Recounting his investigation, ██████████ confirmed interviewing ██████████ and ██████████ as well as ██████████, who was detailed to RCFL and performed the analysis of the laptop and other items seized in the search of the Folly home. (Tr. 182.) In addition, ██████████ averred reviewing the RCFL report and all of the related documents generated. (Tr. 187.) He also reported executing additional search warrants

of this material, as to which extensive testimony was given by ██████████ and ██████████, who is detailed to RCFL and authored the report. (Tr. 92-112, 214-218.)

in order to seize cellphones, cameras and other devices and property from Folly. (Tr. 190-192.)

With the investigation substantiating that Folly possessed and shared child pornography, he recounted conducting a *Gniotek* hearing on April 25, 2017, at which Folly was advised of the disciplinary and criminal charges being brought against him and then arrested. (Tr. 198-199; Joint Exhibits 4 & 6; City Exhibit 1.)⁸ He was also placed on a thirty-day suspension with intent to dismiss. (Joint Exhibit 7.)

Folly's Discharge

On May 18, 2017, then [REDACTED] signed a Commissioner's Direct Action, confirming Folly's dismissal. (Joint Exhibit 5.) By subsequent notice, this action became effective May 22, 2017. (Joint Exhibit 8.)

In her testimony, [REDACTED] averred that the gravity and damaging effect of Folly's offending actions necessitated his discharge. Such criminal conduct, she explained, directly contravenes the Department's mission. (Tr. 225.) In addition, she said, the charges presented a risk management issue for the Department, as Folly, like all officers, must interact with minors in the course of his duties. (Tr. 225-226.) Further, she opined, Folly's misconduct in this regard would likely impede his ability to interact effectively with his fellow officers. (Tr. 227.)

She recounted that in the two other instances where an officer was charged with possessing/sharing child pornography, the Department responded by dismissing the offending individuals. (Tr. 227-228.)

She maintained that notwithstanding Folly's subsequent acquittal of the criminal

⁸ The IAD Report detailing [REDACTED] investigation also reflects a finding that Folly had violated Department Directive 4.21 by his unauthorized use of an unapproved body camera while on duty. (City Exhibit 1.)

charges, it remains problematic for him to serve as a police officer. According to [REDACTED] notwithstanding the outcome of Folly's criminal trial, the Department faces the same risk management issues that supported his discharge. (Tr. 228-229.)

Folly's Testimony

In testifying, Folly denied downloading the child pornography found on the laptop seized at the home he shared with his parents and a niece and three nephews. (Tr. 266-267.)⁹

He averred purchasing the laptop in 2014 for his family's use, as the desktop computer at the home had become inoperable. (Tr. 257-258.)¹⁰ The laptop, he said, was typically stored in his bedroom. (Tr. 256.) He reported "rarely" using the laptop, as he also owned a personal tablet. (Tr. 258.)

At some point, he related installing a password on the laptop to restrict access to it. This action, he said, was taken after discovering porn on the device shortly after his niece had used it. He explained, "I didn't feel like she should be viewing it. I mean, I was under the impression that she viewed it, because it wasn't on there before, and so, I put a password on there." (Tr. 259.)

Subsequently, he acknowledged sharing the password with his niece and nephews, as well as his brothers, who would obtain the laptop from his bedroom whenever they wished to use it. (Tr. 259-260.) The password, he said, was never

⁹ He averred that his niece [REDACTED] and nephew [REDACTED] resided at the home, while his nephews [REDACTED] and [REDACTED] visited regularly. (Tr. 257.) In 2016, [REDACTED], [REDACTED], [REDACTED] and [REDACTED] were [REDACTED], [REDACTED] and [REDACTED] years of age, respectively. (Tr. 271-272.)

¹⁰ In addition to the residents of the home, he averred that his brothers and nephews' friends also used the laptop. (Tr. 258.)

changed. (Tr. 259.)¹¹

He testified to being in disbelief upon learning of the November 17, 2016 search of the home for child pornography. He noted, “It was not something I believed took place at my house. Anybody could tap into a WiFi.” (Tr. 264.)

On cross-examination, he stated that sometime after his arrest, he came to suspect his nephew, ██████ had downloaded the child pornography found on the laptop. (Tr. 288.) This belief, he said, arose from statements made by his mother and niece. (Tr. 288-289.) According to Folly, his criminal attorney shared these statements with a representative of SVU, who, in turn, advised his attorney not to make further contact. (Tr. 294.)

He confirmed being found not guilty of all related criminal charges following a trial in January 2022. (Tr. 266.)

Procedural History

On April 26, 2017, the Union filed the instant grievance contesting Folly’s 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 at the offices of the American Arbitration Association in Philadelphia, PA, commencing on September 9, 2022 and continuing on November 30, 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

¹¹ In testifying, Folly’s brother ██████ affirmed Folly’s purchase of the laptop for the family, as well as his subsequent installation of a password on the device, which he freely shared with his family members. (Tr. 244-247.)

conclusion of the November 30, 2022 hearing day, I declared the record closed as of that date.

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 Police Officer Emanuel Folly, effective May 22, 2017?
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 Folly was for just cause. The evidence, it maintains, conclusively demonstrates that he violated Department Disciplinary Code Section 1-§026-10 by repeatedly downloading child pornography to his laptop computer.

Citing the testimony of [REDACTED] and [REDACTED] and [REDACTED] [REDACTED] which stands unchallenged, it stresses, their investigative work confirmed that Folly's laptop computer did, in fact, contain numerous videos and images constituting child pornography. Further, it highlights, the spreadsheet reports generated by RCFL and the computer's jump file reveal the high volume of searches made for child pornography and the resulting downloads.

In addition, it points out, their investigation substantiated that Folly controlled the laptop. Other content on the laptop, it states, make this fact clear. In particular, it points

out that he used the laptop to store: (1) on-duty videos recorded by means of a body camera; (2) videos of him engaging in sex; (3) police-related materials (e.g., mug shots); and (4) his boxing photographs. It argues further that his having password protected the laptop provides an additional indicia of control.

His efforts to explain away these facts, it submits, must be rejected, as they do not make sense. For example, it contends, his explanation for the password (i.e., to prevent his niece from using the laptop to access porn websites) is at odds with his subsequent sharing of the password with his niece and others, including his nephews, all of who were minors at the time.

Likewise, it argues, his attempt to blame his nephew ██████ for the child pornography found on the computer similarly lacks credibility, and thus, necessarily fails. By his own account, it notes, he made this claim for the first time at the hearing in this matter, despite his prior criminal trial for possession of such child pornography. Such belated raising of this exculpatory assertion, it concludes, defies reason, and, in turn compels its rejection.

His acquittal on the related criminal charges, it argues, offers no defense here. The charged violation of the Department's Disciplinary Code, it notes, plainly states that a conviction is not required.

Moreover, it stresses, in contrast to the manner in which the District Attorney tried the criminal case, a much more fulsome record was developed here, through the testimony of multiple witnesses and the presentation of substantial documentary evidence. On this basis, it asserts, the proof that Folly was responsible for the child pornography found on his laptop computer is overwhelming. Indeed, it maintains, no

other reasonable explanation exists for the presence of those offending videos and images on his laptop.

Accordingly, for all these reasons, it submits, Folly's discharge should be sustained and the Union's grievance should be denied.

Union's Position.

The Union, on the other hand, maintains that the City lacked just cause to dismiss Folly based upon the charge of possessing and sharing child pornography. It submits that the City has failed to meet its burden of proof in this regard.

The City, it acknowledges, has demonstrated that Folly's laptop computer was used to search for and download child pornography. It maintains, however, that the record does not support a finding that he was the person responsible for doing so.

In view of the gravity of this offense and the stigma associated with sharing and/or possessing child pornography, it asserts that an elevated standard of proof is required here. It argues that given these circumstances, the highest standard of beyond a reasonable doubt is appropriate. Alternatively, it seeks application of the clear and convincing evidentiary standard.

It acknowledges that the evidence initially obtained during the Department's investigation pointed to Folly as person who downloaded the child pornography. In particular, it notes, the laptop computer containing the offending material, which was password protected and located in Folly's bedroom, was, in fact, owned by him.

It argues, however, that the Department's investigation should not have stopped there. Instead, it avers, with a crime of this magnitude, the detectives had a responsibility to rule out the alternatives. Yet, they failed to do so.

It stresses in this regard that if the detectives had spoken to the other residents of the home, they would have learned several key facts. These include: (1) Folly did not spend much time at the home; (2) the other family members residing and regularly visiting there, including a niece and three nephews, had access to and frequently used Folly's laptop computer; (3) he password protected the computer to prevent his niece from accessing porn sites; and (4) despite taking this action, he freely shared the password with his family members, so they could continue to access the computer.

In sum, it avers, these facts demonstrate that someone other than Folly, such as a niece or nephew, could have been responsible for downloading the child pornography at issue here. Indeed, it stresses, this possibility led the judge at Folly's criminal charge in January 2022 to find him not guilty.

As such, it contends, even if the Department could be excused for failing in 2017 to rule out the possibility that someone other than Folly had used the laptop computer to download child pornography, the same was no longer true following his 2022 acquittal. Instead, it asserts, the Department had a renewed responsibility to investigate and resolve this alternate possibility.

The City, it maintains, cannot escape its neglect in this regard, by citing Folly's failure to identify others who may have been responsible for the child pornography found on the laptop. Indeed, it stresses, he had a Constitutional right to remain silent in the face of the charges against him. The responsibility for investigating and proving the charges lodged against him rested solely with the City.

Finally, citing ██████████ and Jamar Folly's testimony, it asserts that prior to the instant charges, Folly had spent years building a reputation for being law abiding and

truthful, facts that should be weighed here. Quoting the court in *Commonwealth v. Nealy*, 522 Pa. 236 (1989), it states: “Often a person takes a lifetime to build his or her reputation, and when the dark clouds of life gather, one’s reputation may be all that one has to ward off the impending downpour, and at that moment, it may be the only beacon of truth. Truth is reputation’s reward.”

Accordingly, for these reasons, the Union asserts that its grievance should be granted and the requested relief awarded.

Opinion

The City’s Police Department, no doubt, has a right to expect that its officers will conform to certain standards of conduct. In this regard, the Department’s officers have an obligation to adhere strictly to the laws of the Commonwealth that they have sworn to uphold and refrain from engaging in criminal conduct.

When this responsibility is breached, especially with the commission of a crime as egregious as possessing child pornography, the Department’s mission is gravely undermined by the resulting breach of the public trust. For this reason, the offending officer can and should expect that his/her transgression places his/her continued employment in jeopardy.

The parties have confirmed these standards by incorporating the Department’s Disciplinary Code into their collective bargaining agreement. (Joint Exhibit 1.) As such, officers who breach the Department’s trust by violating any of the provisions of the Disciplinary Code are subject to discipline in accordance with its terms. In the case of Conduct Unbecoming per Section 1-§026-10 of the Code, as charged here, the prescribed penalty is a thirty-day suspension or dismissal for a first offense. (Joint Exhibit 1.)

When charging an officer with violating the Disciplinary Code, it is the City that carries the burden of proof. It must demonstrate with sufficient certainty that the officer committed the charged offense. It must also establish that the level of discipline imposed is appropriate.

The Union, on the other hand, has no corresponding burden. As such, it need not disprove the charges proffered against Folly. Indeed, he is entitled to a presumption of innocence.

After a careful and thorough review of the record and the parties' respective arguments, I am convinced that the City has met its burden of establishing that it had just cause to discharge Folly. My reasons for this conclusion follow.

The City's case against Folly turns on its ability to demonstrate that he, in fact, was the person, who downloaded the child pornography found on his laptop computer.¹²

In reviewing the record, it is plain that the City's lacks direct proof to that effect. Indeed, there is no confirming eyewitness testimony. Nor is there physical evidence, such as a digital fingerprint, conclusively identifying Folly as the user who performed all of the searches identified in Ares that produced the child pornography downloads with which he has been charged. Instead, the forensic evidence assembled by RCFL demonstrates a linkage only between the laptop computer and the Ares account used to perform the identified searches.¹³

¹² The charges against Folly also cite his unauthorized use of an unsanctioned body-worn camera while on duty. Although not in dispute, Folly's actions in that regard do not warrant detailed analysis, inasmuch as I do not find them to rise to a level that would provide just cause for his discharge. Instead, as the parties' respective arguments make clear, the focus here must be on whether he is guilty of the charge of downloading and possessing child pornography.

¹³ As noted above, these facts are not in question. It stands undisputed that Folly's laptop was used to search for and download child pornography through Ares, some of which remained stored on the computer when examined by RCFL. Indeed, the Union concedes as much. In contesting the charges, it asserts only

As such, it is apparent that the City's evidence is circumstantial. This fact alone, however, is not fatal to its case. Indeed, in disciplinary cases, it is not uncommon for arbitrators to be faced with deciding whether a grievant committed the charged misconduct when nothing more than circumstantial evidence exists. In such cases, the determination to be made is whether through close reasoning by inference, the circumstantial evidence weaves a sufficiently tight factual web to substantiate the grievant's guilt of the charged misconduct. I am persuaded that such is the case here.

Beyond substantiating the presence of multiple files on the laptop containing child pornography downloaded through Ares, the Department's investigation, established several other critical facts. These include: (1) Folly owned the laptop, which was found in his bedroom; (2) access to the laptop required a password that Folly possessed; (3) the laptop contained data demonstrating its use by Folly; (4) the laptop contained files that Folly would reasonably want to maintain as private, such as videos of him engaging in sex with different partners, as well as police materials; and (5) the laptop did not contain any files or other material suggesting that it had been used by other persons, including minors.

In sum, these facts serve to demonstrate that Folly had exclusive possession and control of the laptop. As such, absent conflicting evidence, they weave the tight factual web required to substantiate that Folly was responsible for downloading and, in turn, possessing the child pornography found on the computer.

The Union maintains, however, that the record undermines such inferential reasoning and thereby precludes a finding of Folly's guilt. Simply put, it asserts, the

that Folly was not the person responsible for downloading the child pornography found on the laptop computer.

evidence shows that multiple persons regularly used the laptop, including Folly's nieces, nephews and brothers. For this reason, it concludes, unresolved doubt necessarily exists as to who was responsible for downloading the child pornography found on the laptop.

In addressing the Union's multiple users defense, I take note that it rests on Folly's testimony. No forensic evidence was offered. Indeed, the City's contrary account based upon RCFL's analysis of the laptop stands un rebutted.

Folly is, to be sure, entitled to the presumption of innocence. The presumption, however, does not compel me to accept his assertions in this regard at face value. Instead, the veracity of his claim must be tested.

In doing so, I find it lacks the ring of truth. To the contrary, it suffers from such logical flaws that I am compelled to reject it.

Simply put, crediting Folly's testimony that the laptop computer had multiple users necessitates there being a plausible and consistent explanation for his installation of a password restricting access to the device. On review, I am compelled to conclude such justification is lacking, as his efforts to demonstrate otherwise were woefully deficient.

By the account proffered, Folly averred installing the password in response to his niece having used the laptop to access pornographic websites. Yet, in an apparent effort to substantiate his claim of multiple users, he conceded sharing the password shortly thereafter with his niece, as well as his nephews, brothers and others.

It simply defies belief that having installed the password out of concern for his then 12-year-old niece accessing pornography on the internet, he would have turned around and handed her the key to resume doing so, by giving her the password.¹⁴

¹⁴ I also note that his passive act of installing a password on the laptop is hardly in keeping with his expressed concern for his niece's well being. If he actually feared she had been accessing pornographic

Moreover, if his objective was to restrict his minor niece and nephews from accessing pornographic websites, while allowing them and other family members unfettered access to the laptop, as he maintains, he had far better options than installing a password. Use of the laptop's parental controls would have been one such method of doing so. He offered no explanation for choosing the alternative of a password, even though it conflicted with his purported objective.

As such, this obvious inconsistency in his stated explanation for installing a password on his laptop causes me to reject it as lacking in credibility.¹⁵ Consequently, I am compelled to conclude that he acted instead for the purpose commonly associated with computer passwords. Namely, he did so to prevent others from accessing the laptop, thereby belying his claim that multiple persons used the device. This determination is further bolstered by his admitted use of the laptop to store other materials that he would not want viewed by his family members, including videos of him engaging in sex, footage recorded by a body camera while on duty and police documents and materials.

Folly's credibility, I am convinced, is also seriously undermined by his effort to blame his nephew for the child pornography found on the laptop, while failing to provide reportedly available evidence to substantiate that claim.

I recognize that an individual may forego taking a path to exoneration from criminal, or in this case Departmental, charges, where doing so would place an immediate relative or close friend in legal jeopardy. Plainly, however, such motivation cannot

web sites, as he claims, he surely would have responded in a proactive manner so as to address his reported apprehension, such as by speaking with his niece or informing her parents. Yet, he admittedly took no such steps.

¹⁵ Folly's ██████ ██████ offered a similar account regarding Folly's reason for installing the password, as well as his subsequent sharing of the password with all of his family members. Inasmuch as his brother's testimony in this regard suffers from the same logical flaws that I have identified above, it follows that it, too, must be rejected as lacking credibility.

explain Folly's failure to supply the necessary proof. Indeed, he affirmatively chose to point the accusatory finger at his nephew.¹⁶

Further, by his own account, his mother and niece, who purportedly possess the substantiating information, already shared it with SVU detectives or were at least willing to do so. In addition, he expressed no reservation with their making such disclosure. Yet, he did not have them appear as witnesses at the hearing in this matter so as to provide such exculpatory evidence. Nor was any explanation offered for his failure to do so.

Under these circumstances, it is reasonable for me to conclude that if called to testify, Folly's mother and niece would not have corroborated his assertion regarding his nephew's culpability or would have provided evidence contrary to Folly's interests.¹⁷

Accordingly, for these reasons, I am satisfied that the record here substantiates to a reasonable certainty that Folly, as charged, is guilty of downloading and possessing the child pornography found on his laptop computer.¹⁸

As such, there remains only the question of whether discharge represents the appropriate disciplinary response to his proven misconduct. I am satisfied that the answer is an unquestionable yes.

¹⁶ As set forth above, Folly made this assertion while testifying on cross-examination.

¹⁷ This finding does not shift the burden of proof from the City to the Union or Folly. Instead, it simply applies a well-recognized evidentiary principle known as an adverse inference. Namely, when a party makes an assertion bearing on a material fact, but then fails to present confirming testimonial or documentary evidence within his/her control, it follows that such evidence does not exist or alternatively would be contrary to such party's interests.

¹⁸ In reaching this decision, I have considered the character evidence presented, attesting to Folly's reputation as a law abiding and truthful person. It does not, however, undercut my finding that he committed the charged misconduct. Indeed, it is not uncommon for persons engaging in such aberrant behavior to do so in the shadows, thereby concealing their misdeeds from even those who know them best and, in turn, preserving what may otherwise be a sterling public reputation.

Child pornography is a scourge on our society, which victimizes its most vulnerable members. Plainly, those who traffic in producing and distributing child pornography, as well as those who support those acts by possessing and sharing the images produced, are guilty of horrific crimes. Consequently, possession of child pornography by a police officer is without question the type of felonious conduct that warrants the most severe discipline applicable for a proven violation of Department Disciplinary Code Section 1-§026-10; namely, dismissal. Indeed, such gross misconduct by an officer undermines the public trust that is essential to the Department's fulfillment of its mission.

For these reasons, I am satisfied that the penalty of dismissal was warranted here.

AWARD

1. The City had just cause to discharge Police Officer Emanuel Folly, effective May 22, 2017.
2. The grievance is denied.

January 11, 2023



David J. Reilly, Esq.
Arbitrator

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

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.

January 11, 2023



David J. Reilly, Esq.
Arbitrator