AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration	
between	AAA Case No. 01-19-0003-1624
FRATERNAL ORDER OF POLICE, LODGE NO. 5,	Opinion & Award
"Union"	Re: Corporal Thomas Young - Discharge
- and -	Hearing: June 13, 2022 and July 29, 2022
CITY OF PHILADELPHIA	
"City"	

APPEARANCES

For the Union

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

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Frank E. Wehr II, Divisional Deputy City Solicitor

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The City, pursuant to a Commissioner's Direct Action ("CDA"), decided to discharge Corporal Thomas Young, effective July 19, 2019.[1] This action represented the City's response to thirteen Facebook posts/comments that he had made during 2012 - 2018, which it learned of in 2019 though the Plain View Project.

The City determined that these posts violated the Department's 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/comments "displayed a course of conduct… using racial slurs, profanity, dehumanizing, defamatory and/or discriminatory language, and/or language that condoned, glorified or encouraged violence, and/or language that was insensitive and mocked individuals, due process, and the criminal justice system." (Joint Exhibit 5.)

The Union contends the City lacked just cause to discharge Young. 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.

---

[1] The Department did not deliver the CDA and the underlying charges to Young due to his retirement on July 19, 2019, prior to his scheduled *Gniotek* hearing. (Joint Exhibits 5 & 17.) Instead, it placed these documents in his personnel file, along with a memorandum titled "Pending Disciplinary Charges," which states, "If this Employee is ever returned to duty, this will be processed." (Joint Exhibit 2.)

Young's Employment History

At the time of his discharge, Young had completed approximately thirty years of service with the Department. (Tr. II: 5.)[2]

In 2001, the Department promoted him to Corporal, which rank he held at all relevant times for purposes of this matter. (Tr. II: 6.) As a Corporal, he had responsibility for managing the District's operations room and supervising a staff of four – seven officers. (Tr. II: 8.) His duties also required him to interact regularly with the public. (Tr. II: 8-9.)

With his elevation to Corporal, the Department assigned him to the 22nd District. In or about 2004, he returned to the 6th District, where he had been assigned during his first twelve years with the Department. He remained there until his 2015 transfer to PCIC. (Tr. II: 6.)

In testifying, Union Vice President John McGrody described the 6th District as one of the most diverse Districts in the City, and possibly, the country. (Tr. II: 126.) The District's residents, he noted, represent varied racial and ethnic groups and include a substantial LGBTQ community. (Tr. II: 127-128.)

Throughout his tenure with the Department, Young received annual evaluations from his superior officers rating his performance as satisfactory, which also included comments reflecting positively on his service. (Joint Exhibit 18.)[3] In addition, the

---

[2] References to the transcript of the June13, 2022 and July 29, 2022 hearings in this case will be designated as "Tr." followed by the applicable volume and page number. The June 13, 2022 and July 29, 2022 transcripts will be identified as volumes I and II, respectively.

[3] Most recently, in 2017, his rating officer commented: "You are knowledgeable and demonstrate a professional demeanor at all times. You have a great rapport with your co-workers. As I have stated all along I can't accomplish the goals of this operation without you. Tommy keep up the good work." (Joint Exhibit 18.) Other rating officers commended his leadership, strict adherence to procedure and setting an example for subordinates. (Joint Exhibit 18.) [redacted] referencing his work experience with Young,

Department awarded him numerous commendations for his actions on the job, including for his bravery and heroism. (Joint Exhibit 19.)[4]

He has no record of recent prior discipline. In testifying, he related having one reprimand, which was issued in or about 2006. The discipline, he said, was unrelated to social media or unprofessional or inappropriate conduct. He stated further that he has never been counseled, formally or informally, regarding his social media use. (Tr. II: 9-10.)

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 7.) 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 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 7.)

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.

---

described him as an "all around police officer" who was well respected by the command staff, his fellow officers and the local community. (Tr. II: 125-126.)

[4] Young's personnel file includes commendations for bravery heroism and merit, as well as letters of appreciation from members of the public. (Joint Exhibit 19.)

(Joint Exhibit 7.)

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 7.) 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 7.)[5]

The Directive also instructs:

> 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 7.)

In his testimony, Young acknowledged being aware of Department Directive 6.10 following its adoption in or about May 2011. (Tr. II: 15-16.) The Directive, he related, was distributed at roll call without much explanation. (Tr. II: 17-18.) 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/comments at issue here. (Tr. II: 16.) This training, he recalled, included instructions against improper

[5] The Department added these specific prohibitions when it updated the Directive as of July 6, 2012. (Joint Exhibit 7.)

social media postings, while allowing for First Amendment protected content. (Tr. II: 16-17.)[6]

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 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 16.)

Internal Affairs Division ("IAD") Investigation

Deputy Commissioner Robin Wimberly testified that the Department first learned of the Plain View Project in early Spring 2019. (Tr. I: 70.) At that time, she said, a

---

[6] In a prior arbitration between the City and the Union, Staff Inspector Fran Healy testified that this training was conducted in Summer 2019 after the public release 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 12.)

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 did not include Young. (Tr. I: 70.) Copies of the referenced posts, she said, were not provided.

Several months later, she related, the Plain View Project released a public database containing all of the offending social media posts that it had compiled, which included the online activity of approximately 325 officers of the Department. (Tr. I: 70-72.) As a consequence, she said, the Department's Internal Affairs Division ("IAD") commenced an investigation of each of the identified officers for Facebook posts possibly violative of Department Directive 6.10.

In his testimony, [REDACTED], an IAD investigator, confirmed being assigned to investigate Young, among other officers, in response to the Plain View Project database. (Tr. I: 35.) Describing his investigative process, he recounted following a common practice in interviewing each officer, including Young. In particular, he said, Young was shown all of the Facebook postings attributed to him by the Plain View Project and asked to confirm he authored each one, which he did. (Tr. I: 38-39; Joint Exhibit 6.)[7]

Young, he stated, was not questioned as to the reason for any of the posts or asked to explain them. The investigation, he said, also did not involve a review of Young's Facebook account or the links to any of the articles, videos or photographs included in Young's posts/comments at issue here. (Tr. I: 36-37.)

[7] According to the IAD Report, [REDACTED] showed Young 21 Facebook posts or comments attributed to him by the Plain View Project. (Joint Exhibit 6.) Deputy Commissioner [REDACTED] confirmed that this investigative process was followed with all of the Police Officers implicated by the Plain View Project. (Tr. I: 72-73.)

Following the completion of the Young's interview, he confirmed submitting his investigative report through the chain of command. (Tr. I: 37.) Ultimately, he said, it was determined that certain of Young's posts were found to have violated the Department's Social Media Policy. (Tr. I: 40; Joint Exhibit 6.)[8]

Young's Discharge

Deputy Commissioner Wimberly, 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. (Tr. I: 71, 98.) 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. (Tr. I: 71-72.) In addition, she averred, the matter produced substantial negative media coverage of the Department and adversely affected morale among the Department's officers, who are representative of a high degree of diversity. (Tr. I: 98).

In response, she recounted attending community meetings with then Commissioner [redacted] [redacted] to hear and address the public's concerns. (Tr. I: 71.)

Addressing the IAD investigations of the 325 officers implicated by 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 posts constituted constitutionally protected speech. All posts found protected, she said, were disregarded for disciplinary purposes. (Tr. I: 72.)[9]

---

[8] On cross-examination, Saba reported having no knowledge as to which of Young's posts were found to be violative of the Department's Social Media Policy. (Tr. I: 58.)

[9] Deputy Commissioner [redacted] also stated that any posts made prior to the adoption of the Department's Social Media Policy were not considered in assessing discipline. (Tr. I: 72.)

Of the remainder, she averred, the "most egregious" cases were referred to then Commissioner Richard Ross and his executive team for review.[10] Included among these, she said, were thirteen of Young's posts/comments. (Joint Exhibit 13.)

These posts/comments, which Young made between July 9, 2012 and February 24, 2018,[11] consist of the following:

1. **February 8, 2014.** Young commented "Ban Islam from all Western Nations" in response to a post by Michael Bottum, another member of the Department. Bottum's post included a photograph depicting a group of men wearing Middle-Eastern attire standing in front of a burning American flag, which is captioned: "Happy Ramadan from Salaam Mosque Detroit! Greetings from the religion of peace to all of America. Convert or die." In addition, below the photograph, the following quote appears: "The future must not belong to those who slander the prophet of Islam." Barrack Hussein Obama. Finally, Bottum wrote, "What a Disgrace this Guy is!! Lets (sic.) hear your Thoughts…???"

2. **June 14, 2016.** The original post consisted of photograph with a link to freedomdaily.com, labeled "Muslim terrorist kills French Police Chief and wife while livestreaming on Facebook – "Allahu…" In response, Young commented, "Ah, where ever Islam goes it brings peace and happiness. NOT!!"

3. **June 18, 2013.** In this post, Young provided a link to conservativepapers.com, which is captioned, "Muslim Refugees, Yes – Persecuted Christians – Christians are in imminent danger across the world, and..." and included a photograph of several men holding a boy while another individual strikes him with a stick. The post also contained Young's comment, "Islam on the march."

4. **July 30, 2017.** In this post, Young commented, "I hope the people of the West wake up to this Islamic invasion before it['s] too late." This statement responded to a post by Laszlo Zsazados, which included a photograph of the ruins of a medieval castle with the notation that it had been built to shelter people against the Ottoman Empire invasions.

5. **November 13, 2015.** Young's comment here relates to another post by Michael Bottum, in which he first referenced, "Another terrorist attack in Paris … 30 dead so far … I wonder if the religion of peace is responsible???"

---

[10] In addition to the executive team included Deputy Commissioners and (Tr. I: 76.)

[11] One post is dated February 24 without reference to a year. It was represented that any post without a year relates to 2018.

and later remarked, "You sow what you reap … France let these animals in …. This is all coming to a city near you …." In the immediately following comment, Young replied, "Hey they're letting [them] in here too." And in a response to a comment regarding President Obama, he also wrote, "Treasonous POS."

6. **December 2, 2015.** Here, Bottum posted, "It appears that the religion of peace is responsible for the most recent mass shooting in San Bernardino, CA." In reply, Young commented, "That pesky Religion of Peace always up to something."

7. **May 10, 2014.** Responding to a post by William Sperber, Young commented, "Ban Islam from our country." Sperber's post included a link to toprightnews.com captioned, "300 Somali Terrorists Who Crossed the Boarder Still At Large Inside the U.S.," along with a video depicting a man in Middle-Eastern attire and a subtitle that reads, "are guaranteed to kill 330,000 Americans in a single hour."

8. **January 23, 2016.** Commenting on another Zsazados post, Young questioned, "Why are we allowing these savages into America?" Zsazados' post shared a video with a warning label that it may contain violent or graphic content. It also included his statements: "If anyone tries to tell you that all cultures are equal and diversity and all – just take a look. I reject this culture!!!!!!!!" and "This is the culture they are importing to the USA for the last 20 years. European immigration is almost non-existent anymore to America. All third world, so called diversity and cultural experience you need."

9. **June 19, 2016.** Responding to a post by Bottum that the "gay community is buying more firearms for protection…," Young remarked, "Protect us, under this president they are working against us importing thousands of Muslims into our country."

10. **July 12, 2015.** The post, which was initiated by Bottum, includes a linked video from 800whistleblower.com, captioned, "Homosexuals Throw Human Excrement At Christians, And Wipe Their Anuses With Pages of the Bible." In reply, Young wrote: "Liberalism is truly a mental disorder." Then, in an exchange with another commenter, he related, "Ed as a cop I've had the misfortune to [be] detailed to events like this. I'm sure Michael G. Bottum had the misfortune over his career. . . . Dude my point was that even if you are right. I've been to similar events held in Philly."

11. **December 20, 2017.** The post, originated by Zsazados, contains an embedded video with a violent/graphic content warning label, followed by an annotation, "Police officers broke this man's leg after a traffic stop turned into a scuffle."

Young, in turn, commented, "Don't resist arrest."

12. **February 24, 2018.**[12] The post, which was also initiated by Zsazados, includes a video of law enforcement responding to an Antifa protest, as to which Zsazados remarked, "Way to go Italian Police, this is how it's always been done!!!" In the succeeding comments, Young noted, "I can already hear the Libs crying."

13. **July 9, 2012.** The post, another by Zsazados, includes a link to an article from officer.com with the headline, "Border Patrol Agent Dies Following ATV Crash," along with Zsazados' explanation, "My son just called me about this border patrol agent in El Paso. The agent died on duty on his all terrain vehicle in the desert." In response, Young submitted two comments: (1) "I see what they done to our department since we started and could cry. We can't even clear a corner of drug dealers without calling for a supervisor. [H]ow are they going to address shootings. All the thug has to do is complain that the cop looked at him sternly or god forbid talked harshly and there is a major investigation;" and (2) "You're right the political hacks have taken over and the thugs know it. We are a shadow of our former selves. At one time for better or worse the bad guys were afraid of us. Now they know the pendulum has swung in their direction and because of politics we are rendered completely ineffectual."

(Joint Exhibit 13.)

According to [redacted] the Commissioner's executive team determined that these posts/comments by Young constituted egregious violations of Directive 6.10, as they exhibited bigotry, racism, and promoted violence. In particular, she highlighted: (1) several of the posts exhibited anti-Islam bias, by suggesting Muslims are violent terrorists, calling for a ban on the religion and a bar to Muslims entering the country and mocking and dehumanizing Muslims; (2) others advocated violent responses and/or the use of excessive force by law enforcement, such as when responding to protests and resistance in effectuating an arrest following a traffic stop; and (3) one reflected racism, in that it included the racial pejorative term "thug." (Tr. I: 78-98.)

[12] *See* note 11, *infra.*

For these offenses, she said, the executive team determined, consistent with the Department's Disciplinary Code, that dismissal was the appropriate response. (Tr. I: 98-99.)[13]

Adopting this recommendation, then Commissioner Ross signed a Commissioner's Direct Action ("CDA") providing for Young's discharge, as opposed to proceeding through a Police Board of Inquiry. (Joint Exhibit 17.)

Explaining the procedure once a CDA is signed, Deputy Commissioner [REDACTED] related that the assigned IAD investigator notifies the affected officer's commanding officer and the Union of the discipline to be imposed and then schedules a *Gniotek* hearing. (Tr. I: 99-100.) At the hearing, she said, the officer is issued the charges and provided the notice of discipline. In the case of a discharge, she averred, the officer receives a thirty-day suspension with intent to dismiss. (Tr. I: 100.) According to Deputy Commissioner [REDACTED] in virtually all cases, the officer is ultimately discharged upon completion of the thirty-day suspension. (Tr. I: 100).

Sergeant [REDACTED] confirmed scheduling Young for a *Gniotek* hearing on July 19, 2019, in order to issue him the charges and the notice of intent to dismiss. (Tr. I: 44-45; Joint Exhibit 5.) The hearing, he recalled, did not occur because Young elected to retire. (Tr. I: 45; Joint Exhibits 9-11.)

---

[13] Dr. [REDACTED] [REDACTED] a Department Chaplain and Temple University professor, also testified for the City, addressing the impact of Young's posts on the public trust. He related that the posts highlighted anti-Muslim stereotypes, by identifying them as aggressive and destructive, and referring to them as outsiders. (Tr. I: 196-202.) Young's posts, he said, also dehumanized Muslims by comparing them to animals and commodities to be imported or sent back. (Tr. II: 199-205.) Other of Young's posts, he said, expressed xenophobia, anti-LGBTQ sentiments, racism and support for the use of excessive force against persons perceived to be different. (Tr. I: 210-228.) According to Dr. [REDACTED] he would be afraid to be stopped by an officer possessing such intense bias. (Tr. I: 229-230.)

Union Vice President [redacted] testified that in or about July 2019, Commissioner Ross informed him of the Department's decision regarding the imposition of discipline relative to the Plain View Project's disclosures, which included the discharge of approximately fifteen officers. (Tr. II: 132-133.) In response, he reported notifying each of the officers identified for discharge, including Young. (Tr. II: 132.)

In his testimony, Young confirmed being informed by the Union on or about July 18, 2019 of his discharge, as to which he was to receive formal notice the following day. (Tr. II: 52-53.) He reported further being advised by the Union that he could retire and grieve his discharge. (Tr. II: 53.) Although not planning to retire until his scheduled "DROP" date, December 31, 2021, he averred doing so to avoid the financial consequences of being discharged with a loss of salary and benefits. (Tr. II: 53-54.)

Young's Testimony Regarding His Facebook Posts

In testifying, Young reported establishing a Facebook account in or about 2011. (Tr. II: 13-14) He related using the account to stay in touch with friends, former colleagues and co-workers. (Tr. II: 14). According to Young, he understood that his account's privacy setting allowed only his designated friends to view his postings. (Tr. II: 14.)[14]

Addressing the thirteen Facebook posts for which he was discharged,[15] Young stated:

(1) **February 8, 2014** - He confirmed responding to fellow officer Bottum's post by commenting "Ban Islam from all Western Nations," but stated he intended to limit his remark to "Radical Islam." He

[14] Young expressed a belief that Facebook granted the Plain View Project special access that allowed it to view his postings despite not being one of his recognized "friends." He acknowledged not having any evidence to substantiate this claim. (Tr. II: 63-64.)

[15] According to Young, he did not learn of the specific Facebook posts triggering his discharge until sometime after July 19, 2019. (Tr. II: 24.)

explained that Department-provided training regarding "Radical Islam" had caused him to be concerned with non-vetted persons being granted access to the country.

(2) **June 14, 2016 –** He related that his comment regarding Islam not bringing peace and happiness represented sarcasm, which was intended as a joke for Zsazados, a friend and former officer.

(3) **June 18, 2013** – He expressed uncertainty as to whether he authored the words "Islam on the march," or whether instead, they were contained in the link he posted to conservativepapers.com. In explaining this posting, he recalled being concerned with the content of the linked article, which reported that radical Muslims were routinely beating up fellow refugee camp occupants for being Christians or followers of other religions.

(4) **July 30, 2017 –** He averred that his comment regarding an Islamic invasion referred to the acts of "radical Muslims" removing buildings and cultural symbols that pre-dated their "take over" of countries such as Afghanistan. Referencing the photograph included in Zsazados' post, he expressed the belief that it was the ruin of a Christian castle that was "taken down" by "radical Muslims."

(5) **November 13, 2015** – He testified that his comment "they're letting them in here too," related to the content of the article shared by Bottum, which reported that the federal government was granting entry to unvetted persons, who had not been shown to be non-terrorists. He denied that his comment expressed agreement with the characterization of Muslims as animals. According to Young, his further comment, "Treasonous POS," referred to government officials who would grant non-vetted persons entry into the country.

(6) **December 2, 2015 –** He understood Bottum's post as referencing a mass shooting by a radical Muslim couple in San Bernardino, California due to their outrage over a Christmas/Hanukkah party being held in a county workplace**.** His comment regarding that "pesky Religion of Peace," he explained, was intended as a joke directed to Bottum.

(7) **May 10, 2014** – He identified the poster, William Sperber, as a former police officer and acquaintance. Addressing his comment, "Ban Islam from our country," he expressed that it was limited to "radical Islam."

(8) **January 23, 2016 –** He recalled that the video posted by Zsazados depicted the stoning of a pregnant woman by a group of men**,** which may have occurred in Pakistan**.** According to Young, the men were

dressed in “Middle Eastern garb,” but he was not aware whether they were Muslims. He explained that his use of the term “these savages” was a reference to “radical Islamists.”

(9) **June 19, 2016** – In regard to his comment, “protect us, under this president they are working against us importing thousands of Muslims into our country,” he averred that “us” referred to all Americans.

(10) **July 12, 2015 –** He noted: (1) the comment “Liberalism is truly a mental disorder” represented a slogan from a radio program and was intended as a joke for Bottum**;** and (2) his reference to having the misfortune of being detailed to events of the type referenced in Bottum’s post was not intended to convey his objection to protecting certain groups, but rather his general dislike for parade/special event details and desire not to work a detail where such behavior occurred (i.e., throwing human excrement”).

(11) **December 20, 2017 –** He recalled that the video posted by Zsazados showed a traffic stop during which the driver jumped out of his vehicle and started fighting with police. His comment, “don’t resist arrest,” he explained, simply meant, “don’t get out of the car and fight the police. Just comply, give them your license and there wouldn’t be an issue at all.” According to Young, he did not intend to be “flip” about the incident or condone the use of excessive force. Instead, he noted, “if you engage the police in a fight, the cops might be injured or you might be injured.”

(12) **February 24, 2018 –** The video posted by Zsazados, he related, depicted protesters in Rome vandalizing property, followed by the police “swooping in” and promptly arresting them**.** His comment, “I can already here the libs crying,” he said, was intended as a joke for Bottum, expressing that some people might be upset by the Italian police not allowing the protest to continue. He did not recall that the video showed any violence, nor did he intend his comment to encourage or celebrate violence.

(13) **July 9, 2012** – He averred understanding the term “thug” to refer to a violent street level criminal, and expressed his disagreement that it is a racially derogatory reference to African- American men. He recalled hearing the term used by the Commissioner and by actors in old-time gangster movies. He also noted that the posted article, which concerned the death of a border patrol agent in an ATV accident, did not involve any persons of color. Finally, he expressed being uncertain whether he had received the July 2012 revision to Directive 6.10 before posting these comments.

Young stated that while he still maintains a Facebook account, he no longer uses it other than to check a birthday. Referencing the posts at issue here, he stated, "As a whole if I could do things over, I would never have joined Facebook. It cost me my job, a job I loved, obviously this wasn't worth everything I lost."

Procedural History

On August 15, 2019, the Union filed the instant grievance contesting Young's discharge. (Joint Exhibit 3.) When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. (Joint Exhibit 4.) 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 June 13, 2022, and continuing on July 29, 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 July 29, 2022 hearing, the parties elected to close by submitting post-hearing briefs. Following receipt of those briefs, I declared the hearing record closed as of December 3, 2022.

DISCUSSION AND FINDINGS

The Issue:

The issues presented and/or stipulated by the parties to be decided here are as follows:

1. Is the grievance arbitrable?

2. If so, did the City have just cause to discharge Corporal Thomas Young, effective July 19, 2019?

3. And, if not, what shall be the remedy?

Positions of the Parties

Both parties filed extensive post-hearing briefs. Their respective positions are summarized below.

City's Position.

Arbitrability. Addressing the preliminary or threshold issue of arbitrability, the City maintains that the instant grievance should be dismissed as not arbitrable for several reasons.

First, the City states, the grievance fails because it contests Young's discharge, which never occurred. Young's separation of employment, it asserts, arose from his voluntary retirement and not a dismissal by the Department.

As such, it concludes, the grievance is a nullity and not arbitrable. The Agreement, it asserts, does not permit grievances, and, in turn, arbitral review of prospective or potential actions. The plain language of the Agreement, it stresses, makes this intent clear, inasmuch as it states in Article XXI(A) that a grievance contesting a suspension or discharge must be filed "within thirty (30) days ***after*** the Grievant/FOP is notified of the suspension or discharge…." (Joint Exhibit 1 at 76.) By this provision, it reasons, the grievance procedure is not triggered by notice of an intent to dismiss, but rather, the actual imposition of discipline, which did not occur here.

To hold otherwise, it asserts, would allow the Union to bring premature challenges to actions not yet taken. Stated otherwise, such construction of the Agreement

would deny the City the opportunity to complete the disciplinary process before being forced to defend its decision through the grievance and arbitration procedure.[16]

The governing Civil Regulations, it states, buttress this conclusion as to when a discharge occurs, and, in turn, when such action becomes ripe for challenge through the grievance and arbitration procedure. It highlights in this regard that the Regulations require that before such action is taken, the employee must receive notification of the intention to dismiss, so as to allow him/her an opportunity to be heard and prevent his/her discharge. CSR 17.01. For this reason, it states, as of Young's July 19, 2019 retirement, it was legally barred from implementing his discharge and retained the right to alter that decision.

Second, it points out, to the extent the Union seeks to challenge Young's retirement, the instant grievance fails to present such a claim. As written, it notes, the grievance challenges Young's dismissal. As such, it reasons, the Union is barred from unilaterally expanding the scope of the grievance to include Young's retirement. Instead, it concludes, the Union is confined to the issue stated in the grievance, as filed. *See City of Philadelphia v. Fraternal Order of Police Lodge No. 5,* 564 Pa. 290, 296 (2001) (held grievance contesting a failure to promote grievants to rank of staff inspector could not be expanded by the union to assert an claim of underpayment for performance of staff inspector duties).

---

[16] By analogy, it cites as support for this position, the Pennsylvania Labor Board's rejection of charges asserting violations that have not actually occurred. In particular, it notes, the Board refuses to consider a "failure to bargain" charge where the alleged unlawful action has been merely proposed. *See Assoc. of Pa. State College and Univ. Faculties v. Pa. Labor Relations Board,* 2009 WL 8173486 *5 (Pa. Commw., Oct. 22, 2009) (affirmed dismissal of charge, noting "[T]he mere announcement and subsequent approval of a policy change is not tantamount to its implementation.").

In sum, it avers, the Union is limited to contesting Young's dismissal, which is barred because Young was never discharged.

Finally, it submits, even if the Union had explicitly challenged Young's retirement as improper discipline, the outcome would be the same. The Agreement, it points out, expressly limits grievable discipline to suspensions, demotions and dismissals. It makes no provision for contesting a retirement as being discipline.

The Union's past efforts to expand the scope of the term "discipline," it avers, have failed. *See City of Philadelphia v. Fraternal Order of Police Lodge No. 5,* 181 A.3d 485, 493 (Pa. Commw. 2018) ("suspension[s], demotion[s] or dismissal[s] are the only disciplinary actions reviewable under the CBA."); *Fraternal Order of Police Lodge No. 5 -and- City of Philadelphia,* AAA Case No. 01-18-0004-7308 at 12-13 (Buchheit 2021) ("the only type of disciplinary acts explicitly referenced in the definition of 'grievances' set forth in Article XXI of the CBA are 'suspensions, demotions and discharges.").

In sum, it submits, with Young having never been discharged, and his retirement not being grievable, the grievance must be dismissed as not arbitrable.

Merits. Alternatively, the City contends, if Young's voluntary retirement is deemed to be an arbitrable dismissal, the grievance should nonetheless be denied, because it had just cause to discharge him. It maintains that the evidence conclusively demonstrates that he violated Department Disciplinary Code Sections 1-§021-10 and 5-§011-10, by the thirteen identified Facebook posts/comments, which contravened the Department's Social Media Policy set forth in Directive 6.10. These inflammatory posts/comments, it stresses, vilified Muslims, celebrated extra-judicial violence and the use of excessive force by police and contained racial slurs. Such patently offensive

content, it states, demonstrates how little regard Young has for the communities and individuals he has sworn to protect and serve; his primary duty as a member of the Department.

The uncontroverted evidence presented, it asserts, satisfies the seven factors commonly considered in assessing just cause. These are: (1) the employee received notice of the prohibited conduct and the associated probable disciplinary response; (2) the work rule or managerial directive at issue is reasonably related to the orderly, efficient and safe operation of the employer's business and the employee's expected performance; (3) the employer conducted an investigation of the alleged misconduct; (4) such investigation was fair and objective; (5) substantial evidence exists substantiating the finding of misconduct; (6) the employer applied its rules, orders and penalties fairly and without discrimination to all employees; and (7) the discipline is proportional to the offense and the employee's record. *American Fed'n of State, County & Municipal Employees, District Council 88, AFL-CIO v. City of Reading,* 130 Pa. Cmwlth. 575, 582 n. 3 (1990).

In support of this assertion, it cites the following:

(1) The parties' Agreement contains a Disciplinary Code, which identifies proscribed conduct and the penalties applicable to violations of those expectations. Moreover, in particular, Young acknowledged being aware of the Department's Social Media Policy at all relevant times and his obligation to comply with its terms when engaging in social media activity. As updated in 2012, the policy prohibits "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 7.)

(2) The Department's Social Media Policy relates directly to the orderly, efficient and safe administration of law enforcement. More specifically, the Policy supports the Department's core values of

honor, service and integrity. (Joint Exhibit 1 at 152.) Citing Staff Inspector Fran Healy's prior testimony, it stresses, the relationship between the Department's mission and Directive 6.10 is beyond challenge in that off-duty conduct violative of the Policy "directly impact[s] [the Department's] ability to serve its mission…. The issue of trust and transparency with the community [the Department] serve[s] is obviously, paramount for what [it does]. Without the community's trust, [the Department] really can't do policing." (Joint Exhibit 12.)

(3) The evidence presented, which establishes that Young authored each of the offending posts/comments for which he was charged, satisfies factors 3 – 5. Sergeant [redacted] investigation by which this evidence was gathered bears the hallmarks of being thorough, fair and objective. Indeed, after affording Young ample time to review these materials, he secured Young's acknowledgement that he authored each of the posts/comments attributed to him by the Plain View Project. Moreover, there has been no showing of any bias by Sergeant Saba or any failures that would undermine the integrity of his investigation.

(4) In view of the egregious nature of Young's offense, termination represented a proportionate response. It is within the prescribed penalty range for a first offense for his established violation of Disciplinary Code Section 1-§021-10 Conduct Unbecoming – 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. Young's posts/comments were not misinterpreted, as he claims, but reflect clear and unambiguous hate speech, as well as endorsements of the use of excessive force by law enforcement against civilians. No basis exists to explain away or minimize the gravity of these repeated offenses. Further, his abject bigotry cannot be corrected through training and/or progressive discipline. As such, the Department should not be compelled to retain an officer, such as Young, who is so diametrically opposed to its mission. Indeed, discharge represented the only appropriate disciplinary response given the grave nature of his misconduct and the degree to which it undermined the community's trust in the Department.

(5) The Department applied its rules, directives and bargained-for Disciplinary Code fairly and without discrimination here in both issuing charges and determining the contested penalty. Indeed, the penalty of discharge was within the range prescribed by the Disciplinary Code for Young's admitted offense. The Union's attempt to show disparate treatment is unavailing, as critical distinctions exist between Young and the cited comparators. The offenses committed by

> these alleged comparators vary greatly from Young's in regard to the number and offensiveness of the posts/comments at issue.

Accordingly, for all these reasons, the City asks that the grievance be dismissed as not arbitrable, or in the alternative, denied on basis that it has satisfied its burden of demonstrating that Young was discharged for just cause.

Union's Position.

Arbitrability. Contrary to the City's claim, the Union maintains that the Department did, in fact, discharge Young, thus confirming that its grievance contesting that action is arbitrable under the plain language of the Agreement.

Under established law, it notes, the issue of arbitrability in public labor arbitration is a matter to be decided by the arbitrator, as opposed to the court. *Township of Sugarloaf v. Bowling,* 563 Pa. 237, 239, 241-242 (2000) ("The issue of whether a particular matter is arbitrable pursuant to Act 111 must first be submitted to the Arbitrator.").

The City, it argues, has not satisfied its heavy burden of proving the instant grievance is not arbitrable. In support, it highlights that the following stands uncontested: (1) the Agreement authorizes the Union to grieve unjust discipline, including suspensions and discharges; and (2) per that authority, it timely grieved Young's discharge.

Young's retirement before his formal receipt of a notice of dismissal or notice of suspension with intent to dismiss, it argues, does not undermine the arbitrability of the instant grievance. The Agreement, it explains, does not prescribe that such process must occur before a grievance can be filed challenging a discharge; nor does it otherwise define "discharge."

On the evidence presented, it asserts, there can be no doubt that the City discharged Young. In particular, it cites, the Department (1) drafted charges; (2) prepared and signed all the necessary documents to effect that decision, including the CDA; and (3) issued Young a *Gniotek* hearing notice for purposes of informing him of such decision and issuing him the requisite documents. Further, it references Deputy Commissioner Wimberly's testimony that there was nothing Young could have said at his *Gniotek* hearing that would have changed the decision to discharge him.

The argument advanced by the City in contesting arbitrability, it notes, has been rejected by at least one other arbitrator, under a similar circumstances. *See Fraternal Order of Police Lodge No. 5 -and- City of Philadelphia,* AAA Case No. 01-19-0002-2847 (Brown 2021) (*"McCammitt")* (held grievance arbitrable despite grievant's retirement prior to dismissal but after receipt of notice of suspension with intent to dismiss for violating the social media policy). The reasoning in *McCammitt,* it argues, calls for the same result on the record here, given the Commissioner's unequivocal notice to the FOP of his decision to discharge Young.

The practical realities surrounding the disciplinary process, it states, demonstrate the finality of that decision. Simply put, it submits, the Department does not rescind a Notice of Suspension with Intent to Dismiss once it issues one.

Young's decision to file for pension benefits, it reasons, does not conflict with his having been discharged. Citing Arbitrator Brown's finding in *McCammitt,* it posits, his efforts in that regard are consistent with an employee's duty to mitigate damages when contesting his/her discharge. *Id.* at 13.

In sum, it concludes, the grievance properly challenges Young's discharge, which was a certainty and not speculative. Accordingly, for all the reasons stated, it avers, the grievance should be found arbitrable.

Merits. Turning to the merits, the Union argues that the City lacked just cause to discharge Young based upon the thirteen identified Facebook posts/comments. It contends that the City has failed to meet its burden of proof in this regard.

Citing *Enterprise Wire Co.,* 46 L.A. 359 (1965), it asserts that just cause should be assessed by applying the "seven tests" identified by Arbitrator Carroll Daugherty in deciding that case. Under that standard, it states, if the employer's evidence falls short of meeting one or more of those tests, "just cause either was not satisfied or at least was seriously weakened in that some arbitrary, capricious or discriminatory element was present." Koven & Smith, *Just Cause: The Seven Tests,* at 23 (Kendall/Hunt 2d ed., 1992).

On the record here, it submits, the City has failed to satisfy several of Daugherty's seven tests. In particular, it cites, the Department's failure: (1) to give Young adequate notice of the prohibitions of the Social Media Policy and the serious discipline applicable to violations; (2) to conduct a fair, thorough and impartial investigation substantiating the charged violations; (3) to discipline Young consistent with its response to other officers engaging in substantially similar conduct; and (4) to impose a penalty proportionate to Young's conduct with consideration of his length of service and work record.

These deficiencies in the City's proof, it argues, demonstrate that Young's discharge contravenes due process, fairness and equity, all of which lie at the heart of the just cause standard.

In regard to notice, it asserts, the Department failed to adequately inform Young as to the impropriety of his charged conduct or the severity of the discipline that would follow from such actions. Just cause, it states, requires that the employee receive clear notice of both the employer's expectations and the range of penalties for non-compliance.

The failure of notice here, it argues, arises from several factors. These include: (1) the Department's lack of active enforcement of its Policy through monitoring of its officers' social media accounts and advising them of what constitutes appropriate activity; (2) the absence of guidance regarding the scope of First Amendment protected speech; and (3) the lack of any formal training regarding the Policy until 2019.[17]

Turning to the investigation underlying Young's discharge, it asserts, the Department's efforts were seriously deficient. The testimony and documentary evidence, it highlights, reveals the Department's cursory process, which focused exclusively on confirming Young authored the identified posts/comments. No inquiry was made to determine his intent or his awareness that the posts/comments violated the Policy. Young's ability to volunteer such explanatory information, it maintains, cannot cure the Department's failings in this regard. Doing so, it reasons, would allow the City to improperly shift onto Young its burden of demonstrating that the referenced

---

[17] The City's claim that an officer should just know where the line is between constitutionally protected speech and prohibited activity under the Policy, it maintains, is refuted by the Department's belated social media training in 2019, which was provided to address that very uncertainty. Moreover, it notes, the Department required the assistance of an outside law firm to determine what speech could be punished in response to the Plain View Project without violating the First Amendment. It argues further that the Department's neglect in this regard is compounded by its earlier provision of mandatory Radical Islam training to all officers, including Young. The Department's failure to instruct its officers as to the intersection between that training and their obligations under the Social Media Policy, it contends, created uncertainty as to the type of speech prohibited by the Policy. It points out in this regard that the majority of Young's offending posts/comments reflect content from the Radical Islam training (e.g., a "common misconception" is thinking of Islam as the "religion of peace"). (Union Exhibit 17 at 3.)

posts/comments violated the Policy. *See City of Philadelphia -and- Fraternal Order of Police Lodge No. 5,* AAA Case No. 01-19-0002-2846 (Brown 2021) *("Fenico Award").*

The Department's failure to investigate the purpose and meaning of Young's posts/comments, it maintains, is fatal to the City's case. His posts/comments, it reasons, cannot be deemed violative of the Policy by simply taking them at face value, as the Department chose to do so.

By proceeding in this manner, it notes, the Department relied upon erroneous or baseless assumptions in finding several of his posts/comments to have violated the Policy. As to these four posts/comments, it explains:

(1) **July 9, 2012** – (a) the City did not determine whether Young, prior to posting the comment at issue, had received and was on notice of the July 2012 revision to the Policy expressly proscribing discriminatory remarks; and (b) it assumed Young's use of the term "thug" was a racial pejorative for African-American males, even though it did not review the underlying article, which did not even concern African-American men;

(2) **February 24, 2018** – the Department, having neglected to review the posted video, was without basis to conclude that it depicted force, excessive or otherwise, and thus erred in categorizing Young's comment (i.e., "I can already hear the Libs crying") as endorsing violence or excessive force by law enforcement;

(3) **December 20, 2017** – the underlying video, which the Department did not review, depicted a suspect fighting with police officers during a traffic stop; as such, the Department incorrectly assumed Young's comment (i.e., don't resist arrest) represented a flippant remark favoring excessive force, as opposed to a common sense statement; and

(4) **July 12, 2015** – the Department did not consult the underlying article, and thereby erred in concluding that Young's "misfortune" comment concerned protecting certain groups, rather than expressing his aversion to being detailed to events, in general, and to activity of the type occurring at this one, in particular (i.e., throwing human excrement).

For these reasons, it states, the City has failed to meet its burden of showing these four posts/comments violated the Policy.

As to Young's other nine posts/comments, it states that when evaluated in light of all of the relevant circumstances, they do not represent anti-Islam remarks, as the Department charged. It explains that while Young's language should have been more precise, these posts/comments concerned high-profile terrorist attacks or the violent statements and actions of radicals. When properly contextualized, it concludes, these post/comments represent efforts by Young to communicate the dangers of jihadism, as addressed in the Department's Radical Islam training. Simply put, it insists, Young did not intend to these posts/comments to express anti-Islam bias, but instead to warn of Jihad, consistent with his training.

Alternatively, it argues, even if all thirteen of Young's posts/comments are found violative of the Policy, the City still lacked just cause for his discharge due to the Department's failure to consistently discipline other officers committing the same or substantially similar offense.

As proof of this failure, it cites four other officers who received more lenient discipline (i.e., thirty-day suspensions), despite being charged with Conduct Unbecoming in violation of Disciplinary Code Section 1-§021-10, based on posts similar in quantity and quality to Young's (i.e., Officers [REDACTED] [REDACTED] and [REDACTED] and Corporal [REDACTED].[18] The Department, it notes, failed to provide any reasonable explanation demonstrating Young was properly deemed beyond remediation, whereas, these other four officers warranted an opportunity to correct their behavior.

[18] It also highlights that [REDACTED] 30-day suspension was mitigated in arbitration to a 15-day suspension due to inconsistency in the level of discipline imposed for violations of the Social Media Policy. *See FOP Lodge No. 5 -and- City of Philadelphia,* AAA Case No. 01-19-0004-2311 (Reilly 2021).

Further, it points out that other officers implicated by the Plain View Project received even more lenient discipline for similar or more egregious violations of the Policy. In particular, it cites:

(1) Lieutenant [redacted] [redacted] -- one-day suspension for racially disparaging and mocking statements);

(2) Officer [redacted] [redacted] -- no discipline for substantiated violation, including the use of the term "animal" in relation to an article regarding Muslims;

(3) Detective [redacted] [redacted] -- was not charged with conduct unbecoming and received only a reprimand for posts that were racially offensive and endorsed violence, despite a prior Social Media Policy violation; and

(4) Officer [redacted] [redacted] -- two-day suspension for posts with racist and anti-Islam content.[19]

In sum, it states, no basis exists to distinguish Young from these other officers as to the level of discipline imposed. As such, it submits, his discharge was undoubtedly arbitrary, and thus, without just cause.

Finally, it asserts that on the record here, the penalty of discharge is disproportionate to any proven misconduct by Young. In determining proportionality, it argues, Young was entitled to consideration of his extended and exemplary record of service without any prior discipline relative to the Policy or a lack of professionalism. In addition, it cites the absence of any negligence or mal-intent that would be necessary to justify the severe penalty imposed here.

In sum, it concludes that Young is exactly the kind of employee for whom progressive discipline is appropriate. And, therefore, if any penalty is due on the record here, it should be significantly less than that imposed.

---

[19] It also cites Officer [redacted] [redacted] who received a 12-day suspension in January 2019 for violating the Social Media Policy by posting a photograph of himself in "Black face."

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

Opinion

Arbitrability

In contesting arbitrability of the instant grievance, the City does so on substantive grounds. More specifically, it maintains that the Union seeks to grieve an event that never occurred; namely Young's discharge.

Resolving a disputed matter of substantive arbitrability requires application of a two-part test. This standard requires determining whether: (1) the parties have entered into a valid agreement to arbitrate; and (2) the parties' dispute falls within the scope of their agreement. In doing so, general principles of contract construction control.

Upon examination of the record, I am satisfied that the evidence supports a finding that both prongs of this test have been met here.

First, per Article XXI of the Agreement, the parties have clearly entered into a valid agreement to arbitrate. Specifically, they have committed to a multi-step procedure for processing grievances to resolution, which culminates in arbitration. For this purpose, they have defined a grievance as being "limited to contract violations, disciplinary suspensions, demotions and discharges." (Joint Exhibit 1 at 75.)

Second, the instant grievance, on its face, presents an issue that plainly falls within the scope of the parties' agreement to arbitrate. In contesting Young's discharge, the grievance, by definition, states a grievable, and, in turn, an arbitrable matter.

The question that remains to be decided then is whether the City actually discharged Young, and thereby generated a grievable dispute. On review of the

Agreement's grievance and arbitration procedure, I am satisfied, as the City asserts, that it does not permit arbitration of contemplated discipline. Instead, it limits arbitration to the specific acts identified, including discharge. It does not allow for advisory opinions by an arbitrator regarding actions under consideration. Indeed, I do not understand the Union to claim otherwise.

On the record here, I am satisfied that the Department crossed the line from contemplated to actual discipline. Simply put, it made a definite decision to discharge Young prior to his retirement on July 19, 2019. There was nothing speculative or equivocal about that determination. It was a certainty.

In reaching this conclusion, I take note that prior to July 19, 2019, the Department drafted the charges and the Commissioner signed the CDA confirming that discharge would be the penalty imposed upon Young for those transgressions. (Joint Exhibits 5 & 17.) Further, on July 18, 2019, the Commissioner notified the Union of his decision to discharge Young and approximately fourteen other officers for violating the Social Media Policy based upon the Plain View Project's disclosures. As Union Vice President [redacted] testimony reflects, there was nothing conditional or qualified about the Commissioner's notification. The Union thus informed Young and the other affected officers that they were being discharged.

All that remained was for Sergeant [redacted] to conduct a *Gniotek* hearing and issue Young the Notice of Suspension with Intent to Dismiss. I am persuaded that this step was ministerial in nature and would not have altered the decision to discharge Young. Indeed, Deputy Commissioner Wimberly acknowledged as much, stating there was

nothing that Young could have said at the *Gniotek* hearing that would have caused the Department not to issue him the notice of discharge. (Tr. I: 167.)

In sum, the die had been cast. A final decision had been made to discharge Young. Therefore, I am compelled to conclude that per the Agreement, the Union had the contractual right to contest that decision by filing the instant grievance.

Young's act of filing for retirement did not alter these circumstances. There is nothing in the record that suggests he acted to preempt or derail a decision as to his discharge. To the contrary, the Department had finalized that decision before he took that step. As such, I persuaded that he acted purely for financial reasons; namely to maintain a source of income despite his unavoidable separation from employment. The Department confirmed this reality by placing the charges in Young's personnel file with a memorandum stating, "If this employee s ever returned to duty, this will be processed." (Joint Exhibit 1.)

Accordingly, for all these reasons, I conclude that the grievance is arbitrable as to the issue of whether the City had just cause to discharge Young.[20]

Merits

In turning to the merits of the instant grievance, some preliminary comments are appropriate here.

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

---

[20] The City also contests the arbitrability of the instant grievance on two additional grounds. In particular, it avers: (1) the Union has improperly expanded the scope of the grievance to encompass Young's retirement; and (2) Young's retirement is not a grievable matter under the Agreement. It is unnecessary for me to address these two additional theories, inasmuch as I have concluded that the grievance, as written, presents a grievable issue in contesting Young's discharge.

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 7.)

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 325 of 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 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 Young 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 Young. 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 Young committed certain of 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 Young stems from thirteen posts/comments that he made to his Facebook account during 2012 – 2018. 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.[21] As I understand, the Neglect of Duty charge rests upon the alleged violations of Directive 6.10; while the purportedly egregious nature of Young's posts provides the basis for the more serious Conduct Unbecoming charge.[22]

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

---

[21] 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.)

[22] 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.)

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 thirteen posts/comments on which the Department relied in discharging Young, I find that eight, on their face, fall into the category of prohibited content per the Policy. Stated otherwise, in contravention of the Policy, these eight posts/comments demean or ridicule Muslims, as a group, by the use of offensive stereotypes and/or portraying them as terrorists or persons committed to violence based upon their religion.

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

February 8, 2014. This comment, on its face, indicates Young's opposition to Islam, by declaring "Ban Islam from all Western Nations." Further, in the context of the post to which he is responding, which includes a photograph of men in Middle Eastern attire standing behind a burning American flag, with the words "greetings from the religion of peace to all America, convert or die, it is apparent that his message conveys the sentiment that Muslims are violent and intent on doing harm to Americans.

I am unpersuaded by the Union's argument that the message of this post mirrors that communicated by the Department's 2008 "Radical Islam" training, which it provided

to all officers, including Young. In contrast to this post, the 2008 training did not express that all Muslims are terrorists or intent on committing acts of violence against Americans. Instead, as the power point used in conducting that training reflects, it focused on educating officers as to the potential for Islam to be misused in radicalizing individuals. This distinction is clear from the Venn diagram on the second page of the training materials, which shows Shiite Extremists and Jihadists as small subsets among the universe of Muslims. (Union Exhibit 4 at 2.)[23]

Further, this comment cannot be excused based upon Young's claimed imprecision in his choice of words. Even accepting his stated intention to limit this comment to Radical Islam, the fact remains that his words conveyed otherwise and thus served to undermine the public trust by reflecting an anti-Islam bias. In doing so, he violated the Social Media Policy.

June 14, 2016. The person initiating this post shared an article reporting the murder of a French police chief and his wife by a Muslim terrorist. In responding with the comment, "Ah where ever Islam goes it brings peace and happiness, Not!!" Young, in a mocking tone, linked Islam, as a religion, to this act of violence and thereby demeaned and disparaged all Muslims. His description of the remark as a sarcastic joke intended for the original poster offers no defense. The comment remains a per se violation of the Social Media Policy.

---

[23] The Union repeats this argument in support of its assertion that Young's posts/comments dated June 14, 2016, June 18, 2013, July 30, 2017, November 13, 2015, December 2, 2015, May 10, 2014, January 23, 2016 and June 19, 2016, should be found not to have violated the Social Media Policy. I reject this claim for the reasons expressed above. Namely, the referenced training served to inform and raise officers' awareness as to the threat posed by "Radical Islam," whereas, Young's posts/comments, regardless of his intent, conveyed the message that all Muslims are terrorists and should be banned from the country.

June 18, 2013. The anti-Muslim sentiment conveyed by this post is clear and direct. By sharing an article referencing that Christians are in imminent danger of persecution by Muslims across the world, and adding the words, "Islam on the march," Young expressed that all Muslims are intent on killing Christians based simply on their religion. Obviously, on its face, his post violates the Policy by disparaging Muslims in that it labels them as inherently violent and actively engaged in persecution.

July 30, 2017. In commenting that people of the West should wake up to this Islamic invasion before its too late, Young shared a view that all Muslims are an invading force to be feared. His stated concern for the acts of radical Muslims destroying cultural and religious symbols, such as reportedly depicted in the photograph shared by the original poster, does not provide him with a defense. Regardless of such intent, his words, as visible to the public, send a message that demeans all adherents of Islam, and thereby violates the Policy.

November 13, 2015. In reviewing the totality of this post, including Young's comments, two points stand clear. First, the poster, in speculating that Islam may have been responsible for a French terrorist attack, noted "France let these animals in … this is all coming to a city near you." Second, Young, in turn, commented, Hey they're letting [them] in here too." By this exchange, it is reasonable to read Young's comment as expressing his concurrence with the characterization of Muslims as "animals."

Young's more nuanced explanation that his comment reflected concern with federal officials granting non-vetted persons entry into the country is unavailing. Even if true, it serves only to reduce the gravity of his transgression. His words, on their face, remain dehumanizing of Muslims, and thus violative of the Policy.

December 2, 2015. His public comment mocking Islam cannot be excused, as he suggests, as a joke intended for the poster. Instead, by remarking, "That pesky Religion of Peace always up to something," he effectively concurred with the poster's suggestion that the "religion of peace" was responsible for a mass shooting in California. Regardless of his belief that the persons responsible for this crime were radical Muslims, his comment was not so limited. Instead, it links Islam and all Muslims with terrorism. Such disparagement of a religious group, no doubt, violates the Policy.

May 10, 2014. His comment to "Ban Islam from our country," standing alone, conveys an obvious anti-Islamic sentiment. When read in the context of the entire post, which references Somali terrorists having gained access to the United States, it serves to link Islam and terrorism. His stated intent to limit his remark to Radical Islam does not alter the message received by the public; namely, Islam must be banned to protect residents of the United States from terrorism. In portraying all Muslims as terrorists, he committed an obvious violation of the Policy.

January 23, 2016. This post originated with a video and the poster's statement rejecting that all cultures are equal. According to Young, the video, which the Department concededly did not access, depicted the stoning of a woman in Pakistan, to which he commented, "Why are we allowing these savages into America." On review, I am not persuaded that Young's comment can be deemed an endorsement of the poster's disparagement of non-European cultures, as opposed to an understandable reaction to the violence that he reported observing in the video. In sum, with no evidence other than the post, I am not satisfied that the City has established the necessary linkage between Young's comment and the Policy's proscriptions, so as to demonstrate a violation.

June 19, 2016. This comment, by which Young states a need for protection due to the federal government importing thousands of Muslims into this country, plainly expresses an anti-Islamic bias. On its face, it suggests that all Muslims are to be feared. This sentiment by Young is bolstered when his comment is assessed in the context of the poster's initial remark commending the gay community for purchasing more firearms because the government cannot protect them. By portraying all Muslims as group to be feared, Young's comment represents precisely the type of disparaging and discriminatory comment that the Policy prohibits.

July 12, 2015. Contrary to Deputy Commissioner Wimberly's explanation of the Policy violation committed in this instance, I am not persuaded that Young's comment attacks or demeans a protected group or classification. The original post does include a video with the caption "Homosexuals Throw Excrement at Christians …" Nonetheless, with only the post upon which to rely, I do not find a sufficient basis to conclude that Young's statement indicating he had the "misfortune" of being detailed to events like "this" expresses a desire not to be assigned to protect LGBTQ groups or any other group. Instead, I find equally plausible Young's explanation that his comment expressed his displeasure with details, in general, and the referenced behavior, in particular, as opposed to protecting any particular group. In sum, in contrast to other posts addressed above, Young's comment here do not represent a per se violation of the Policy. In concluding otherwise, I am compelled to find that the Department relied upon unjustified assumptions and speculation.

December 20, 2017. On review, I find a lack of evidentiary support for the Department's determination that Young's comment (i.e., "Don't resist arrest") endorsed

violence or excessive force by law enforcement. Other than the video, which the Department did not review, the only other information in this post by which to judge Young's comment is the caption, "Police Break Man's Leg." I find this reference too ambiguous to classify Young's comment as expressing support for the use of excessive force. Stated otherwise, without confirmation that the video depicted an unjustified physical response by the police, I cannot agree with the characterization that Young's comment represented a flippant remark that endorsed such inappropriate conduct, while also exhibiting a callous disregard for the injuries sustained by the person being detained.

February 24, 2018. Here too, the record reflects an insufficient basis to conclude that Young, by commenting, "I can already hear the Libs crying," was supporting the use of excessive force by law enforcement. On its face, his comment, standing alone, is simply insufficient to support that determination. Instead, such finding requires context, which is lacking here.

The Department never reviewed the posted video to which his comment relates. Likewise, the poster's statement "Way to go Italian Police, this is how it's always been done, does not provide the bridge by which to find Young's comment violated the Policy. To the contrary, the statement is too vague to do so. It is equally consistent with Young's account that the video simply showed the police halting an Antifa protest once the participants began engaging in vandalism.

In sum, the Department has failed to establish that Young's comment here violated the Policy.

July 9, 2012. Young's Policy violation in this instance, according to Deputy Commissioner Wimberly's testimony, stems from his use of the term thug, which she

described as a racial slur for African-American males. I find this conclusion unsupported by the record. Unlike certain more vile and egregious racial epithets, the term thug, standing alone, does not, without more, express a racial aspersion. To the contrary, its common dictionary meaning is much more general, referring to a violent or brutish criminal or bully. *See Merriam Dictionary* (2022).

Therefore, greater context is required beyond Young's mere use of term "thug" in order to conclude it represents a racial slur, whether intentional or otherwise. Such additional evidence is absent on the record in this case.

I find nothing in Young's comments suggesting his use of the term carried a racial connotation. To the contrary, he employs the term as a general reference to street-level criminals, who he also calls "bad guys." Nor is there any information in the balance of the post that even suggests such context. In fact, the post originated with the poster sharing an article reporting on the death of a border patrol agent from injuries sustained from an on-duty all terrain vehicle accident. There is nothing indicating that this article, which the Department did not review, concerns or involves African-American Males.

As such, it necessarily follows that the City has not demonstrated that Young's referenced comment violated the Policy.

Having found that the City proved that Young violated the Department's Social Media Policy by eight of the thirteen identified posts/comments to his Facebook account, there remains the issue of whether the level of discipline imposed was an appropriate response.[24] I conclude that it was not.

---

[24] 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

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. 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 Young's misconduct was no minor matter. It occurred repetitively over a period years. Moreover, by his offending posts/comments, he breached the public trust. Regardless of his stated intent, these posts/comments express clear anti-Islamic sentiments and demean Muslims by identifying them as a group to be

---

together, they also confirm a course of conduct by which Young exhibited little regard for his duties as a police officer, and thereby establish the Section 1-§021-10 charge. In so finding, I reject the Union's due process challenge by which it asserts the City failed to conduct a fair and thorough investigation. Contrary to the Union's assertion, I am not persuaded that the City had an obligation to examine the source material referenced in each post/comment and inquire as to Young's intent in making these posts/comments. Such further examination may have made for a more thorough investigation and avoided charging those violations that I have found could not be substantiated. However, for the reasons I have explained above, each of the eight offending posts/comments, on its face, violates the Social Media Policy. Indeed, as to those posts/comments, their content, along with Young's confirmation of having posted each, as confirmed by the Department's investigation, was sufficient to prove his misconduct. Likewise, I am unpersuaded by the Union's claim that Young lacked sufficient notice of the Policy's prohibitions in regard to his offending posts, all of which fall squarely within the Policy's prohibition against posting material that is discriminatory or harassing or would not be acceptable in a City workplace under established policy or practice. This restriction is clear from a simple reading of the Policy, and, as such, should have been known to Young, who acknowledged receiving and reviewing the Policy. Finally, I find unavailing the Union's assertion that the Department's failure to actively enforce the Policy by monitoring its officers' social media activity for violations unfairly deprived officers, such as Young, from receiving notice and an opportunity to conform to the Department's expectations regarding permissible social media activity. I find no basis to impose such an obligation on the Department.

feared based upon a propensity for terrorism and violence. As such, by this conduct, 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 Young'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, Young has thirty years of service with the Department, without recent record of serious 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 Young 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.[25]

---

[25] I am persuaded in this regard by his testimony that his anti-Islamic posts/comments were intended to be limited to "Radical Islam." As I have stated, such intent does not excuse his transgression in making posts/comments that, on their face, publicly demeaned Islam and disparaged all Muslims, as a group. It does, however, serve to mitigate the gravity of his offense and, in turn, the appropriate level of discipline. Indeed, it demonstrates that Young is capable of reforming his conduct and complying with the requirements of the Department's Social Media Policy.

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 Young'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] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] and [redacted] [redacted] [26] In response to Facebook posts revealed by the Plain View Project in 2019, which violated Directive 6.10, [redacted] [redacted] [redacted] and [redacted] each received a thirty-day suspension, whereas, the Department issued Crowe 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 Young. Indeed, their posts presented a wide variety of offensive content, including material that was demeaning or harassing based on religion, race, sex/gender, ethnicity and national origin, as well as endorsements of violence. In fact, some of these posts were arguably more egregious than any of Young's posts/comments. (Union Exhibits 1-6, 8 & 12-13.) In addition, [redacted] was a repeat offender. She had been disciplined two years earlier for

[26] 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.

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 1.)

On the record here, no basis exists for me to disregard such lesser discipline in assessing whether the City had just cause to discharge Young. 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 Young's offending posts/comments 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 Young 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.[27] In addition, I instruct the Department to revise Young's personnel record, to the maximum extent permitted under governing law, to reflect that his July 19, 2019 separation from employment has been adjusted to a thirty-day suspension.

[27] The record does not include evidence of Young'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 Young's discharge, overtime would have been offered to him and he would have worked such overtime.

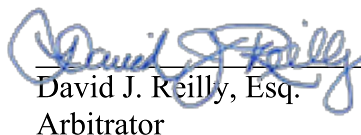
AWARD

1. The grievance is granted, in part, and denied, in part.

2. The City had just cause to discipline Thomas Young for violating the Department's Social Media Policy by his offending Facebook posts/comments, 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 Thomas Young 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 July 19, 2019 separation from employment 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. Young based on this award, including the issue of whether he satisfied his obligation to mitigate his damages.

December 30, 2022

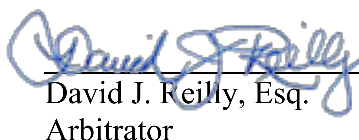


David J. Reilly, Esq.
Arbitrator

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.

December 30, 2022



David J. Reilly, Esq.
Arbitrator