AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between the

FOP LODGE 5,

"Union,"

-and-

CITY OF PHILADELPHIA,

"Employer."

OPINION AND AWARD

AAA Case No. 01-19-0002-2849
(Sgt. Michael V. Melvin (221787) – Discharge)

Before
Robert C. Gifford, Esq.
Arbitrator

Appearances:

For the Union:
Jessica C. Caggiano, Esq.
Willig Williams & Davidson

For the Employer:
Frank Wehr, Deputy City Solicitor
Ellen Berkowitz, Senior Attorney
Diana P. Cortes, City Solicitor
Renee Garcia, Chair of Litigation
City of Philadelphia Law Department

FOP Lodge 5 and the City of Philadelphia are parties to a collective bargaining agreement ["Agreement"]. [Ex. J-1]. On July 19, 2019, the Union filed a grievance alleging that the City violated the Agreement by terminating the employment of Sergeant Michael Melvin ["Grievant"] without just cause. [Ex. J-2]. On July 22, 2019, the Union submitted the unresolved grievance for binding arbitration. [Ex. J-3]. On September 19, 2019, Monica Marchetti-Brock, the City's Director of Labor Relations, notified AAA of the City's position that the grievance was not arbitrable since the Grievant retired before any discipline was imposed. [Ex. J-4]. On September 18, 2019, AAA notified me that I was chosen to serve as arbitrator.

The arbitration proceedings were held via Zoom videoconference on January 31, 2023, and then in-person at AAA's Philadelphia offices on March 21, 2023, at which time the parties were afforded the opportunity to argue orally, present witnesses and submit documentary evidence into the record. A stenographic recording of the proceedings was taken. Testifying on behalf of the City were Lieutenant Joanne Garvey, Deputy Commissioner Robin Wimberly, [redacted] Testifying on behalf of the Union were Police Officer Jennifer Gresham Grievant and Grievant Melvin.[2] The parties also agreed to include the testimony of [redacted] from the *Young* arbitration and

[1] Garvey's testimony is located from T1:34-94. Wimberly's is located from T1:95-221. [redacted] is located from T2:31-71.
[2] Gresham's testimony is located from T2:8-28. Grievant Melvin's is located from T2:73-181.

[redacted] from the *Farrelly* arbitration. The parties provided post-hearing briefs to AAA on or before June 12, 2023. The City submitted a reply on June 30, 2023. The Union submitted a sur-reply on July 6, 2023. The record was declared closed on July 24, 2023.

ISSUES

The parties stipulated to the issues to be heard and decided:

1. Whether the grievance is arbitrable?
2. If so, whether the City had just cause to discharge the Grievant? If not, what shall be the appropriate remedy?

[T:5].

CITED CONTRACT PROVISIONS

ARTICLE XX. DISCIPLINE AND DISCHARGE

A. General
No employee shall be disciplined or discharged except as is consistent with the Home Rule Charter and the Regulations of the Civil Service Commission.

ARTICLE XXI. GRIEVANCE AND ARBITRATION PROCEDURE

A. Definition

1. Grievances as defined herein shall be limited to contract violations, disciplinary suspensions, demotions, and discharges.

* * *

B. Step 1

* * *

1. The Grievant/FOP must, within thirty (30) days of the occurrence giving rise to the grievance, or within thirty (30) days after the Grievant/FOP is notified of the suspension or discharge, submit the grievance in writing.

* * *

I. Authority of Arbitrator

The arbitrator selected shall have no authority to add tom subtract from or in any way alter the terms of this contract, Act 111 arbitration awards or the scale of wages set forth therein.

BACKGROUND

Grievant Michael Melvin had been employed by the City of Philadelphia Police Department ["PPD"] for 24 years. Throughout his career, the Grievant has received satisfactory ratings and numerous commendations. [Exs. J-15 & J-16]. Prior to his separation of employment, the Grievant served in the rank of Sergeant.

This matter arose after a reporter from an organization called Injustice Watch informed the PPD Public Affairs in February 2019 about inappropriate/disparaging Facebook posts/comments that were allegedly made by seven (7) PPD officers. Lieutenant (then Sergeant) Joanne Garvey, who worked within the Internal Affairs Division, was assigned to investigate the seven (7) officers, including the Grievant, who were eventually identified by Injustice Watch.

Garvey interviewed the Grievant on March 21, 2019. The internal investigation report includes the following summary of the Grievant's interview:[3]

> On Thursday, 03-21-19, **Sgt. Michael Melvin #8706, PR #221787, 2nd District, 3B** was interviewed, in the presence of his attorney Nicholas Pinto, inside Internal Affairs Headquarters, by the assigned, where he relayed the following in summary:

[3] The statement of the Grievant's internal affairs interview held on 3/21/19 is consistent with the summary. [*See* Ex. J-8].

Sgt. Melvin stated that he currently has accounts on Facebook and Snapchat. His user name on Facebook is "M[redacted] V[redacted]", and his user name on Snapchat is "M[redacted] M[redacted]." He opened/activated his Facebook account in November 2015, and his wife made his Snapchat account about two years ago. Sergeant Melvin stated he has no social networking accounts that he deactivated, deleted, or cancelled.

Sgt. Melvin said he received a letter in the mail regarding his social network accounts; he did not contact the sender and disposed of the letter. A week to a week and half later, Sergeant Melvin's [redacted] asked him to contact [redacted]. [redacted] informed him that a letter was also received in his name at the Public Affairs Unit, and requested permission to open the letter. [redacted] read the letter; it appeared to be the same letter he received. [redacted] asked Sgt. Melvin whether he responded to the letter and he said that he did not, and had no plans to respond.

When asked, Sgt. Melvin stated that he did not have anything on his social media sites that identified him as a Philadelphia Police Officer, or that is employed/works for the City of Philadelphia, or the Philadelphia Police Department.

Sgt. Melvin stated he was aware of Directive 6.10 (Social Media and Networking) and Disciplinary Code 1-§021-10 (inappropriate communication(s) based on race, color, gender, religion, national origin, age, ancestry sexual orientation, disability, or gender identity conveyed in any manner). He was provided a copy of both.

Sgt. Melvin was asked, "Have you ever posted, commented, or in any way stated on any social networking sites any bias, used dehumanizing language, promoted violence, undermined due process, promoted falsify testimony in court, or any policing issues?" He replied, "No, not that I am aware of."

Sgt. Melvin was shown the examples of officer Facebook posts that were provided by [the Injustice Watch] email.

With regard to most of the statements in question, Sgt. Melvin stated that he did not, or did not recall, posting the statements or commenting on them.

Sgt. Melvin was asked whether, in 2018, he posted the statement, "To rehash my November statement: If you listen closely you can hear Police cars all through the city being placed in park. Let it burn", or anything like it, to social media. He replied, "I may have posted something along the lines of police cars being placed in park, but I don't recall posting the statement, 'let it burn." Sgt. Melvin was asked what he meant when he posted this, and replied, "Cops may be afraid to do their jobs anymore, because of the anti-police atmosphere."

Sgt Melvin was asked whether, in 2016, he shared or posted an image of protestors with Black Lives Matter posters standing on an American flag, and posted or commented the following statement, "Filthy scum. But they have no problem taking free handouts." He replied, "No, not that I recall." He was asked whether he has ever see such an image and replied that he has, and that there are lots of images like that in the news and on social media outlets.

Sgt. Melvin was asked whether he has ever seen that statement on anyone's social media networking site. He replied, "I don't recall where I actually saw the picture but wherever I saw the pictures I am sure there were numerous comments but I don't remember it was one of the comments. I didn't post that photograph or statement."

Sgt. Melvin was asked whether, in 2016, he ever posted or responded to another officer's post who was frustrated about judges and the court system with the following statement, "I'm done with court. I've called out till I ran out of notices." He replied, "No, I don't believe I said that." Sgt. Melvin was asked whether he's ever seen this statement on anyone's social networking site and replied, "No, I don't recall."

Sgt. Melvin, when asked, stated that he has called out of work and not gone to court when subpoenaed. He stated, "I called out because I was sick or family issues, not just to call out."

Sgt. Melvin said he has never seen any seen any statements, comments, or posts or any Philadelphia Police personnel's

social networking sites that he found offensive, inappropriate, or unprofessional.

Sgt. Melvin stated he has never been disciplined in any way regarding his social networking sites, and that no one has ever told him or informed him that they found a post or comment on his social networking site offensive or inappropriate.

Sgt. Melvin confirmed that he has been a defendant in a lawsuit; he believed this occurred twice.

[Ex. J-8, pp. 6-8].

In June 2019, the Plain View Project ["PVP"] published a database of publicly available social media posts made by police officers that, according to the PVP, "could undermine public trust and confidence in our police". https://www.plainviewproject.org/ The published database included social media posts and comments made by police officers including those employed by the PPD. The PVP posted disclaimers on its website, including the following:

1. Multiple Meanings

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 views 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 commentators 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. [Ex. J-7].

As a result of the PVP publication, Garvey reinterviewed the Grievant on July 1, 2019. The internal investigation report includes the following summary of the Grievant's interview:[4]

> On Monday, 07-01-19, **Sgt. Michael Melvin #8706, PR #221787, 2nd District, 3C,** was re-interviewed, by the assigned, in the presence of his attorney Charles Gibbs, and John McGrody, Fraternal Order of Police, Union Representative.
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> Upon review of the posts and/or comments provided in the Plain View Project database, it was alleged that Sgt. Michael Melvin was using a Facebook account with the user name "Michael Vincent". The Facebook account with the user name "Michael Vincent" contained 40 total posts and/or comments that were contained on the website.
>
> Sgt. Melvin was shown and reviewed all forty (40) posts and/or comments under Facebook user name "Michael Vincent." Sgt. Melvin stated that the Facebook account with user name "Michael Vincent" was his account. Sgt. Melvin added that he made the forty (40) posts and/or comments that he reviewed.

[4] The statement of the Grievant's internal affairs interview held on 7/1/19 is consistent with the summary. [*See* Ex. J-8].

> Sgt. Melvin could not recall if he made any of the posts or comments while on-duty. Sgt. Melvin added that he has never seen a post or comment attributed to him that he did not make.
>
> Some of the Facebook posts/comments made by Sgt. Melvin violated the Philadelphia Department's Social Media Policy in that they contained posts/comments that expressed discriminating or harassing behavior based on race, color, gender, religion, national origin, age, ancestry, sexual orientation, disability, or gender identity, or other content or communications that would not be acceptable in a City workplace under City or agency policy or practice.
>
> The Facebook posts/comments that were contained in the Plain View Project database that were attributed to Sgt. Melvin are included in the documents section of this report.
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> [Ex. J-8, p. 8].

On July 11, 2019, Internal Affairs Division Inspector Kevin Hall reviewed and approved Garvey's Internal Investigation Report. [Ex. J-8]. Inspector Hall sustained charges against the Grievant for violating Directive 6.10, Social Media and Networking, and Course of Conduct for lying while being interviewed during a departmental investigation. [*Id.* at 28-29]. With respect to the violation of Directive 6.10, the investigation report provides:

> The posts and comments in question are completely devoid of any professional expectations and standards.
>
> Whether or not the above [the Grievant] intended that these posts and comments be visible to a limited number of people, or to the greater public, is irrelevant. As the Directive states, there is no reasonable expectation of privacy when engaging in social media. The above [Grievant] knowingly posted [his]

> remarks online, to the World Wide Web, where sharing content with just one person is akin to sharing with everyone.
>
> [*Id.* at 28].

As to the violation of Course of Conduct for lying while being interviewed during a departmental investigation, the investigation report provides:

> While being interviewed for this investigation, [the Grievant was] interviewed inside of the Internal Affairs Division, in the presence of [his] attorney. [The Grievant] was asked if [he] every posted, commented, or in any way stated on social networking sites, any bias, used dehumanizing language, promoted violence, undermined due process, promoted false testimony in court or any policy issues. [The Grievant] responded no, that [he] never [has]. However, this investigation has obtained several posts and/or comments that not only contradicts [his] responses, but shows a pattern of such activity.
>
> In addition, during his interview, Sgt. Melvin was asked specifically whether he ever made the following post and/or comments: "Filthy scum. But they have no problem taking free handouts" and "I'm done with court. I've called out till I ran out of notices."
>
> Sgt. Melvin responded, "No, not that I recall" and "No, I don't believe I said that." However, during this investigation, Facebook posts obtained from 3-11-16 and 6-9-16 reveal that Sgt. Melvin did in fact make both comments.
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> [*Id.* at 29].

The City's brief provides a description of the posts/comments that served as the basis for its decision to dismiss the Grievant:

- On March 22, 2017, Sergeant Melvin (footnote omitted) posted an image that included an old photograph of white children who appear to be child laborers, with the caption "WHITE IRISH SLAVES WERE TREATED WORSE THAN ANY OTHER RACE IN THE US. WHEN WAS THE LAST TIME YOU HEARD AN IRISHMAN BITCHING HOW THE WORLD OWES THEM A LIVING?" at the top and at the bottom of the photograph, the words, "You Won't . . . The Irish are not pussies looking for free shit." J-10 at 1 (Exhibit A).

- On or after July 27, 2017, Sergeant Melvin commented "LOL" on a post of a photograph of Michelle Obama with the caption, "Every single day I wake up in a house that was built by slaves," above an image of actor John Wayne, which had the words "THEN GET OUT!" at the top and "AND TAKE YOUR GAY HUSBAND WITH YOU." *Id.* at 2.

- On March 24, 2017, Sergeant Melvin posted an image of a fox with feathers hanging from his mouth, outside the entrance to a chicken coop, below the caption "If a fox came to your home, would you put him in the chicken coop hoping he would integrate?" and above the words, ". . . **Didn't think so** . . . Stop the invasion of Islam to the free world!" *Id.* at 3.

- On March 2, 2016, Sergeant Melvin posted a photograph of three black closed patio umbrellas, each with a layer at the top hanging down, framed with the caption, "I spent half an hour trying to talk with them, wanting to learn about their culture" at the top and "until the bartenders cut me off and told me they were patio umbrellas" at the bottom. *Id.* at 4.

- On February 12, 2016, Sergeant Melvin posted an article (footnote omitted) that he introduced with his own words, "Every other story is about the wonderful violent muslims." The article is no longer visible; the headline states "Italy: Muslims Destroy and Urinate on a Virgin Mary Statue." *Id.* at 5. Sergeant Melvin additionally commented, "Nope, still haven't seen this on the news."

- On September 16, 2016, Sergeant Melvin posted an image of a Blue Lives Matter flag with a litany of statistics about

citizens "killed by cops," ending with the words, "Almost all had criminal records. We don't have a race problem or a cop problem. We have a MEDIA problem, a drug problem, a mental illness problem and an entitled welfare state breeding thugs problem." *Id.* at 6.

- On October 26, 2016, Sergeant Melvin posted an image of a laughing man with a mustache wearing a giant sombrero labeled "MEXICO" under the words "**MEXICAN WORD OF THE DAY: BISHOP**" superimposed with a photograph of Hillary Clinton and at the bottom the words, "**CAN SOMEONE PLEASE SHUT THIS BISHOP?!**" *Id.* at 7.

- On December 22, 2015, Sergeant Melvin posted a link to an article, introduced with his words, "Unreal . . . or is it?" and the headline "17 Black Gang-Members Arrested Following White Girl Being Burned Alive" *Id.* at 8.

- On January 31, 2016, Sergeant Melvin posted an announcement from a fire company about a vandalized gravesite with his own comment, "How does someone not only vandalize a grave site but a fireman's grave. Would be just terrible if the Police caught that person in that nice dark cemetery." *Id.* at 9.

- On April 27, 2016, Sergeant Melvin posted an image of the barrel of a gun pointed directly at the viewer with the words **"WRONG BATHROOM"** at the top and **"MY DAUGHTER WILL BE DONE IN A MINUTE"** at the bottom. *Id.* at 10.

- On January 24, 2016, Sergeant Melvin posted an image of four military officers in uniform with the words **"SHARE IF YOU THINK IT SHOULD BE LEGAL . . . TO THROAT PUNCH A CIVILIAN THAT SPITS ON A MAN IN UNIFORM."** *Id.* at 11.

- On February 15, 2016, Sergeant Melvin linked to an article that featured an image of students standing on an American flag with the comment, "Those little shits need to be smacked in the mouth." *Id.* at 12.

- On November 11, 2016, Sergeant Melvin posted a link to a video of protestors being dispersed with his comment, "That's how you move a group of violent cowards." *Id.* at 13, *see n.3, infra*.

- On September 10, 2017, Sergeant Melvin posted a link to an article in the Philadelphia Inquirer about a murder in Fairmount and opined, "These two pieces of garbage should be thrown in the wood chipper." *Id.* at 14.

- On February 15, 2016, Sergeant Melvin linked to an article with the caption, "ITALY: African Muslim paedophile who attacked a 13-year-old-girl gets the crap beat out of him," commenting, "Beautiful, beautiful." *Id.* at 15.

On or about July 12, 2019, the Police Department issued a Statement of Charges Filed and Action Taken against the Grievant in which the Department charged him with conduct unbecoming a police officer and neglect of duty in connection with social media posts attributed to him by the Plainview Project. [Ex. J-11]. Specifically, the Grievant was charged with three (3) violations: (1) Section 1-§009-10 of the Disciplinary Code which refers to "conduct unbecoming" as "lying or attempting to deceive regarding a material fact during the course of any Departmental investigation." The penalty for a first offense is a 10-day suspension to dismissal; (2) Section 1-§021-10 of the Disciplinary Code which refers to "conduct unbecoming" 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." The penalty for a first offense is a 30-day suspension or dismissal; and (3) Section 5-§011-10 of the Disciplinary Code which refers to "neglect of duty" as "failure to comply with any Police Commissioner's orders, directives, memorandums, or regulations; or any oral or written orders of

superiors." The penalty for a first offense ranges from a reprimand to a 5-day suspension. [*Id.*].

On July 17, 2019, then Police Commissioner Richard Ross ordered Commissioner's Direct Action for the Grievant dismissal in connection with the charges described in the Statement of Charges Filed and Action Taken. [*Id.*]. On July 19, 2019, the Grievant was provided with non-criminal Gniotek warnings in the presence of his counsel and FOP Vice-President John McGrody at which time he was notified that the Commissioner ordered him suspended for 30 days with intent to dismiss ["Suspension Notice" and "Notice of Intent to Dismiss"]. [*Id.*].

On July 19, 2019, the Union filed a grievance alleging that the City violated the Agreement by terminating the employment of Sergeant Michael Melvin ["Grievant"] without just cause. [Ex. J-2]. On July 22, 2019, the Union submitted the unresolved grievance for binding arbitration. [Ex. J-3]. That day, the Grievant filed for his service pension before he was formally terminated by the City. The Grievant's voluntary retirement was made effective on July 22, 2019. [Exs. J-12 & J-13].

On September 19, 2019, Monica Marchetti-Brock, the City's Director of Labor Relations, notified AAA of the City's position that the grievance was not arbitrable since the Grievant retired before any formal discipline was imposed.

[Ex. J-4]. On September 18, 2019, AAA notified me that I was chosen to serve as arbitrator.

During the arbitration proceedings, Garvey testified that during the Grievant's first interview she did not show him the actual posts recovered by the PVP, but simply the email from Injustice Watch that did not include screen shots of the posts that had yet to be attributed to any particular officer within PPD. Garvey indicated that she provided the Grievant with an opportunity to explain his actions or offer additional comments during each interview. Garvey testified that the Grievant declined each invitation. Garvey indicated she was not certain if the Grievant lied during his interview in March 2018:

> [Garvey, On Cross]
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> Q. [By Union Counsel Caggiano] Since you interviewed him, do you believe that he lied to you in March of 2019?
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> A. In some of his responses, he stated no. And some he stated he could not recall. So if he didn't remember, it would be a no, then that would have been considered a lie. But if he didn't recall or didn't remember, then it wouldn't be considered, in my opinion, a lie due to the time frame.
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> Q. So then as you sit here, you're not sure. And it depends on his memory. Is that - -
>
> A. Correct, yes.
>
> [T1:90, lines 4-15].

DC Wimberly testified that she was part an executive team consisting of herself and Deputy Commissioners Sullivan, Wilson and Coulter. DC Wimberly indicated that the team was tasked with reviewing the PVP cases that were considered by herself and Chief Flacco to be the most egregious to determine the level of discipline that should be imposed. DC Wimberly testified that the Grievant was one of the officers whose posts/comments warranted the team's review. DC Wimberly stated that each team member reviewed the investigations on their own and then met together to discuss them. DC Wimberly indicated that approximately 20 of the cases that a majority of the team considered to be the most egregious were taken directly up to Commissioner Ross for Direct Action while the other ones went through the regular PBI process. DC Wimberly explained that the team viewed the posts for each officer that were screenshotted by the PVP but was unable to go to each Facebook page or click on any links or videos that may have been within any of the posts. DC Wimberly testified that the team did not consider an officer's performance record, prior discipline, or accommodations. DC Wimberly indicated that the team did not consider an officer's length of service or compare the posts of one officer to another's. DC Wimberly testified that an officer's rank may have been a factor in the level of discipline at the "second level" but it was the egregiousness of each post that was given most consideration. [See T1:113, lines 3-18]. DC Wimberly also testified that the quantity of an officer's posts did not factor into the team's

decision to impose discipline, but "then collectively, the person becomes, like - - the post becomes even bigger." [*Id.* at lines 21-22].

DC Wimberly testified that Grievant Melvin filed for his service pension after he was served with the Notice of Intent to Dismiss and Suspension Notice but prior to the PPD imposing formal discipline. DC Wimberly could not recall a single instance in which the PPD changed its decision to dismiss an officer after service of the Notice of Intent to Dismiss and Suspension Notice. [T1:197, line 19 through T1:198, line 1].

DC Wimberly reviewed the Grievant's posts/comments that served as the basis for his dismissal. DC Wimberly indicated that they were biased, homophobic, racially charged, inflammatory, disrespectful, discriminatory, and contained profanity. DC Wimberly explained her concerns about having the Grievant return to work for the PPD:

> [DC Wimberly, On Direct]
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> A. * * * When someone kind of self-identifies that they have a bias against a certain group of people, a targeted group of people and you are working in the City of Philadelphia where people aren't just separated by neighborhoods, you know, we are not the melting pot. We are like the toss salad. We are all over the place.
>
> It's concerning that if you come in contact or have to provide a service, will you provide the service that you would provide to someone else, the service that we want to provide to all citizens across the board.

So, it's very concerning to the Department to know - - if you don't know that someone has a bias, you don't know. But once they identify themselves as having an issue, it's concerning for the Department. Yes. It's a risk management issue.

[T1:124, line 9 through T1:125, line 1].

DC Wimberly expounded upon the reasons for recommending dismissal in lieu of a lesser penalty that would have enabled the Grievant to rehabilitate himself:

[DC Wimberly, On Direct]

A. ...we felt that his posts were that egregious. The part of rehabilitating we found would be very difficult because this is not an extension of not getting enough training or not being exposed enough to other cultures. This is an extension of what's in this part of a person's being, his fiber, his heart. Those are things that I don't have training for.

So when we look at it and we are arming this person with a gun, with arrest powers, authority to take a life if necessary, it's very difficult to do that knowing how this person and what this person's biases are in - - in what part of the community that he seems to have very little respect for.

[T1:160, line 14 through T1:161, line 4].

A[redacted] W[redacted] is a [redacted] of the [redacted] in Philadelphia. Pastor Waller testified on behalf of the City for the purposes of discussing the offensive nature of the posts/comments published by the PVP and

the negative impact they had on the community. On these points, W[redacted] testimony was generally consistent with DC Wimberly's.

Police Officer Jennifer Gresham testified as a character witness on behalf of the Grievant. Gresham has been employed by the PPD for 14 years. Gresham testified that the Grievant was her immediate sergeant in the 12th District for approximately one (1) year in 2014/2015. Gresham indicated that they worked together on the same work schedule. Gresham testified that the Grievant "was one of the best sergeants that I ever had", "got along with everybody", and "treated everyone fairly". [T2:10, line 25 through T2:11, line 12]. Gresham indicated that she was not aware of any complaints of discrimination of any type filed against the Grievant. Gresham acknowledged that she has never served in a rank or as a commanding officer in the PPD. Gresham indicated that she may have reviewed the posts/comments made by the Grievant, but there was nothing that would change her opinion of him.

[redacted] testified as a character witness on behalf of the Grievant. B[redacted] has been employed by the PPD for over 29 years and is currently assigned to [redacted]. B[redacted] and the Grievant were [redacted] for 3-4 years when they were assigned in the 23rd District as police officers. B[redacted] testified that the Grievant "had a great work performance", "needed little to no supervision", "comprehended things well", and "got along with others". [T2:18, lines 23-25].

B[redacted] stated that the Grievant always interacted with the citizens of Philadelphia in a professional manner. He was not aware of any complaints of discrimination of any type filed against the Grievant.

B[redacted] testified that he was aware of the basis for the Grievant's dismissal. B[redacted] was asked to review some of the Grievant's posts/comments. B[redacted] acknowledged the Grievant's use of profanity and he agreed that the posts/comments could be perceived as racially or religiously discriminatory. B[redacted] agreed that the posts/comments violated the Social Media Directive, but his opinion that the Grievant is a good guy did not change.

The Grievant testified that he has never received an unsatisfactory review over his career, but he acknowledged that he received a 15-day suspension and a transfer in December 2009. The Grievant indicated that the basis for that disciplinary action was unrelated to the type of charges at issue in the instant matter.

The Grievant testified that he set up his Facebook account in November 2015. The Grievant indicated that to his knowledge his settings have always been set to "private". The Grievant stated that he never included anything on his Facebook page that would identify him as a PPD police officer or a City employee.

The Grievant confirmed that he received a copy of the Social Media Directive 6.10, but he has never had an occasion to counsel or reprimand any of the officers he has supervised concerning their use of social media.

The Grievant recalled being interviewed by Garvey in March 2019. The Grievant testified that he answered truthfully throughout the interview. The Grievant indicated that he was shown "just several lines of just statements written with numbers next to them" without any screenshots, memes, or clips. [T2:97, line 24 through T2:98, line 5]. The Grievant stated that at the time of the interview he could not recall if he made the comments that were purportedly made years prior. The Grievant indicated that when he was actually able to see the posts/comments that were accompanied by screenshots during the July 1, 2019 interview that he was able to identify and admit to his posts/comments.

The Grievant testified that he has never treated or been accused or treating anyone differently because of any protected classification. The Grievant indicated that he has never been advised by a supervisor that someone from his squad had a problem with him.

The Grievant reviewed the comments/posts for which he was dismissed. [*See* Ex. J-10]. Although the Grievant provided explanations for some of his comments/posts, he conceded that at least some of them violated the Social

Media Directive either because he used profanity, could be perceived as being insensitive towards a protected class, or viewed as inciting vigilantism or suggesting the use or excessive force. [*See generally* T2:110 through T2:133, 149-151, 156-173]. The Grievant testified that looking back now he would not have made the same comments/posts. The Grievant indicated that he continues to use Facebook but only uses it now for family photos.

The Grievant testified to the basis for his decision to file for his service pension:

> [Grievant Melvin, On Direct]
>
> Q. [By Union Counsel Caggiano] Did there come a time when you filed for your service pension?
>
> A. I did, yes.
>
> Q. Okay.
>
> A. And that would be the following week.
>
> Q. And why did you do that?
>
> A. Well, over the weekend, after - - after Friday afternoon on the 19th, I sat down with my wife, and we discussed our options about how we were going to go forward with our lives.
>
> And at the time, I still had two young daughters that were under my medical care, and my wife under my medical care.

> And in order to preserve that and in order to be able to continue to pay my mortgage, I kind of - - I kind of felt I had no other option. I was - - we talked about it. We came to the decision that this is what we have to do.
>
> [T2:107, line 11 through T2:108, line 3].

The Grievant testified that prior to his dismissal that he did not have any plans on retiring until he was well into his late 60s. [*See* T2:180, lines 22-24].

SUMMARY OF THE ARGUMENTS

The City's Position

The City contends that the Union's grievance is not arbitrable because the Grievant "elected to retire from the police force rather than participating in the disciplinary process to which he was entitled." [City Brief, p. 16]. The City therefore submits that the Grievant's "termination never occurred, and the plain language of the parties' collective bargaining agreement does not provide for arbitral review of prospective or potential actions", "the Union grieved a discharge that never happened", and the Grievant's retirement is not grievable because "grievable discipline is limited to suspensions, demotions, and dismissals...." [*Id.* at 17]. The City emphasizes that the Grievant elected not to avail himself of "an opportunity to change his employer's mind and stop his termination." [*Id.* at 19].

The City maintains that in the event the arbitrator finds the grievance to be arbitrable that it had just cause to terminate the Grievant "because he engaged in a course of conduct demonstrating no regard for his responsibilities as a member of the PPD." [*Id.* at 21]. The City contends that it has satisfied the seven (7) traditional factors of just cause:

> The seven factors of just cause are whether (1) there was notice of the possible or probable disciplinary consequences

> of the conduct; (2) the work rule or managerial order is reasonably related to the orderly, efficient and safe operation of the employer's business and the performance properly expected of the employee; (3) the employer conducted an investigation to determine if the misconduct occurred; (4) the investigation was fair and objective; (5) whether substantial evidence or proof supported the finding of misconduct; (6) the employer applies its rules, orders, and penalties fairly and without discrimination to all employees; and (7) the discipline is proportionate to the offense and employee's record. American Fed'n of State, Cty. & Mun. Employees, Dist. Council 88, AFL-CIO v. City of Reading, 130 Pa. Cmwlth. 575, 582, n. 3 (1990).
>
> [City Brief, p. 22].

With respect to the first factor, the City indicates that the Grievant was aware of and received training on the Department's Social Media Directive and is subject to the disciplinary scheme that is part of the parties' Agreement. As to the second factor, the City submits that the directive is "directly related to the provision of orderly, efficient, and safe law enforcement." [*Id.* at 25]. Turning to the third through fifth factors, the City maintains that the Department conducted "a thorough, fair, and objective investigation" that included but was not limited to a review of the Grievant's social media posts, interviews with the Grievant, and providing the Grievant with several opportunities to explain his conduct. [*Id.* at 26]. The City emphasizes that the Union presented no evidence of bias.

In addressing the sixth factor, the City contends that "[t]ermination was the penalty proportionate to Sergeant Melvin's egregious offense." [*Id.* at 27]. The

City emphasizes that two (2) out of the three (3) charges the Grievant was facing include a penalty of 30 days or dismissal for violations. The City submits that the Grievant's hollow excuses for his conduct and his lack of awareness are evidence of the appropriateness of the penalty. The City also submits there is nothing in the Grievant's personnel file that requires the imposition of lesser discipline. The City provides the following support for its position:

> Philadelphia's citizens come from every walk of life and represent the diversity of the United States: they are Christians, Jews, Muslims, Buddhists, and atheists; they can trace their families back to indigenous people or are first-generation immigrants, seeking America's promise of opportunity and equality; they represent the full spectrum of human sexuality and gender identity; and they, like every other person in this country, have a constitutionally-protected right to protest the government, no matter where they fall on the political spectrum. Sergeant Melvin's posts demonstrate contempt and bigotry for members of the community that he is sworn to protect – Muslims, African-Americans, gay people, trans people, protestors – and an enthusiasm for extra-judicial violence. No police officer is hired to simply protect and defend those like themselves; they have a greater, and far nobler, mission: to protect even those they disagree with, and to treat all citizens with dignity and respect. Sergeant Melvin has shown himself to be unwilling to carry out that mission and unworthy of the honor of calling himself a Philadelphia police officer. He cannot use his family members or past awards as a shield against the damage he caused by his actions: the community has to be able to trust the police, and his comments and posts breached that trust.
>
> The Philadelphia Police Department issued a penalty proportionate to Sergeant Melvin's misconduct. Nothing in his personnel file could possibly mitigate the damage done to the Police Department and the communities it serves. He demonstrated a complete disregard for his responsibilities as a Philadelphia Police Officer through his public expressions of

> hateful, bigoted rhetoric. Termination was the only appropriate remedy in light of Sergeant Melvin's egregious course of conduct, and the damage to the community trust cause by his intolerant and indelible Facebook content.
>
> [*Id.* at 32-33].

Lastly, with respect to the seventh factor, the City contends that it "applied its rules, directives, and the bargained-for Disciplinary Code fairly and without discrimination in both issuing disciplinary charges and administering the penalty associated with the charges." [*Id.* at 33]. The City maintains that the evidence shows that the Grievant lied during the investigation when he denied making certain posts. The City emphasizes that the Grievant must be held to a higher standard in his rank of Sergeant and given the egregiousness of his posts, rather than the number of them, termination was required.

Continuing with its discussion on the seventh factor, the City submits that the Union's attempt to compare the Grievant's actions to other officers who were also disciplined for their social media posts cannot serve as the basis for modifying the penalty imposed:

> The union makes a misguided attempt to identify what it contends are comparators but fails to recognize critical distinctions between Sergeant Melvin and other employees disciplined for misusing social media, arguing that some of its members deserved harsher discipline. Specifically, the Union began to question DC Wimberly about a number of officers who were part of the group of twenty that were disciplined

through Commissioner's Direct Action because their posts were so egregious. After DC Wimberly repeatedly responded that the Executive Team did not compare the posts of one officer to the posts of another officer – that each situation was assessed individually -- the Union entered the remaining disciplinary records of the group of 20 into evidence over the City's standing objection to relevance, without continuing to question DC Wimberly, who agreed her answers would be the same in every case. See Tr. 1 at 204-215, generally; 210:9-15 ("I will say that when we viewed separately and individually, the decisions was made for Officer Amato to receive 30 days. When Sergeant Melvin's posts were reviewed, the decision was if he should be discharged? There was no comparison between the two. So --and that was for everyone individually?").

The FOP's alleged comparators are not similarly situated enough to be appropriately compared to the grievant. First, the City notes that many of the Union's alleged comparators—specifically Officer A[redacted], Officer C[redacted], Officer G[redacted], Officer G[redacted], Officer N[redacted], Officer S[redacted], Officer Y[redacted], and Officer G[redacted]–were a lower rank than the Grievant. As DC Wimberly testified earlier in the hearing, while the focus of the Executive Team was on the egregiousness of the posts, the fact that Sergeant Melvin was a supervisor who was responsible for ten to twelve officers was a consideration, and that he had to be held to a higher standard. Tr. 1 at 113:5-13. Of the universe of sworn officers the Union seeks to compare to Sergeant Melvin, only one, [redacted] D[redacted], U-9, had a higher rank, but he did not call for a ban against Muslims coming into the United States, for instance, as Sergeant Melvin did, and his few posts did not share racist imagery the way Sergeant Melvin did repeatedly. It is also worth noting that Officer N[redacted] only made one offensive post and Sergeant C[redacted] only posted three inflammatory posts and both individuals received lessor discipline than the grievant. U-10; U-14. Additionally, G[redacted] received no discipline whatsoever because all of his posts were determined to be protected speech or not offensive or detrimental to policing. U-11.

As Wimberly repeatedly testified, the Executive Committee looked at each case individually. They did not compare one case to another. Id. at 115:10-16. Each case was given a careful, nuanced review, and the Committee made a

determination for each of them. Their determination was that Sergeant Melvin's posts were particularly egregious and damaging to the community in which he served.

There was no evidence presented that the Executive Team determined they could no longer hold positions as Philadelphia Police Department officers and none presented that would show their circumstances were so similar to Sergeant Melvin's as to make his discipline disproportionate – no evidence presented at all.

Sergeant Melvin was treated fairly and was not discriminated against. His Facebook posts attacked Muslims, African Americans, Latinos, gay people and called for vigilante violence against protestors and transgendered people. His extraordinarily egregious conduct necessitated a penalty at the upper end of the bargained-for penalty range: termination. The City has satisfied the seventh element of just cause.

[City Brief, pp. 34-36].

The City's reply brief emphasizes the need for this matter to be reviewed and evaluated by the Arbitrator on its own merits rather than permitting other arbitral decisions to serve as precedent:

Even if this Arbitrator were to consider other arbitral awards, which the City submits it should not, the specific cases presented by the FOP should not apply to the arbitrator's decision in this case. Of the five cases the Union references, four are officers whose rank was below Sergeant Melvin's. Deputy Commissioner Wimberly testified that in Sgt. Melvin's case, while the executive committee primarily relied on the egregiousness of his posts, they also considered his rank and the fact that he had 10-12 officers reporting to him. [Citation omitted]. Also of those five cases, three, including Y[redacted] and P[redacted], were decided by the same arbitrator. The union appears to be suggesting that this

arbitrator can merely map the directions of that arbitrator, considering those officers, those officers' posts, and the testimony in those cases – onto the testimony in this case. This is not what the parties ask of arbitrators in just cause cases.

The City is not parsing out the individual posts in those cases – neither Y[redacted] nor P[redacted]'s individual posts were attached as exhibits in the hearing – and has already addressed the posts from the alleged comparators that the FOP submitted for consideration at the hearing. The City submits, however, that Sgt. Melvin's posts were uniquely "hatred-laid," as DC Wimberly testified, and that although DC Wimberly insisted that only one post was sufficient to warrant dismissal, Sgt. Melvin made 14 posts that violated policy. To the extent that the FOP asserts in its brief, as it did during the hearing, that this arbitrator should consider other disciplinary actions by the City-not other arbitration awards-in determining if Sgt. Melvin's discipline is supported by just cause, the City has addressed the appropriateness of those alleged comparators [in its] post-hearing brief. While the City disagrees that the alleged comparators raised by the FOP are appropriately similarly situated or establish that Sgt. Melvin was unfairly disciplined, the City agrees that it bears the responsibility to issue discipline consistently and submits that it has done so in this case. However, the Arbitrator here is not obligated to adopt the opinion of other arbitrators in their subjective evaluations of different sets of facts.

In short, the City asks that this arbitrator use his discretion, rather than mechanically apply the determinations of other arbitrators in other cases.

[City Reply, pp. 2-3].

For these reasons, and the entire record, the City contends that it had just cause to terminate the Grievant's employment, and the Union's grievance must be denied.

The Union's Position

The Union contends that the grievance is arbitrable, an issue that is "solely within the jurisdiction of the arbitrator." [Union Brief, p. 16]. The Union maintains that it is grieving the unjust discipline of the Grievant, a subject that is expressly is grievable under the terms of the Agreement. The Union submits it is undisputed that the City imposed discipline and the Grievant's decision to file for his service pension does not alter this fact. The Union emphasizes that arbitrators in similar cases between the City and the Union have upheld the arbitrability of the grievances. The Union's brief provides:

> The City has not met the heavy burden of proving that the grievance is not arbitrable in this matter. There is no dispute that the parties' CBA permits the Lodge to grieve unjust discipline, including discharge and suspension, of its members, among other matters. See Ex. J-1, Art. XXI(1); see also, Art. XXII(L). Further, there is no dispute in this case, nor can there be, that that the FOP in fact grieved Sgt. Melvin's discipline. Ex. J-2. He was, in fact, disciplined, as he was placed on suspension and advised that he was suspended with notice of intent to dismiss on July 19, 2019, when he appeared for his Gniotek hearing and was served with discipline. See Ex. J-11 at 11. Nor was the nature of the discipline imposed in any way speculative – it was formally served and the grievant was suspended. See id.; see also, Tr. Jan. 31 at 197. Moreover, the Deputy Commissioner testified that it was unequivocal – there was nothing the grievant could have said or done thereafter that would have caused the Department to change its mind or revoke the discipline imposed. Tr. Jan. 31 at 198. Relatedly, once the PPD serves someone with intent to dismiss, it does not rescind that decision. Id. at 197-98. The Department places the Notice in the personnel file of the at-issue officer, where it remains. See Ex. J-11 at 1. Thus, where the City suspended and discharged Sgt. Melvin, the grievance is arbitrable.

The fact that Sgt. Melvin thereafter filed for his service pension is irrelevant to the question of arbitrability. Sgt. Melvin filed for his service pension the following week, having no other option to ensure he could continue to support his family. Id. at 107-08. Absent the PPD's decision to discharge him, he had no plans to retire at that time. Id. at 186. The CBA not only permits the Lodge to grieve the City's actions here, it also does not preclude officers from mitigating their damages as a result of such discipline; in fact, well-established labor law principles require grievants to mitigate damages sustained as a result of a discharge or suspension from employment.

Two other arbitrators, under nearly identical circumstances, have likewise found such grievances arbitrable. In FOP Lodge No. 5 and City of Philadelphia, (M[redacted]), (Brown, 2021) (attached as Appendix A), another officer caught up in the PVP, E[redacted] M[redacted], was discharged and retired three days after receiving a Notice of Suspension with Intent to Dismiss. The City, as it has in this case, argued that the grievance was not arbitrable because Officer M[redacted] retired before his termination formally took effect.

In M[redacted], Arbitrator Brown found the grievance arbitrable, in relevant part, because of the notice provided to the officer of the discharge – in that case, by way of public announcement. Similarly, in this case, there is also evidence of notice – even stronger evidence of notice from the PPD to the grievant -- who was notified to appear for his Gniotek because the PPD advised the FOP that he was going to be discharged. Tr. Mar. 21 at 106-07. Sgt. Melvin, like Officer M[redacted], appeared on July 19, 2019, for his Gniotek hearing and was formally served with his charges and discipline. Id. at 103, 107.

The arbitrator in M[redacted] also rejected the City's argument that the grievance was premature or speculative because there was "nothing preliminary about the decision" to terminate the grievant where there was "no substantial difference under the circumstances presented between the City having the ability to change its mind after the Commissioner already made the decision but before the employee's termination date and the City being able to change its mind during the grievance and arbitration process. M[redacted] at 12. Moreover, the arbitrator in that case found

that under very similar circumstances, the "Grievant's efforts to collect pension payments is not inconsistent with a duty of an employee who challenges his or her termination to mitigate damages." M[redacted] at 13.

In FOP Lodge No. 5 and City of Philadelphia (Y[redacted]), (Reilly, 2022) at 29-31 (attached as Appendix B), the Arbitrator found another PVP grievance arbitrable under similar circumstances. The only significant difference between the two cases is that [redacted] Y[redacted]'s grievance was found arbitrable even though Y[redacted], unlike Melvin, did not appear for his Gniotek and was not formally served with his disciplinary charges and notice of suspension and dismissal. Nevertheless, [redacted] Y[redacted] was notified by the Union that the PPD had advised he was going to be discharged. Like Sgt. Melvin, his paperwork was drafted and the decision was already made. Like Sgt. Melvin, the PPD specified that nothing would have changed its decision. The Arbitrator in Y[redacted] correctly found that the above facts amounted to a discharge, which was clearly arbitrable pursuant to the parties' CBA:

> 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 Y[redacted] prior to his retirement on July 19, 2019. There was nothing speculative or equivocal about that determination. It was a certainty.

Id. at 30. The Arbitrator found the grievance arbitrable even though, unlike Sgt. Melvin, the grievant in that case did not appear for his Gniotek and get formally served because, as the Arbitrator correctly noted, that step would have been "ministerial in nature and would not have altered the decision to discharge..." Id. The Arbitrator further concluded that the grievant's decision in that case to file for his pension did not alter the analysis. Id. at 30-31.

Sgt. Melvin's separation from employment was neither voluntary, nor speculative; it was a direct consequence of the PPD's unequivocal determination to discharge him for his role in the PVP. For all the above reasons, the Arbitrator should find this matter arbitrable and decide the merits of this case.

[Union Brief, pp. 17-20].

With respect to the merits of the case, citing the seven (7) traditional factors of just cause, the Union contends that the City has not met its burden to prove that it had just cause to terminate the Grievant's employment:

> Here, several aspects of the Daugherty test have been violated: (1) The Department failed to put Sgt. Melvin on notice that he might be terminated for his Facebook posts under the Directive and failed to provide him with sufficient training on its expectations; (2) the Department failed to complete a fair, thorough, and impartial investigation and failed to ascertain, before disciplining him, whether Sgt. Melvin was guilty of violating any work rule by obtaining sufficient evidence of Sgt. Melvin's guilt; (3) the Department failed to discipline Sgt. Melvin consistent with other officers who engaged in substantially-similar conduct; and, (4) the Department failed to impose a penalty proportionate to Sgt. Melvin's actual conduct considering his excellent work record and other mitigating factors.
>
> [*Id.* at 21].

In addressing the City's claim that the Grievant lied during the investigation, the Union points out that mere forgetfulness does not amount to deception. The Union indicates that the Grievant simply could not recall making two (2) of the three (3) comments that were presented to him three (3) years after he made them on social media. The Union emphasizes that the Grievant was not shown the social media posts during the interview, but "[i]nstead, approximately 10 unattributed comments were read to him off of a paper, the vast majority of

which were not quotes he made." [*Id.* at 22-23]. The Union points out that the Grievant "did admit to making one of the three comments later attributed to him which demonstrates his candor and his good faith attempt to answer questions asked of him accurately in the interview. [*Id.* at 23]. The Union stresses the fact that the officer who interviewed him did not conclude that the Grievant lied or was deceptive during the interview. The Union also notes that "the City never advised Sgt. Melvin it believed he had lied in March, 2019, or otherwise gave him an opportunity to defend against this allegation, prior to discharging him for it on July 19, 2019." [*Id.*]. Lastly, the Union submits that the City singled out the Grievant without explanation:

> ...the City had no just cause to discharge Sgt. Melvin for an ostensible violation of this charge, either. This is so where IA found that all six of the officers interviewed in March, 2019 had lied, yet only Sgt. Melvin was charged with lying and discharged for it. See id. at Tr. 83. The City's witnesses offered no explanation for why Sgt. Melvin was singled out for discipline on this ground. See id. at 170. In fact, Officers C[redacted] and O[redacted] – part of the original six interviewees and who IA sustained lying charges for as well – had prior social media misconduct in their work history and were also not discharged by the PPD. Id. at 178, 179-80. Instead, these two officers received an opportunity to remediate their behavior and were given 30-day suspensions. Id. at 179-80. Likewise, Officer F[redacted] just like Sgt. Melvin, was read the list of comments which included several quotes ultimately attributed to him. Id. at 83-84. Even though Officer F[redacted] was found to have denied making two specific comments later attributed to him, the PPD did not charge him with lying. See id. at 171-74, 175. This arbitrary treatment is particularly egregious where Sgt. Melvin was the only officer out of all of the six officers initially interviewed who took ownership of any of the comments read off by IA and where the PPD never gave him an opportunity to

defend himself against this allegation prior to firing him for it. Id. at 84; Tr. Mar. 21 at 102. [Union Brief, pp. 22-23].

The Union contends that the City violated the Grievant's due process rights by failing to provide him with clear notice "that such conduct was unacceptable because it did not adequately train him about off-duty social media use or otherwise provide sufficient training on its Directive until after the fact." [*Id.* at 26]. The Union emphasizes that the Grievant "was not on social media when he originally signed off for the Directive", and it was not until the summer of 2019 that the City provided training on the Directive. Moreover, there was a lack of notice of the severe consequences for Directive violations. The Union stresses that the City terminated the Grievant, a 24-year veteran of the Department, rather than providing him with any opportunity either through retraining or counseling to correct conduct that took place several years before the investigation occurred.

The Union submits that the City failed to conduct a fair investigation before it concluded that the Grievant was guilty of violating the work rules and imposed discipline in this matter. The Union indicates that the investigation simply consisted of two (2) interviews with the Grievant. The Union points out that "the Department never asked Sgt. Melvin for any form of clarification or for any explanation regarding his social media activity." [*Id.* at 29]. Moreover, the Grievant "was unaware which of the approximately 40 posts attributed to him by the PVP the

Department discharged him for until after the decision was made to terminate him." [*Id.*].

To the extent that the City will argue that the Grievant could have clarified his posts during or after the investigatory interview, the Union emphasizes that it is the City's burden to prove a work rule violation. The Union points out that this argument was previously rejected by Arbitrator Brown in *City of Philadelphia v. FOP Lodge 5 (F[redacted])* (Brown, 2021). Arbitrator Brown wrote, "I find that Grievant's posts present a significant degree of ambiguity and the City inappropriately relied upon assumptions and guesswork to come to a number of its conclusions relating [*sic*] Grievant's posts." [*Id.*]. The Union addresses the 14 posts for which the Grievant was terminated:

> As will be explained in more detail below, the City's assumptions about many of Sgt. Melvin's posts should likewise be disregarded by this Arbitrator. More specifically, the Arbitrator should not permit the City to shift its burden of proof onto the grievant by placing an affirmative obligation on him to explain the meaning of his speech in over 40 posts in an investigatory interview, at a time when the City had not yet made any conclusions that Sgt. Melvin violated *any* Department policies whatsoever. See Tr. Jan. 31 at 87; Tr. Mar. 21 at 105-06. The Department's failure to conduct even a rudimentary investigation into what Sgt. Melvin meant and why he shared and commented upon the at-issue content renders the City unable to meet its burden. Accordingly, to the extent that Sgt. Melvin's posts had ambiguous meanings, the City cannot meet its burden of establishing a violation of the Directive.

With regard to the 14 at-issue posts identified by the City, the City either failed to demonstrate a violation of the Social Media Directive or otherwise erroneously assumed the grievant's comments were discriminatory in nature, as opposed to mere uses of profanity. For example, without even viewing the underlying article, the PPD "interpreted" a December 22, 2015 comment made by Sgt. Melvin as meaning it was "unreal" that the perpetrators were arrested as opposed to some other type of violence. Ex. J-10 at 8. Putting aside how speculative and unlikely the PPD's "interpretation" was, Sgt. Melvin testified he does not believe his post violated the Directive and clarified that his comment was in reference to the horrendous nature of the crime described in the article. Id. at 122-23. Contrary to the City's assumptions about what Sgt. Melvin posted, [redacted], who commented on the post, also did not interpret his comment in this manner. Tr. Mar. 21 at 20-22. Since the City's discipline was based on incorrect assumptions, there is no evidence to support a finding that this post violated the Directive.

Likewise, the City improperly purported to discipline Sgt. Melvin for a November 11, 2016 comment on a Fox 12 Oregon video. Ex. J-10 at 13. Sgt. Melvin recalls the police in the video using tear gas. Tr. Mar. 21 at 130. His comment was in reference to the means used, which he acknowledged he did not recall well, but noted that the use of tear gas to disperse persons would be in lieu of more physical action that could lead to violence. Id. at 130-32. The PPD failed to explain how this comment, without more, violated its policy. See Tr. Jan. 31 at 150-51. Since the City's discipline was based on incorrect assumptions, there is no evidence to support a finding that this post violated the Directive.

In another post, dated March 22, 2017, Sgt. Melvin candidly admitted the profanity contained in the post violated Directive 6.10. Ex. J-10 at 1. However, he denied that the post represented any racially-charged commentary on his part, contrary to the PPD's contentions; instead, he shared the content because of his own family's treatment as Irish immigrants. See Tr. Mar. 21 at 110-11. Similarly, the PPD wrongfully concluded that the mere reference to "thugs" in his September 16, 2016 meme share was a reference to Black men. See Ex. J-10 at 6; Tr. Jan. 31 at 135-36. Instead, Sgt. Melvin testified that in his 24 years as a PPD officer, "thug," to him,

means a person who commits a crime – it is not code for black male.[5] See Tr. Mar. 21 at 119-21.[6]

The City also alleged that Sgt. Melvin expressed anti-Muslim sentiment in several of his posts. See Ex. J-10 at 2, 3, 4, 5, 15. However, much of his commentary was a reaction to the offensive and often violent content being reported on or referenced in either a link or another article. See e.g., Tr. Mar. 21 at 117-19, 133. Several of these posts, when properly contextualized as referring to radicals with violent ambitions, or as reactions to concerns with Islamic terrorism, are also consistent with the mandatory, 2008 MPO training on Radical Islam that the PPD provided Sgt. Melvin. See id. at 115. The PowerPoint for the training explicitly teaches that Islam is a complete way of life that cannot exist with a pure democracy, unrestrained capitalism, or other forms of government. See Ex. U-16 at 3. Sgt. Melvin has been disciplined for expressing his concerns over a violent subset of radical Muslims, yet the PPD's mandatory training broadly characterized Islam as a violent religion. See Ex. U-16 at 2 (noting the "common misconception" that Islam is the religion of peace). For this reason as well, taken in context, there is no just cause for a finding that these comments by Sgt. Melvin violated the Directive.

The remaining posts identified by the PPD as forming the basis for discharge can all be characterized as hyperbolic expressions of Sgt. Melvin's political opinions or venting about horrific acts, often because of an underlying personal connection or experience on his part. None of these should be taken as literal incitements to violence or otherwise read into. See Ex. J-10 at 7, Mar. 21 at 122 (commentary on Hillary Clinton); Ex. J-10 at 9 (commentary on defacement of a fireman's grave and erroneous/inaccurate contention that the post was somehow racial commentary); Ex. J-10 at 10; Mar. 21 at 127-28 (commentary on ending sex segregated

[5] [Union footnote 8] [redacted] also admitted that the word "thug" is used in reference to individuals who are not Black men. Tr. Mar. 21 at 70.

[6] [Union footnote 9] In addition to the PPD failing to meet its burden in this regard, a broader look at posts other than those flagged by the PVP during this time period shows Sgt. Melvin commenting in a positive way on a number of law enforcement and military personnel posts and successes throughout the period, regardless of the person's race, creed or otherwise. See Ex. U-15. These were posts that, among others on his Facebook wall, the PPD neglected to look at in connection with its investigation, prior to self-servingly attacking the Sergeant's character as a whole and accusing him of racially motivated commentary. See, e.g., Tr. Jan. 31 at 160 (attacking the "fiber" of Sgt. Melvin).

> bathroom practices and not on transgender persons); Ex. J-10 at 11, Mar. 21 at 128 (meme reacting to spitting on service members); Ex. J-10 at 12, Mar. 21 at 129-30 (reacting to article depicting persons standing on an American flag and giving the middle finger); Ex. J-10 at 14, Mar. 21 at 132-33 (reacting to murder of persons in Fairmount Park); Ex. J-10 at 15, Mar. 21 at 133 (reacting to horrific attack on young girl).
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> [Union Brief, pp. 30-33].

Shifting the focus directly on the penalty of dismissal, the Union indicates that the Agreement and Department Directive 8.6 require "fair and consistent penalties". [*Id.* at 33, *citing* Ex. J-1, Disciplinary Code, at 1]. The Union argues that even if a penalty is warranted in this matter that the Grievant's discipline "was unfairly harsh in comparison to other officers involved in the PVP, as well as other non-PVP social media-related disciplinary matters." [Union Brief, p. 33]. The Union contends that the Grievant's posts are substantially similar in quantity and quality to those of A[redacted], C[redacted], G[redacted], and [redacted] G[redacted] who all received 30 day suspensions through Commissioner's Direct Action for their PVP posts.[7] The Union provides an analysis of these matters as well as six (6) other PVP cases that resulted in arbitration awards:

> For example, Officer Cain commented on a Fox news report: "What did they think would've happened when they released a bunch of sword swallowing, Goat F'ing ragheads that already attacked Americans?..." Ex. U-5 at 1. Other comments and posts by Officer C[redacted] arguably relate to Muslims and/or contain profanity and references to violence.

[7] G[redacted] also received a transfer as part of his discipline.

See Ex. U-5. Officer G[redacted]'s 10 actionable posts allegedly violated the Directive by supporting violence, in the same manner the City contended several of Melvin's posts did. See Ex. U-8, U-9. Officer G[redacted]'s 30-day suspension was further mitigated by a labor arbitrator, who found that the City had established just cause for only a 5-day suspension. See City of Philadelphia and FOP Lodge 5 (G[redacted]) (Brown, 2022) (attached as Appendix E).

By way of further example, Officer A[redacted] was also charged with Conduct Unbecoming and Neglect of Duty for four posts attributed to her by the PVP database. See Ex. U-2 (posting under the username "Yo Stuff"). One of the comments for which she received discipline was a December 1, 2015 comment, apparently in reference to Muslim refugees, stating "[s]end these ungrateful fucks back. Fuck them." See Ex. U-2 at 6. Officer A[redacted] nevertheless received a 30-day suspension. See Ex. U-2 at 1. She was not terminated despite the fact that she, unlike Sgt. Melvin, had previously been disciplined for violating the Directive. See Ex. U-1. Similarly, Officers C[redacted] and O[redacted] were not discharged by the PPD, despite their record of prior social media violations prior to finding themselves in the PVP database. Tr. Jan. 31 at 178-79, 179-80.

[redacted] G[redacted]'s actionable posts also reference Islam. See Ex. U-6, U-7. While the Department issued her a 30-day suspension and a disciplinary transfer for her PVP posts, her discipline was mitigated to a 15-day suspension by a labor arbitrator because "...the Department has not been consistent in the level of discipline imposed for violations of its Social Media Policy." See City of Philadelphia and FOP Lodge 5 (G[redacted]) (Reilly, 2022) at 30 (attached as Appendix F). In so deciding, the Arbitrator specifically pointed to, among others, Officer A[redacted]'s one-day suspension in 2017 for her violations of the social media policy "which included 40 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." Id. at 31; see also, Ex. U-1.

The PPD was unable to offer any cogent explanation for why Sgt. Melvin was deemed irremediable, while A[redacted], G[redacted], G[redacted], and C[redacted] were given an opportunity to

correct their behavior. See Tr. Jan. 31 at 209-10 (discussing A[redacted]), 214 (G[redacted]), 215 (G[redacted] and C[redacted]). Instead, it contended his posts were "egregious," attacked his character, and admittedly failed to apply discipline consistently where it did not compare his conduct to that of others. See id. at 115, 160, 209-10.

Numerous other officers identified by the PVP received even less discipline. [redacted]S[redacted]D[redacted] received only a 1-day suspension for four PVP posts in which he appears to mockingly use ebonics with references to "ghettoism" and "Ghettology," among other comments. Ex. U-12. At least ten other PPD employees received written reprimands in lieu of more severe punishment for their posts from the PVP database. See Ex. U-13, U-14. By way of example, one of those posts was made by Officer M[redacted]F[redacted], and read "[g]reat ending...good riddance animals," in response to a shared video depicting a gunfight following a traffic stop in which the police apparently killed the driver. See Ex. U-13 at 6. In addition, unlike Sgt. Melvin, eight officers were given the benefit of a PBI hearing with respect to their own PVP disciplinary charges, and none received any discipline. Ex. U-17; see also Ex. J-19 at 137-42 (T. of V.P. McGrody). Even apart from PVP-specific discipline, the Department also issued a 12-day suspension to Officer H[redacted]N[redacted] for posting a photograph of himself on social media in blackface. Ex. U-10.

The Department's conduct with respect to giving many of the other officers lesser discipline and a meaningful opportunity to correct their behavior before imposing severe discipline is consistent with the Contract and its policies. The problem lies not with the choice to give them progressive discipline, rather, the Department's inconsistent treatment of Sgt. Melvin, who had no prior discipline on the Directive, a similar number of posts, arguably posts that were less inflammatory than many of the above, and yet received industrial capital punishment as a penalty.

It is anticipated that the City will rely upon the F[redacted] Award, supra, as though reinstatement of Sgt. Melvin would somehow be inconsistent with that decision. In contrast, a decision sustaining the Lodge's grievance here would be fully consistent with F[redacted], as well as all of the other decisions on PVP discharges between these parties thus far decided on the

merits, all the rest of which – involving five different grievants – resulted in reinstatement orders and mitigated discipline: F[redacted], supra, City of Philadelphia v. FOP Lodge 5 (M[redacted] Discharge) (Brown, 2022) (attached as Appendix G), City of Philadelphia v. FOP Lodge 5 ([redacted], Discharge) (Reilly, 2022) (attached as Appendix H); [redacted], supra; and, City of Philadelphia v. FOP Lodge 5 (M[redacted]) (Leonard, 2023) (attached as Appendix I). In F[redacted] the grievant was discharged and the sheer quantity and quality of the posts at issue outdistances those at issue in this case by a considerable margin. See F[redacted] at 59, 61. F[redacted] also largely turned on Arbitrator Brown's finding that F[redacted]'s character was reflected in his posts. Id. at 61-62.

In contrast, the F[redacted], M[redacted], Y[redacted], P[redacted], and M[redacted] decisions are similar to this case in terms of the quantity and type of posts, but all resulted in decisions to mitigate discharges to 30-day suspensions. A fair look at these cases supports a finding that Sgt. Melvin's conduct was more akin to these grievants, at a minimum, and to those officers described above who received only 30-day suspensions or less. M[redacted] is particularly comparable. In that case, the grievant was disciplined for 10 posts for alleged anti-Muslim bias, anti-LGBTQ bias, and promotion of violence. See M[redacted] at 6-16. These posts are comparable to those of Sgt. Melvin. See id.

[Union Brief, pp. 34-37].

Lastly, the Union points out that the City did not consider the quality and length of the Grievant's service with the PPD. The Union submits that the Grievant "was entitled to progressive discipline because of his lengthy record of excellent service, the absence of any evidence of bad intent on his part, and other mitigating factors." [*Id.* at 38]. The Union emphasizes that the City "failed to produce any evidence showing Sgt. Melvin was ever even accused of treating someone differently because of their religion (or other protected category),

violent against protesters or other citizens, let alone proof that he actually did." [*Id.*].

For these reasons, and based upon the entire record, the Union requests that the grievance be sustained. As a remedy, the Union requests that the Grievant be reinstated expeditiously, made whole for lost wages, lost overtime opportunities, and anything else the Arbitrator deems proper. The Union also requests that the Arbitrator retain jurisdiction over the implementation of the remedy.

DISCUSSION

I have carefully considered all of the arguments and evidence submitted into this extensive record. I will first address the issue of whether the grievance is arbitrable.

As I indicated in C[redacted] the issue of arbitrability was addressed by Arbitrator David J. Reilly in Y[redacted] and Arbitrator Timothy J. Brown in *M*[redacted]. In each case, the arbitrator concluded that the Union's grievance was arbitrable. The parties are intimately familiar with the basis for these decisions, including C[redacted][8] I have considered the facts and circumstances that led Grievant Melvin to file for his service pension and conclude that they are substantially similar to those encountered by [redacted] Y[redacted], Officer *M*[redacted] and Officer C[redacted]. I conclude that the arbitrators' well-reasoned decisions in *Y*[redacted] and *M*[redacted] are persuasive, and I do not find sufficient grounds for rendering an award that is inconsistent with them. Put simply, the Union's grievance as to whether the City had just cause to discharge the Grievant is arbitrable and will proceed to be heard on its merits.

I now turn to the issue of whether the City had just cause to discharge the Grievant. The City has the burden to prove that it had just cause to terminate the

[8] I refer you to Y[redacted] at pp. 29-31, and *M*[redacted] *(Arbitrability)* at pp. 10-13. *See also Melvin* at p. 40.

Grievant's employment. The Grievant is charged with conduct unbecoming a police officer and neglect of duty in connection with social media posts attributed to him by the Plainview Project. Section 1-§021-10 of the Disciplinary Code refers to "conduct unbecoming" 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." [Ex. J-1]. The penalty for a first offense is a 30-day suspension or dismissal. [*Id.*]. Section 5-§011-10 of the Disciplinary Code defines "neglect of duty" as "failure to comply with any Police Commissioner's orders, directives, memorandums, or regulations; or any oral or written orders of superiors." [Ex. J-1]. The penalty for a first offense ranges from a reprimand to a 5-day suspension. [*Id.*]. The Grievant is also charged with lying during the internal affairs investigation. Section 1-§009-10 of the Disciplinary Code refers to "conduct unbecoming" as "lying or attempting to deceive regarding a material fact during the course of any Departmental investigation." [Ex. J-1]. The penalty for a first offense is a 10-day suspension to dismissal.

Before I address the alleged violations of Section 1-§021-10 and Section 5-§011-10 as they relate to the Social Media Directive, I will discuss the City's claim that the Grievant lied during the internal affairs investigation. During the initial investigation that took place on March 21, 2019, the Grievant was asked about a series of posts/comments. He was given little to no context concerning posts/comments that may have been made either by himself or someone else

years before the interview. On July 1, 2019, when the Grievant was reinterviewed, he was provided with posts/comments and screenshots that were displayed on his Facebook account. With this additional information, the Grievant admitted to his posts/comments. Based upon these facts and circumstances, and having reviewed the totality of the evidence, I conclude that the City has not met its burden of proving that the Grievant lied during the investigation. Notably, even Garvey, the interviewing officer, could not state with any degree of certainty that the Grievant lied. For these reasons, the charge of a violation of Section 1-§009-10 of the Disciplinary Code is dismissed.

With respect to the alleged violations of the Social Media Directive, Arbitrator Reilly eloquently addressed in the Union's grievance involving the discharge of Corporal Thomas Young how Department's Directive 6.10 was reasonably related to the orderly, efficient and safe administration of its law enforcement mission:

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

[Citation omitted].

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

[Y[redacted] at pp. 31-32].

As I did in C[redacted], I have given due consideration to Arbitrator Reilly's analysis above and conclude that it applies equally to the grievance concerning Grievant Melvin.

The focus of my analysis is now drawn to the sixth and seventh factors of the just cause analysis: whether the employer applied its rules, orders, and penalties fairly and without discrimination to all employees; and whether the discipline is proportionate to the offense and employee's record. The Grievant's

use of profanity in his Facebook posts and comments violated the Directive. I am also persuaded that several of the Grievant's posts and comments, notwithstanding that they might be subject to ambiguity, can reasonably be viewed as demeaning and disparaging towards individuals within protected classes. The Grievant's Facebook posts and comments cannot be condoned, and they serve as a legitimate basis for the City's decision to discipline the Grievant. For these reasons, I conclude that the City had just cause to discipline the Grievant. However, the parties' Agreement and the concept of just cause require that discipline be progressive and corrective, rather than punitive, in nature. There is undisputed evidence that shows the City did not consider the Grievant's work history prior to making its decision to discharge him. The Grievant had been employed by the PPD for 24 years and received satisfactory ratings and numerous commendations throughout his career. The Grievant admitted to a prior disciplinary action, but the evidence does not suggest or show that the basis for this action related to a violation of the Social Media Directive. Moreover, there is nothing in the record to suggest or show that the Grievant failed to perform his duties to the detriment of any Philadelphia resident. I also considered that fact that the City did not make any comparisons of the Grievant's misconduct to prior incidents in which officers violated the Directive. It also did not draw any comparison to the discipline imposed upon other officers implicated in the PVP.

I have independently reviewed the evidence in this matter. I have also considered the penalties that the City imposed in other PVP cases including but not limited to the discipline that was addressed by the arbitrators in F[redacted], F[redacted], M[redacted], Y[redacted], M[redacted], and F[redacted]. I have also factored in the Grievant's work history. Taking everything into consideration, and without minimizing the gravity of the Grievant's actions, I am not persuaded that the penalty of dismissal has been shown to be required in the Grievant's first instance of violating the Directive or that he is incapable of being rehabilitated. Instead, I conclude that the evidence supports the lesser, corrective form of discipline that is prescribed in Section 1-§021-10. For these reasons, and the entire record, I conclude that the City had just cause to discipline, but not terminate the Grievant. The Grievant's termination shall be reduced to a 30-day suspension without pay and he shall receive retraining as deemed appropriate by the City. The Grievant shall be reinstated to his position as a police officer and made whole in all other respects.

AWARD

The City had just cause to discipline but not to dismiss the Grievant. The Grievant's termination shall be reduced to a 30-day day suspension without pay and he shall receive retraining as deemed appropriate by the City. The Grievant shall be reinstated to his position as a police officer and made whole in all other respects.

Dated: October 11, 2023