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. 01-19-0003-1622
(P/O Jesus Cruz (205768) – Discharge)

Before
Robert C. Gifford, Esq.
Arbitrator

Appearances:

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

For the Employer:
Frank Wehr, Deputy City Solicitor
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 August 15, 2019, the Union filed a grievance alleging that the City violated the Agreement by terminating the employment of Police Officer Jesus Cruz ["Grievant"] without just cause. [Ex. J-2]. On October 4, 2019, the Union submitted the unresolved grievance for binding arbitration. [Ex. J-3]. On December 19, 2019, AAA notified me that I was chosen to serve as arbitrator. On January 22, 2021, 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].

The arbitration proceedings were held at AAA's Philadelphia offices on February 28, 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 Leslie Marant – Chief Diversity, Equity and Inclusion Officer for the Philadelphia Police Department and Deputy Commissioner Robin Wimberly.[1] Testifying on behalf of the Union were Grievant Cruz and Lieutenant

[1] Marant's testimony is located from T:32-84. Wimberly's is located from T:85-166. Wimberly's testimony from *Melvin* (AAA Case No. 01-19-0002-2849) was admitted into evidence and made part of this record.

John McGrody – FOP Vice-President.[2] The parties provided post-hearing briefs to AAA on or before July 3, 2023. The record was declared closed on July 24, 2023.

ISSUES

The parties provided me with the authority to frame the issues to be heard and decided. [T:7]. Having considered the evidentiary record developed by the parties in this matter, I frame the issues as follows:

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

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

[2] The Grievant's testimony is located from T:167-228. McGrody's is located from T:230-233. McGrody's testimony from *Young* (AAA Case No. 01-19-0003-1624) was admitted into evidence and made part of this record. [Ex. J-15].

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 to subtract from or in any way alter the terms of this contract, Act 111 arbitration awards or the scale of wages set forth therein.

[Ex. J-1].

BACKGROUND

Grievant Jesus Cruz had been employed by the Philadelphia Police Department ["PPD"] as a Police Officer since November 20, 1989. Throughout his career, the Grievant received satisfactory ratings and numerous commendations. [Exs. U-15 & U-16]. Prior to his separation of employment, the Grievant was last assigned to the Firearms Identification Unit.

Department Directive 6.10 is entitled "Social Media and Networking".[3] The Directive indicates that "employees are embodiments of [the PPD's] mission" and, therefore, "[i]t is...essential that each member accept his or her role as an ambassador of the department." [Ex. J-6, p. 1]. The Directive provides that "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." [*Id.*]. The Directive emphasizes that "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." [*Id.* at 1-2]. The Directive provides that "[e]mployees are prohibited from using ethnic slurs, profanity, personal insults; material that is harassing, defamatory, fraudulent, or discriminatory, or other content or communications

[3] Staff Inspector Francis Healy was involved in the drafting of the Directive. Healy provided testimony concerning the Directive in *Farrelly*, AAA Case No. 01-19-0002-2851. Healy's testimony in *Farrelly* was admitted into evidence as part of this record. [Ex. J-12].

that would not be acceptable in a City workplace under City or agency policy or practice." [*Id.* at 3]. Employees are also "prohibited from displaying sexually explicit images, cartoons, jokes, messages or other material that would be considered in violation of the City Police Preventing Sexual Harassment in City Government." [*Id.*].

This matter arose after 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].

The parties stipulated to the following facts:

1. Sgt. Brian Saba, #8791, was assigned to the Internal Affairs Division of the PPD since December of 2018.

2. During his assignment to IAD, Sgt. Saba conducted investigations of complaints against police employees.

3. In order to conduct investigations, Sgt. Saba received training from the Department.

4. On June 10, 2019, Sgt. Saba was assigned to investigate approximately 50 to 60 employees who had been identified on the Plain View Project ("PVP") website. This was part of IAD #19-1077.

5. In the course of his investigation, Sgt. Saba learned that the PVP contained Facebook posts from approximately 2011 to 2018.

6. The PVP "is a database of public Facebook posts and comments made by current and former police officers from several jurisdictions across the United States." https://www.plainviewproject.org/

7. One of the employees Sgt. Saba was assigned to investigate was former Police Officer Jesus Cruz.

8. This particular case was assigned IAD #19-1077.128.

9. It was alleged that PO Cruz used the public Facebook account with the username, "Jesus Cruz."

10. Sgt. Saba started his investigation by visiting the PVP website where he accessed the Plainview Project Database.

11. Sgt. Saba reviewed a disclaimer ("PVP Disclaimer") the first time he accessed the Plainview Project Database.

12. Sgt. Saba printed all of the posts.

13. Sgt. Saba did not visit the Facebook page of "Jesus Cruz."

14. Sgt. Saba did not click on any links or videos that may have appeared within Jesus Cruz's posts.

15. Sgt. Saba interviewed PO Cruz on June 12, 2019.

16. PO Cruz was represented by attorney Danielle Nitti.

17. Sgt. Saba reminded PO Cruz that if he failed to cooperate or attempted to deceive he would be subject to departmental discipline.

18. PO Cruz indicated he understood and would cooperate.

19. PO Cruz did cooperate and answered the questions asked of him.

20. During his interview, Sgt. Saba showed PO Cruz a package of 32 pages containing 36 posts and/or comments under the Facebook profile "Jesus Cruz."

21. Sgt. Saba gave PO Cruz time to review the entire packet of Facebook posts and/or comments and confirmed the PO Cruz had enough time to review and initial each page of the document.

22. PO Cruz reviewed all 36 posts and initialed each of them.

23. PO Cruz confirmed that he made all of the posts/comments under the Facebook profile "Jesus Cruz."

24. PO Cruz did not believe that he was on duty at the time he made the posts.

25. Sgt. Saba asked PO Cruz if Cruz had anything else to add to his interview and Cruz answered, "No sir."

26. In the approximately 60-65 interviews that Sgt. Saba conducted relative to the PVP, Sgt. Saba asked each officer the same or substantially similar questions to those asked of Officer Cruz.

27. Sgt. Saba did not ask Officer Cruz for clarification as to the substance of any of Officer Cruz's Facebook posts.

28. Sgt. Saba did not ask Officer Cruz why he posted and/or shared the content shown to him during his interview.

29. Sgt. Saba allowed Officer Cruz as much time as Cruz needed to inspect the posts.

30. Sgt. Saba concluded his investigation, prepared his findings and submitted them to his supervisor, Staff Inspector Deborah R. Francis for review.

31. Sgt. Saba did not contact the Criminal Intelligence Unit of PPD or social media team for assistance as he believed it was unnecessary in this investigation.

32. Staff Inspector France reviewed and approved the investigation.

33. IAD sustained a departmental violation of Directive 6.10 against PO Cruz.

34. IAD forwarded its investigation to the Commanding Officer, Police Board of Inquiry for action.

35. At the time he interviewed PO Cruz, the PPD had not yet evaluated the posts to determine if any might be protected by the First Amendment.

36. Accordingly, Sgt. Saba did not advise PO Cruz during his interview which, if any, posts were unprotected.

37. Sgt. Saba did not advise PO Cruz during his interview which posts the Department believed violated Dir. 6.10.

38. No one within PPD directed Sgt. Saba to reach a specific conclusion.

39. Sgt. Saba had not met PO Cruz before the June 12, 2019 interview.

40. Sgt. Saba did not interview PO Cruz again thereafter.

41. In a database published on or about June 3, 2019, the Plainview Project attributed Facebook posts to PPD Officer Jesus Cruz.

42. On or about July 10, 2019, the Police Department issued a Statement of Charges Filed and Action Taken against Officer Cruz, in which the Department charged Cruz with conduct unbecoming a police officer and neglect of duty in connection with social media posts attributed to him by the Plainview Project.

43. On July 17, 2019, then Police Commissioner Richard Ross ordered Commissioner's Direct Action for Officer Cruz's discharge in connection with both charges described in the Statement of Charges Filed and Action Taken.

44. The PPD was prepared to serve Officer Cruz with a Notice of Intent to Dismiss, but Officer Cruz filed for his service pension on July 18, 2019. Consequently, Officer Cruz did not appear to receive service of the Notice of Intent to Dismiss.

45. The Notice of Intent to Dismiss is placed in an officer's personnel file and disciplinary record and it remains there regardless of whether an officer retires within the period of suspension.

46. On August 15, 2019, the Lodge filed a grievance and subsequently demanded arbitration because "Member Was Terminated Without Just Cause." The parties stipulated to the admission of this document as Jt. Ex. 2.

[Ex. J-13].

Robin Wimberly is the Deputy Commissioner of the Office of Professional Responsibility. As indicated in the stipulations above, and as confirmed through the testimony of DC Wimberly during the arbitration proceedings, "[t]he PPD was prepared to serve Officer Cruz with a Notice of Intent to Dismiss, but Officer Cruz filed for his service pension on July 18, 2019." [Stipulation 44, *See* T:93]. During the

arbitration proceedings, DC Wimberly testified that the Department was prepared to charge the Grievant with conduct unbecoming and neglect of duty based upon his Facebook posts.[4] [*See* Ex. J-10].

DC Wimberly testified that she was part an executive team consisting of herself and Deputy Commissioners Patterson, Sullivan, Wilson and Coulter. DC Wimberly testified that the executive team was tasked with reviewing each individual PVP case to determine the level of discipline that should be imposed. DC Wimberly indicated that the cases that the team considered to be the most egregious, approximately 20 in total, 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 at "face value" and did not 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 or accommodations because "it would not impact the negativity and the hatefulness that was posted and so it was two separate issues." [T:95, lines 7-8]. DC Wimberly indicated that the team did not consider an officer's time in service or compare the posts of one officer to another's. DC Wimberly also testified that the quantity of an officer's posts did

[4] DC Wimberly was designated by the Department "to represent the reasons for the Department's decision to terminate Officer Cruz." [T:125, lines 15-18].

not factor into the team's decision to impose discipline, "but what it did was solidify our decision." [T:125, line 6].

The Grievant's dismissal stems from 27 social media posts made from 2015 through 2017 that the City concluded were not protected by the First Amendment. These posts were admitted into evidence as Joint Exhibit 9. There are 22 posts in which the Grievant, often in response to reports of terroristic activity, made negative, disparaging comments about Muslims or the Islamic faith. There are several posts in which he used profanity and/or suggested the use of excessive force or vigilantism. For instance, in response to a post with the caption, "BREAKING! This is the Islamic scum that killed 22 in Manchester, AND HE WAS ARRESTED FOR TERROR AND LET GO BY U..", the Grievant wrote, "Tell me again why Trump is wrong about these fucking animals.....and remember these were young kids he just murdered....." By way of another example, in response to a post with the caption, "Police say 'around 20' killed in shoot at Orlando nightclub, more than 40 taken to local...", the Grievant wrote, "No.....it's that fucked up religion of Islam. Wake the fuck up people". As for two (2) posts addressing other subjects, in response to a caption entitled "Black Lives Thug Tries To Rape Woman, Husband Beats Him To Death With A Tire Iron" and "NASTY Woman With AIDS-> BITES Police Officer On Traffic Stop! Exposing Him To DISEASE!", the Grievant wrote, "One less piece of dog shit". In the other post, the Grievant commented upon

the way the Portland Police Bureau responded to protesters who blocked traffic. "That's how you do it".

With respect to the Grievant's posts that contain profanity, DC Wimberly indicated that the Directive prohibits such usage. As to the Grievant's posts about Muslims and the Islamic faith, DC Wimberly explained why they are troubling:

> [DC Wimberly, On Direct]
>
> Q. [By City Counsel Wehr]. What, if any, issue did the Department take with the lack of dignity or respect shown to the faith in those post[s]?
>
> A. Well, that's concerning for us, because if that is where -- that's how you feel, and that's where you stand as far as the Islamic religion is concerned, then how can we, as an organization, believe that in your duties, in the discharge of your duties, that that bias will not come through.
>
> If you have someone that needs some lifesaving help, that you will not rely on what you have shown through your posts, that you hate and degrade so much.
>
> We can't tell people how to feel about anything. But what we have to do is make sure that as they do this job for this Department, that if we already know there's a problem, we have to address it. And this is extremely concerning.
>
> And I would be concerned if I was a Muslim right now, and I needed help from somebody who posts things like this. And they have the ability to have my life or death in their hands. That's the concern for the Department.
>
> [T:107, line 20 to T:108, line 18].

Turning to the other posts, DC Wimberly testified that officers cannot advocate for vigilantism, the use of unnecessary, deadly force, refer to black males as "thugs", or use other dehumanizing language.

DC Wimberly concluded that the Grievant's character was irredeemable. She explained the basis for the Department's decision to dismiss the Grievant:

> [DC Wimberly, On Direct]
>
> Q. [By City Counsel Wehr] Okay. At the conclusion of this review, did you, personally, feel that Officer Cruz could no longer serve as a member of the Philadelphia Police Department?
>
> A. That's correct.
>
> Q. * * *
>
> Why - - can you explain to the Arbitrator why Mr. Cruz's conduct puts him too far beyond redemption, such that he can be remediated for these sorts of programs and efforts?
>
> A. * * *
>
> The concern when it comes to Mr. Cruz is he's first of all, he's self-identified this hatred towards one specific group of people.
>
> * * *
>
> So the concern for the Department to have someone who has the power - - as I said before, to take a life, to make decisions, life-altering decisions for other people, to hate a certain group of people, that we cannot control if they come in contact with anyone who believes in Islamic religion is too large of a risk for the Department to take.

> We are a service-oriented organization. We are here to service the public, to protect, honesty, integrity, that's part of our code. And none of which, what we just discussed in his postings, has anything to do with that.
>
> I do feel that everyone can feel how they want to feel about anything, but once they identify themselves with characteristics that are truly against what we're doing, and they definitely have a negative impact, as they already have, on this Department and policing, they should not be a police officer here.

[T:121, line 4 through T:123, line 1].

DC Wimberly testified that she was not aware of any prior reports of the Grievant acting in a biased manner towards any protected class of individuals. DC Wimberly also testified that she was not aware of the PPD changing its mind to discharge any of the officers who were to set to receive that penalty as a result of the posts/comments published by the PVP once they were served with the Notice of Intent to Dismiss and the Suspension Notice.

Leslie Marant has been the PPD's Chief Diversity, Equity and Inclusion Officer since April 2022. Marant testified that in her role as Chief DEI Officer that she seeks "to create the most beneficial employee experience for all of our employees." [T:34, lines 5-6]. She indicated that "[i]t's not just a matter of diversity and representations, but also for intentional equitable inclusion." [*Id.* at lines 11-13]. Marant stated that she is also "responsible for rebuilding community trust with the Department." [T:35, lines 7-8].

Marant testified that she has attended a couple of community events after some "well-publicized incidents of alleged racism, based on misconduct or inappropriate words used by members of the Police Department." [T:40, lines 17-19]. Marant indicated that there is a lack of trust within the community and "express concerns about the willingness to work with the Department, despite everyone's concern about police reform, public safety." [T:41, lines 9-11]. Marant stated that when the community becomes aware of issues of racism within the Department "[t]here has been a tendency by the members of the public to express concerns and then impute that behavior, the behavior of one person, to the Department...[a]nd then a desire to hold the Department's feet to the fire." [T:43, line 23 to T:44, line 3]. Marant indicated that a swift response from the Department "seem[s] to temper some of the concerns." [T:45, lines 17-18].

Marant reviewed the Grievant's posts, and her concerns were consistent with DC Wimberly's.

During the arbitration proceedings, the Grievant testified to the lack of discipline in his personnel file, his commendations, and the lack of any prior counseling regarding his social media use. The Grievant indicated that he has never been accused of treating anyone differently because of any protected classification.

The Grievant testified that he never identified himself as a PPD officer on Facebook. The Grievant indicated that he was not aware that his settings were set so that the public could review his posts.

The Grievant acknowledged that he received training on the Social Media Directive prior to making his posts, but he could not recall the specifics of the training. The Grievant recalled being interviewed by Internal Affairs concerning his Facebook posts. The Grievant testified that he was asked to review, verify and sign approximately 36 posts/comments he made on Facebook. The Grievant indicated that at the time of his interview he was not told which of his posts/comments violated the Directive. The Grievant confirmed that he was given an opportunity at the end of the interview to comment but he declined.

The Grievant testified that he voluntarily stopped using Facebook in 2017 because it was "toxic". The Grievant admitted that he should have been disciplined for the posts he placed on Facebook but he felt that discharge was excessive given his 30 years of unblemished service. The Grievant testified, "I felt like I was going to get at least a 30-day suspension." [T:202, lines 6-7]. The Grievant admitted that his "posts were terrible" but he "didn't mean it the way it came out." [T:221, lines 1-4]. The Grievant testified that he does not hate Muslims and it was not his intention to attack the entire Islamic faith. The Grievant stated, "My posts were about the ones that were so called fighting in the name of religion,

the terrorist ones." [T:191, lines 10-12]. The Grievant recalled receiving mandatory police department training on Radical Islam back in 2008. [See Ex. U-16].

The Grievant does not deny that his posts/comments were inappropriate, but he believes they were often taken out of context and did not intend for his comments to be taken literally. The Grievant acknowledged that he sometimes commented "in the heat of the moment". [T:194, lines 7-8]. As to the term "thug", the Grievant testified that it refers to "just a bully, a person that...has no mindset of right and wrong." [T:195, lines 4-6].

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

> [Grievant Cruz, On Direct]
>
> Q. [By Union Counsel Caggiano] Now, Jesus, it's my understanding there came a time you filed for your service pension in July of 2019?
>
> A. Yes, ma'am.
>
> Q. Why did you do that at that time?
>
> A. I felt like I had no other choice, that I was going to lose everything - - my pension. I didn't know how I was going to feed my family. At that time, I still had child support.
> I panicked, and I just resigned - - tried to save something.
>
> Q. Why were you afraid of - - what were you afraid, in terms of not being able to feed your family?

• • •

Q. Did you know you were going to be fired?

A. Yes.

Q. How did you know?

A. We went to the FOP, the Fraternal Order of Police, and they said that they got wind that we're - - the next following day, I believe it was, we were supposed to be - - we had to turn ourselves in and sign our 7518.

But before that, I just panicked. And I just said: Let me go and save my pension, and save - - after 30 years, you know, I was going to lose everything.

Q. So just so the chronology is clear, you filed for your pension after that meeting at the FOP?

A. Yes, ma'am. As soon as that meeting was over at the FOP with McGrody and McNesby, I couldn't fly fast enough or run fast enough to get out of there and go to the Pension Board.

I just felt like I was going to lose everything.

Q. And then am I correct that you didn't actually come on July 19 to receive service of any disciplinary paperwork?

A. No, ma'am. We just came in to the FOP, just to let us know, to break the bad news, we were all supposed to - - we were served with 7518s.

[T:204, line 2 through T:206, line 1].

The Grievant confirmed that he was in a deferred retirement option plan ["DROP"] at the time that he filed for his service pension.

FOP Vice-President John McGrody testified that in the summer of 2019 he was informed by Police Commissioner Richard Ross, Deputy Commissioner Robin Wimberly, and FOP President John McNesby that the Department intended on discharging a group of approximately 15 police officers for their Facebook posts discovered by the PVP. McGrody recalled meeting with the Grievant:

[McGrody, On Direct]

Q. [By Union Counsel Caggiano] And do you recall sitting here today, whether Officer Cruz was one of those officers?

A. Yes.

Q. Okay. And do you recall what, if anything, you said to him, specifically?

A. I remember telling him about the - - what would happen in Internal Affairs, what the grievance and arbitration process looked like.

And because of his years of service, we had a brief discussion about the pension. Because he had over ten years of service, and he had attained the minimum pension age, he had the wherewithal to immediately collect the pension without a deduction in his monthly pension at the time.

Q. Did you communicate to him what level of discipline he was going to receive?

A. Yeah. I told the officer, along with others, that he was going to be terminated and separated from the Police Department.

I told them they were going to receive 30 days with intent to dismiss, but for all intents and purposes, their pay and their employment with the Police Department would end on the day that they were going to be terminated.

My recollection is it was July 19.

[T:232, line 5 through T:233, line 6].

SUMMARY OF THE ARGUMENTS

The City's Position

The City contends that the Union's grievance is not arbitrable. The City maintains that the Grievant was never discharged from his position because he voluntarily retired from the PPD before the City formally terminated his employment. The City contends that "[t]he Union's grievance is, therefore, a nullity and not arbitrable because the parties' CBA does not permit grievances over prospective or potential actions, at least in part to avoid fruitless grievances." [City Brief, p. 27]. The City submits that a notice of intent to impose discipline does not equate to the "actual imposition of discipline" which is required for a grievance to be filed. [*Id.*]. The City emphasizes that the purpose of providing notice prior to dismissal is "to provide the affected employee an opportunity to change his employer's mind and stop his termination." [*Id.* at 28]. The City points out that "the City remained able to change its mind until it implemented the Grievant's discipline and dismissed him." [*Id.*]. Yet, the Grievant voluntarily chose not to participate in the process. The City submits that whether the Grievant would have been discharged had he fully participated in the process is speculative.

The City contends that the grievance is not arbitrable because the Union expressly grieved the Grievant's dismissal rather than his voluntary retirement. The grievance, therefore, must be limited to the dismissal that never occurred. The City submits that a retirement is neither a dismissal nor an expressed form of grievable discipline under the parties' Agreement. The City maintains that the Union cannot be permitted to expand the type of actions that are grievable under the Agreement.

Based upon the above, and the entire record, the City contends that the grievance is not arbitrable and must be dismissed.

The City submits that in the event the grievance is determined to be arbitrable that the traditional seven (7) factors of just cause support the City's decision to discharge the Grievant for his reprehensible Facebook posts and comments:

> Over a span of years, the Grievant publicly made a series of inflammatory Facebook posts and comments vilifying Muslims, celebrating extra-judicial violence and the use of police force, and using offensive, racially-charged language. The Grievant's posts demonstrate how little regard he has for the communities and individuals he swore to protect and serve: his primary responsibility as a member of the PPD.
>
> The parties agreed that, pursuant to the relevant contractual provisions, [t]he Grievant's dismissal must be supported by 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, pp. 30-31].

With respect to the first factor, whether there was notice of the possible or probable disciplinary consequences of the conduct, the City indicates that the Grievant was fully aware that he was subject to the Disciplinary Code contained within the Agreement, had a duty to abide by the social media policy in Directive 6.10, and could be subject to discipline for disregarding his responsibilities.

As to the second factor, whether 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, the City refers to the core values of the PPD: (1) honor; (2) service; and (3) integrity. As outlined in the Disciplinary Code, the City emphasizes the importance of having a successful relationship with the citizens of and the communities within the City of Philadelphia. The City submits that the testimony of Staff Inspector Healy, DC

Wimberly, and Chief DEI Officer Marant established the relationship between Directive 6.10 and the Department's mission, and the negative issues that arise and must be addressed by such Facebook posts and comments made by the Grievant.

Turning to the third, fourth, and fifth factors, whether the employer conducted an investigation to determine if the misconduct occurred, the investigation was fair and objective, and whether substantial evidence or proof supported the finding of misconduct, the City contends that the evidence shows that "Sgt. Saba conducted a thorough, fair, and objective investigation into the Grievant's misuse of social media, an investigation that resulted in the Grievant's unqualified admission of misconduct." [*Id.* at 34]. Moreover, the Grievant was given ample opportunity to review his posts and comments and "to explain or contextualize" them. [*Id.* at 35]. The City emphasizes that the Grievant "declined to provide any elaboration." [*Id.*]. Additionally, the City submits that the Union "produced no evidence of bias, no evidence of other documents that should have been reviewed and were not, no evidence of any witness who should have been interviewed and was not interviewed, or anything else to impugn Sgt. Saba's investigation." [*Id.*].

Shifting the focus to the seventh factor and the penalty of dismissal that the City imposed upon the Grievant, the City contends that the Grievant's egregious

course of conduct was in direct violation of Section 1-§021-10, which includes a penalty of 30 days or dismissal. The City maintains that the Grievant disregarded his responsibilities as a police officer. The City cites to numerous examples out of the 27 Facebook posts at issue in this matter to support its position that "the Grievant engaged in abhorrent hate speech" and "used dehumanizing language, such as 'animals' in reference to Muslims or other minorities." [*Id.* at 36]. The City submits that the Grievant's "excuses at the hearing in this case claiming that he does not hate Muslims, just terrorists...ring hollow...." [*Id.* at 41]. The City's brief provides the following support for its position:

> The Grievant unequivocally admitted to the heinous nature of his posts at the hearing in this case. When confronted with his Facebook posts, he stated that he was "disgusted" by his posts, describing them as "terrible" and "nasty". Cruz Tr. at p. 223:4-13. He admitted that he understands how someone would draw the conclusion that he had an animus towards Muslims based on his posts, stating, "I would come to that conclusion. Yes." Id. at 219:12-18. He appreciated that offensive conduct—such as his—by an individual police officers gets imputed to the entire department. Id. at 223:13-24. He even admitted that he understood why the Department would no longer want him to serve on the force. Id. at 224:6-10.
>
> There is no redeeming the Grievant as a member of Philadelphia Police Department. His comments were so clearly discriminatory and hateful in nature that the police Department had no option but to terminate him, as he could no longer serve in his role as a public facing member of the Philadelphia Police Department.
>
> 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; 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. The Grievant's posts demonstrate contempt and bigotry for members of the community that he is sworn to protect. 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. The Grievant has shown himself to be unwilling to carry out that mission and unworthy of the honor of calling himself a Philadelphia police officer.
>
> The Philadelphia Police Department issued a penalty proportionate to the Grievant'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 the Grievant's egregious course of conduct, and the damage to the community trust cause by his intolerant and indelible Facebook content.
>
> [City Brief, pp. 42-43].

With respect to the sixth 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 44]. The City emphasizes that the Grievant "even admitted that he understood why the Department maintains that he [is] no longer fit to serve." [*Id.*]. The City stresses that this matter must be reviewed and considered on its own rather than other instances in which police officers were disciplined for social media posts and comments:

The union makes a misguided attempt to identify what it contends are comparators but fails to recognize critical distinctions between the Grievant and other employees disciplined for misusing social media. First, the conduct committed by these alleged comparators varies greatly in the number of posts and the ambiguity and offensiveness of the language used in each post. None of these alleged comparators authored as a prolific volume of violative posts that were not protected by the First Amendment as the Grievant. Each of these alleged comparator instances required the same nuanced analysis by the Police Department that was afforded to the Grievant. Ultimately though, those cases are not before this arbitrator. While the Union here may attempt to debate whether these alleged comparators also deserved to be terminated, there is no doubt that the Grievant did.

Additionally, based on previous Plain View Project discipline cases between the parties, the City assumes that the FOP will improperly suggest that this arbitrator adopt the findings of previous arbitrators that have reduced terminations to suspensions in their arbitration awards. The decisions made by other arbitrators in other "just cause" cases, with different facts, testimony, and mitigating factors are not binding or precedential. This is not a case alleging a violation of a discrete contract provision that has been analyzed in previous arbitral awards, upon which the parties have relied. There is no dispute in this case about the elements of just cause; there is no question as to what standard any arbitrator should apply. The task of each arbitrator is to rule on the evidence before them in a particular case. The testimony and evidence in the cases involving discipline stemming from the Plain View Project has varied. Whether particular Facebook posts violate department policy, whether the Grievant fully comprehends the gravity of his posts, whether the Department's determination was reasonable under the circumstances, whether the penalty was appropriate – all of these are matters for this arbitrator to determine.

The parties have a history of citing to other instances of discipline when arguing proportionality, but other arbitration awards are not relevant to the Arbitrator's determination as to whether the instance termination was supported by just cause. While the City disagrees that the alleged comparators raised

by the FOP—in exhibits U-2 through U-14—are appropriately similarly situated or establish that the Grievant 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. The City asks that this arbitrator use his discretion, rather than mechanically apply the determinations of other arbitrators in other cases.

The question before this arbitrator is not a complicated one: Did the City's dismissal of the Grievant violate the CBA? The facts of this case are clear and almost entirely uncontested. The department maintained a policy on social media use; the Grievant repeatedly and admittedly violated that policy; the City disciplined the Grievant for violations of the policy within the collectively bargained penalty range for his offenses. The fact that the Grievant expressed contrition at arbitration or that he had an otherwise satisfactory performance record does not change the fact that the Department maintains the authority to discharge him for the policy violations he admittedly committed. An award in this case that reduces the Grievant's discipline would fall afoul of the ultimate question before this arbitrator, which is whether the City lacked the discretion and authority to take the action it took. The facts of this case clearly establish that the Department not only had the authority but the obligation to the citizens it serves and the honorable men and women that wear PPD badges everyday to remove the grievant from its ranks.

The Grievant was treated fairly and was not discriminated against. His extraordinarily egregious conduct necessitated a penalty at the upper end of the bargained for range: termination.

[Id. at 44-46].

Finally, the City argues that in the event that the Arbitrator reinstates the Grievant "he is not entitled to backpay beyond his DROP date." [*Id.* at 46].

For these reasons, and the entire record, the City contends that it had just cause to dismiss the Grievant, and requests that the grievance be denied.

The Union's Position

The Union contends that the City has not met its burden to prove that the grievance is not arbitrable. The Union maintains that it grieved the discipline that the City imposed upon the Grievant:

> ...there is no dispute in this case, nor can there be, that that the FOP in fact grieved Officer Cruz's discipline. Ex. J-2, J-3. He was, in fact, disciplined, as the disciplinary charges were drafted and signed and the decision to discharge him was unequivocally made and communicated to him. See Ex. J-10; Tr. 128-29, 130-31, 204-06, 232. The PPD was prepared to serve Officer Cruz with the charges. Ex. J-13 at ¶44. Moreover, the Deputy Commissioner has testified that such decisions are unequivocal– once the PPD issues the charges and notice of intent to dismiss it does not change its mind. Ex. J-14 (T. of Wimberley) at 197-98; see also, Tr. 147 (contending the grievant's character was irredeemable). The Department places the Notice in the personnel file of the at-issue officer, where it remains. See Ex. J-10 at 1; Ex. J-13 at ¶45. Thus, the Lodge's grievance is arbitrable.
>
> [Union Brief, pp. 13-14].

The Union submits that the Grievant's decision to file for his service pension does not alter the fact that he was disciplined by the City:

> The fact that Officer Cruz thereafter filed for his service pension is irrelevant to the question of arbitrability. Officer Cruz filed for his service pension with the knowledge that the PPD had decided to discharge him and because he felt he "had no other choice" in order to continue to support his family. Tr. 204. 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.
>
> [Id. at 14].

The Union emphasizes that two (2) other arbitrators have previously concluded under similar circumstances that the grievances were arbitrable. [*See FOP Lodge No. 5 & City of Philadelphia*, (McCammitt), (Brown, 2021); *FOP Lodge No. 5 & City of Philadelphia*, (Young), (Reilly, 2022).

Based upon the above, and the entire record, the Union contends that the grievance is arbitrable and must proceed to be heard on its merits.

In addressing the merits of the grievance, the Union references the traditional seven (7) factors of just cause. The Union contends that the City violated the test in four (4) ways:

> ...(1) The Department failed to put Officer Cruz 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 Officer Cruz was guilty of violating any work rule by obtaining sufficient evidence of Officer Cruz's guilt; (3) the Department failed to discipline Officer Cruz consistent with other officers who engaged in substantially-similar conduct; and, (4) the Department failed to impose a penalty proportionate to Officer Cruz's actual

> conduct considering his excellent work record and other mitigating factors.
>
> [Union Brief, pp. 17-18].

The Union points out that "[s]everal other arbitrators have agreed that just cause for discharge was lacking in nearly identical cases involving officers discharged in the wake of the Plainview Project." [*Id.* at 18].

With respect to notice, the Union contends that the City failed to provide the Grievant with adequate training regarding off-duty social media use. The Union points out that given the lack of training that hundreds of officers were "unclear" "where the line is between protected speech and speech that violates the policy...." [*Id.* at 20]. The Union submits that the training provided in 2011 was deficient:

> Significantly, the 2019 training contained guidance on the limits of First Amendment speech. See Ex. J-12 at 126. While it is not disputed that the Department promulgated its Directive in approximately 2011, and while the Directive does explicitly prohibit certain types of social media activity for police officers, the PPD failed to train Officer Cruz on the Directive prior to the summer of 2019. Tr. 181-82, 184. This failure is significant, since Officer Cruz benefited from the belated training provided to him in 2019, noting that it taught him about the ability to make his account private and to be cautious about the content of posts. See Tr. 182.
>
> [Union Brief, p. 20].

The Union maintains that the City also "failed to put officers on notice that severe discipline would be imposed for Directive violations." [*Id.* at 21]. The Union emphasizes that prior to the PVP there was not a single instance of the City dismissing an officer for violating the Directive. The Union points out that given the lack of investigation of social media prior to 2019 that "officers like Officer Cruz were left to their own devices and were given a false sense of security that their off-duty social media activity was acceptable." [*Id.*, footnote omitted].

Lastly, with respect to notice, the Union indicates that "Officer Cruz's 30-year career was cut short for years-old conduct, on a platform no longer in use by the grievant, belatedly packaged and presented as a serious violation, at a time when he had no opportunity to course correct or respond to training or counseling." [*Id.* at 21].

Turning to the investigation, the Union contends that "[t]he Department failed to complete a fair, thorough, and impartial investigation and failed to ascertain, before disciplining him, whether Officer Cruz was guilty of violating any work rule by obtaining substantial evidence of his guilt." [*Id.* at 22]. The Union points out that the Department's investigation was nothing more than a 6-minute interview of the Grievant during which he accepted responsibility for the posts:

> The Department's investigation was wholly inadequate to establish just cause. The PVP website includes a prominent

> disclaimer which specifically states that its content is subject to multiple interpretations, and that the PVP does not know what a poster may have meant or whether the posts accurately reflected the poster's views on a particular issue. See Ex. J-7. Despite this, the Department never asked Officer Cruz for any form of clarification or for any explanation regarding his social media activity. Ex. J-13 at ¶¶27-28; see Tr. 184-85. In fact, Officer Cruz's IA investigator never reviewed the articles or videos referenced in the offending posts. Id. at ¶14. Indeed, Officer Cruz was unaware which of the approximately 27 posts attributed to him by the PVP the Department discharged him for until after the decision was made to terminate him. See Tr. 186, 188-89.
>
> [Union Brief, p. 23].

The Union does not dispute that the City provided the Grievant with an opportunity to clarify his posts, but it emphasizes that it is the City that bears the burden of proving just cause. The Union submits that the City's assumptions about the several of the Grievant's posts must be disregarded:

> ...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 his 36 posts in an investigatory interview, at a time when the City had not yet made any conclusions that Officer Cruz violated *any* Department policies whatsoever. The Department's failure to conduct even a rudimentary investigation into what Officer Cruz meant, the underlying content he commented upon, and why he shared and commented upon the at-issue content renders the City unable to meet its burden. See Ex. J-13 at ¶¶27, 28, 35-37. Accordingly, to the extent that Officer Cruz's posts had ambiguous meanings, the City cannot meet its burden of establishing a violation of the Directive.
>
> [Union Brief, p. 24].

With respect to the posts that the City claims express anti-Muslim sentiment, the Union points out that "much of [the Grievant's] commentary was a reaction to the offensive and often violent content being reported on or referenced in an article or as an on-going current event." [*Id*]. The Union emphasizes that the Grievant was adamant that "his focus was on violent criminals or terrorists – not Muslims." [*Id.*]. The Union submits that when these posts are "properly contextualized as referring to radicals with violent ambitions", they are also consistent with the training that the Grievant received through the PPD in 2008 regarding Radical Islam. [*Id.* at 25].

Regarding the other posts for which the Grievant was discharged, the Union explains how the City either took them out of context:

> ...the PPD made assumptions that the grievant was supportive of violence and took his comments out of context. For example, in one post (Ex. J-9 at 27), Officer Cruz merely posted a statement and a video saying "that's how you do it" to a Fox 12 video relating to police response to protestors in Oregon. He explained Tr. 196-98. In another, Ex. J-9 at 25, Officer Cruz explained his comment, "That's absolutely right..." was simply meant as in support of law enforcement. Tr. 196.
>
> The remaining posts identified by the PPD as forming the basis for discharge can all be characterized as hyperbolic expressions of Officer Cruz's political opinions or venting about horrific acts. None of these should be taken as literal incitements to violence or otherwise read into. See e.g., Ex. J-9 at 20 (reacting to article about PPD officer injured in assault);

at 22 (reacting to article about man who attempted to rape woman); [footnote omitted][5] see Tr. 193-95.

[Union Brief, pp. 25-26].

The Union also contends that the City punished the Grievant more severely than other employees with similar violations of the Directive. The Union's brief draws a comparison to other officers who were disciplined:

> Officer Cruz'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. Four officers implicated in the PVP—Amato, Cain, Green, and Cpl. Grandizio—all received Conduct Unbecoming charges for their PVP posts, just like Officer Cruz. Yet, all four officers received 30-day suspensions (and a disciplinary transfer, in Cpl. Grandizio's case) instead of discharge. See Ex. U-2 through U-9. A fair review of the posts at issue for each of these other four officers show they are arguably more egregious than those made by Officer Cruz. See Ex. U-3, U-5, U-7, U-9.
>
> 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 Cain arguably relate to Muslims and/or contain profanity and references to violence. See Ex. U-5. Officer Green's 10 actionable posts allegedly violated the Directive by supporting violence, in the same manner the City contended several of Cruz's posts did. See Ex. U-8, U-9. Officer Green'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 (Green, Suspension) (Brown, 2022) (attached as Appendix H).

[5] [Union Brief footnote 6] Officer Cruz also clarified that his understanding of the word "thug" used in the title of an article he shared is akin to "bully." Tr. 194-95.

By way of further example, Officer Amato 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 8. Officer Amato nevertheless received a 30-day suspension. See Ex. U-2 at 1. She was not terminated despite the fact that she, unlike Officer Cruz, had previously been disciplined for violating the Directive. See Ex. U-1.

Similarly, Cpl. Grandizio'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 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 (Grandizio, Suspension & Transfer) (Reilly, 2022) at 30 (attached as Appendix I). In so deciding, the Arbitrator specifically pointed to, among others, Officer Amato'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.

The PPD was unable to offer any cogent explanation for why Officer Cruz was deemed irremediable, while Amato, Grandizio, Green, and Cain were given an opportunity to correct their behavior. Tr. 149-51 (Dep. Wimberley testifying her responses as to Officer Cruz on this point were the same as her testimony in Sgt. Melvin's case); see also, Ex. J-14 at 209-216 (admitting there was no rationale for different treatment of discharged officer than Amato, Grandizio, Green and Cain's suspension because the PPD failed to compare conduct and discipline amongst officers); Ex. J-14 at 191 (admitting PPD failed to compare discipline assessed to other officers).

Numerous other officers identified by the PVP received even less discipline. Lt. Sean Dandridge 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 eight 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. In addition, unlike Officer Cruz, 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-18; Ex. J-15 at 137-49 (T. of McGrody describing PBI process for PVP and explaining Ex. U-18). Even apart from PVP-specific discipline, the Department also issued a 12-day suspension to Officer Hung Nguyen 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 Officer Cruz, who had no prior discipline on the Directive and made posts that were arguably less inflammatory or comparable to the above, and yet received industrial capital punishment as a penalty.

It is anticipated that the City will rely upon the Farrelly Award, supra, as though reinstatement of Officer Cruz would somehow be inconsistent with that decision. In contrast, a decision sustaining the Lodge's grievance here would be fully consistent with Farrelly, as well as those issued on the merits in Fenico, supra, McCammitt, supra, Palma, supra, Young, supra, and Milligan, supra. In Farrelly, the arbitrator's decision largely turned on Arbitrator Brown's finding that Farrelly's character was reflected in his posts. Id. at 61-62.

In contrast, the Fenico, McCammitt, Young, Milligan, and Palma decisions all resulted in decisions to mitigate discharges to 30-day suspensions. A fair look at these cases supports a finding that Officer Cruz'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. All of these officers posted on the same topics and in the same manner as the grievant. See, e.g., McCammitt at 6-16 (posts involving alleged anti-Muslim sentiment, among others); Fenico at 5-8 (posts involving alleged anti-Muslim sentiment, among others); Young at 34-49 (posts involving alleged anti-

Muslim sentiment); Palma at 8-9 (posts ostensibly supporting violence, among others); Milligan at 4-5 (posts ostensibly supporting violence, among others).

While it is anticipated that the City will argue Officer Cruz had more at-issue posts than the officers who were reinstated, that is not a legitimate basis upon which to differentiate among the officers for purposes of discipline. This is particularly true where the PPD admittedly did not consider the amount or quantity of the posts in deciding who would be discharged and who would not. Tr. 147-48. Nor was that the deciding factor in the aforementioned cases that ordered reinstatement with a mitigated penalty; the arbitrators in those cases reinstated in large and relevant part because of the City's failure to dole out discipline fairly and consistently and related concerns about the failure to consider these officers' lengthy and largely unblemished work records. See, e.g., Milligan at 13-14; Palma at 23-24; Young at 41-42; McCammitt at 32-33; Fenico at 33-34.

For all these reasons, the City has not demonstrated that there was just cause for the discipline imposed, even if the Arbitrator finds that some of Officer Cruz's posts violated the Directive.

[Union Brief, pp. 26-30].

Lastly, the Union contends that the City did not adhere to the concept of progressive discipline by dismissing the Grievant in his first instance of violating the Directive. The Union emphasizes that the Grievant was a 30-year employee with excellent service and no prior discipline at the time he was discharged. Moreover, the Union submits that the record does not support a finding of bad intent. The Union points out that the City acknowledged that it did not consider these factors. The Union stresses that the Grievant has proven himself to be remediable as he expressed sincere regret for his actions, he took it upon himself

in 2017 to stop using Facebook and has never "even accused of treating someone differently because of their religion (or other protected category), let alone proof that he actually engaged in such behavior." [*Id.* at 33].

For these reasons, and based upon the entire record, the Union requests that the grievance be sustained, that a make-whole remedy including lost wages and overtime opportunities be granted, that the Grievant be reinstated expeditiously, and any other relief the Arbitrator deems appropriate. The Union request that the Arbitrator retain jurisdiction over the remedy and "the impact, if any, of the Officer's participation in the Deferred Retirement Option Program ("DROP") on the remedy requested." [*Id.* at 34].

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.

The issue of arbitrability was addressed by Arbitrator David J. Reilly in *Young* and Arbitrator Timothy J. Brown in *McCommitt*. In each case, the arbitrator concluded that the Union's grievance was arbitrable. At this point, the parties are familiar with the basis for each arbitrator's decision.[6] I have considered the facts and circumstances that led Grievant Cruz to file for his service pension and conclude that they are substantially similar to those encountered by Corporal Young and Officer McCammitt. I conclude that the arbitrators' well-reasoned decisions 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 Grievant's employment. The Grievant is charged with conduct unbecoming a

[6] I refer you to *Young* at pp. 29-31, and *McCammitt (Arbitrability)* at pp. 10-13.

police officer and neglect of duty in connection with social media posts attributed to him by the Plainview Project. The Disciplinary Code defines "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, Section 1-§021-10]. The penalty for a first offense is a 30-day suspension or dismissal. [*Id.*]. 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, Section 5-§011-10]. The penalty for a first offense ranges from a reprimand to a 5-day suspension. [*Id.*].

In addressing the Union's grievance involving the discharge of Corporal Thomas Young, Arbitrator Reilly eloquently addressed 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.

[*Young* at pp. 31-32].

I have given due consideration to Arbitrator Reilly's analysis above and conclude that it applies equally to the grievance concerning Grievant Cruz.

As indicated above, the parties provided extensive arguments in support of their respective positions. This said, the focus of my discussion goes 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.

With respect to Grievant Cruz, his use of profanity in his Facebook posts and comments violated the Directive. Moreover, I am persuaded that his posts and comments on several occasions, notwithstanding that they might be subject to ambiguity, can reasonably be interpreted as being demeaning and disparaging towards individuals within protected classes. Put simply, 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. 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. As discussed above, the Grievant had been employed by the PPD since November 1989 and received satisfactory ratings and numerous commendations throughout his career. Notably, 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. Moreover, 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 *Farrelly*,

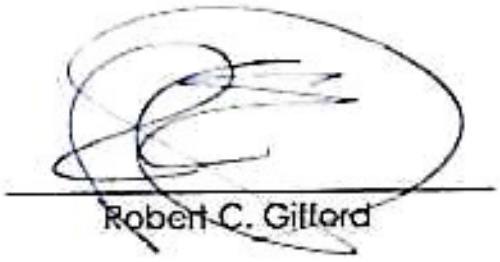
Fenico, *McCammitt*, *Young*, *Milligan*, and *Palma*. I have also factored in the Grievant's unblemished work history. Taking everything into consideration, and without discounting the gravity of the Grievant's actions, I am not persuaded that the penalty of dismissal has been shown to be required in the Grievant's first instance of violating the Directive or that the City has proven 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.[7]

[7] I will retain jurisdiction over the implementation of the remedy, including any issues pertaining to the Grievant's DROP status.

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: September 26, 2023



Robert C. Gilford