City of Ada, 134 LA 702 (Lumbley, 2014)

134 LA 702

City of Ada

Decision of Arbitrator

FMCS Case No. 130702/57136-1

December 19, 2014

In re THE CITY OF ADA, OKLAHOMA and INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 2298

Arbitrator(s)

Arbitrator: M. Zane Lumbley, selected by parties through procedures of the Federal Mediation and Conciliation Service

Headnotes

EVIDENCE

[1] Post-discharge Facebook posts ▸100.0775 ▸100.559535

Discharged firefighter's post-discharge Facebook posts are inadmissible as to issue of discharge, since they are irrelevant to substantive question of appropriateness of discharge; employer could resurrect offer of posts to argue that grievant should not be candidate for reinstatement if there was remedy phase.

DISCIPLINE

[2] Off-duty misconduct ▸100.552505

Discharged firefighter's actions in relation to police officer, who had stopped car in which firefighter's wife was sitting and accused her of intoxication, warranted discipline, where firefighter cursed at officer and threatened him.

[3] Facebook posts ▸100.552510

Some Facebook posts of firefighter who had dispute with police officer did not warrant discipline, where they were merely inane and unprofessional, such as saying that city was “infested with leeches,” or they embodied opinions, such as that unnamed department heads leave work early, which touch on matters of public interest.

[4] Facebook posts — Harassment ▸100.552510

City had just cause to discipline firefighter for some Facebook posts inspired by dispute with police officer that violated workplace harassment policy, where grievant's posts were offensive, intimidating, hostile, derogatory, disparaging, bullying, disrespectful, and threatening.

DISCHARGE

[5] Notice of charges ▸100.5520

Discharged firefighter was properly notified of charges against him, where his own statements conceded that he knew charges were about his wife's arrest and subsequent Facebook posts.

[6] Information requests ▸100.5523

City had just cause to discharge firefighter, even though city failed to promptly provide union with all information requested, where grievant had intimate first-hand knowledge of evidence, such as his derogatory Facebook posts.

[7] Disparate treatment ▸100.33

City had just cause to discharge firefighter, despite contention that chief had similar misconduct and was not discharged, where chief was not part of unit.

[8] Facebook posts — Harassment ▸100.552510 ▸100.552505

City had just cause to discharge firefighter, where his Facebook posts violated workplace harassment policy, and he had off-duty, profane dispute with police officer.

Attorneys

For the employer—Tony Puckett (McAfee & Taft), attorney.

For the union—Rick Beams, advocate.

Opinion Text

Opinion By:

LUMBLEY, Arbitrator.

Issue

The parties were unable to agree on the issue to be resolved and authorized the Arbitrator to frame the issue. The Union suggested the following statement of the issue:

1. Was the Grievant terminated for just cause?

2. If not, what [is the appropriate remedy?]

The Employer proposed the following statement of the issue at hearing:

1. Did the discharge of S__ violate the Collective Bargaining Agreement?

2. If not, what is the appropriate remedy?

Having now had the opportunity to consider the entire record in this matter, while I see little substantive difference between the parties' statements of the issue in light of the language of the Agreement, I have decided to frame the issue as follows:

1. Did the termination of the Grievant violate the Agreement?

2. If so, what is the appropriate remedy?

Relevant Provisions of the Agreement

The relevant provisions of the Agreement are:

ARTICLE V
MANAGEMENT RIGHTS AND RESPONSIBILITIES

Section 1. Union recognizes the prerogatives of Employer to operate and manage its affairs in all respects and in accordance with its responsibilities; and the power or authority which the Employer has not officially abridged, delegated, granted or modified by this Agreement are retained by the Employer, and all rights, powers, and authority the Employer had prior to the signing of this Agreement are retained by the Employer and remain exclusively without limitation within the rights of the Employer.

Section 2. Except as may be limited herein, the Employer retains the rights in accordance with the Constitution and laws of the State of Oklahoma and the responsibilities and duties contained in the Charter of the City of Ada and the ordinances and regulations promulgated thereunder:

* * *

C. To direct the members of the Fire Department, including the right to hire, terminate, suspend, discipline, promote or transfer any Fire Fighter for just cause, (probationary without cause);

* * *

Background

The parties are signatory to the Agreement on behalf of a unit of the City's firefighters excluding the Chief, one administrative assistant, civilian employees and volunteers. At all times relevant, the Grievant was a member of the collective bargaining unit and covered by the Agreement.

The series of incidents that led ultimately to the Grievant's termination commenced on April 24, 2013. 1 At approximately 9:30 p.m. on that date the car in which the Grievant's wife was a passenger was

stopped by Ada Police Department (hereinafter "APD") Officer R__ for investigation of an illegal turn. During the stop, both the driver of the vehicle and the Grievant's wife were administered field sobriety tests. During this procedure, the Grievant arrived on scene after being notified of the stop by his wife via cell phone. The Grievant protested and attempted to convince R__ to let his wife go home with him. After R__ refused and instructed the Grievant a number of times to return to his vehicle, the Grievant responded to R__ in a profane fashion but eventually returned to his own vehicle. 2 R__ ultimately arrested both the driver and the Grievant's wife, the latter for public intoxication.

1 All dates hereinafter are 2013 unless otherwise specified.

2 The interaction between R__ and that Grievant was recorded by the former's body camera and entered in the record as part of Employer Exhibit No. 4.

R__ then took both arrestees to the Ada Justice Center for booking. 3 The Grievant also showed up at the Justice Center and spoke to APD Sergeant P__, R__'s shift supervisor. 4 During this confrontation, the Grievant called R__ profane names, threatened to "knock his fucking ass off" and made clear to Potter his unhappiness with both R__ and the APD. He also promised to "smear this shit all over the place." It is undisputed that he kept that promise commencing the following day via his public Facebook account.

3 A confirmatory breath test administered at the Justice Center showed the Grievant's wife was under the influence of alcohol.

4 This interaction was recorded by P__'s body camera and also appears in Employer Exhibit No. 4.

Thus, between April 25 and the date of the Grievant's termination on May 13, he made scores of posts disparaging R__, P__ and the APD generally. The posts ranged from general observations that the APD "is completely out of control" and that the City "is infested with leeches" as well as questions such as "who picks these morons out" to specific comments directed at R__ and P__. Those directed at R__ included the following, among others:

• I will not miss a single day of trying to bust you to a cart pusher where you belong. I'm not one to turn the other cheek you prick. I'm coming to make you miserable you incompetent son of a bitch.

• I don't know where you live and don't have your number R__. But I will. You take from me and I'll take from you. I'll have my say.

• I want your job R__.

• You take my wife and I'll take your head.

• So go fuck yourselves you incompetent Barney fife sob.

• Come pick on me. I got one mean bone in my body and R__ found it.

• I got there to get her before she was arrested. And he took her anyway. Maybe I go take his fuckin wife and see how that mother fucker likes it.

• I'll tell you something else too. As a boy I was taught not to look through a woman's purse. So I don't. It's hers. But damned if its [sic] okay for a stranger to rummage through it. R__ [sic] what were you looking for if not a gun? Because you missed that you big soft half man you. I see you took the money. Cash. But won't accept cash at the jail. Money order only. Tell me I have to drive to Paul's valley for a money order? You kidding me? For a .04. While I was there to pick her up? wtf is the matter with you? Now you know what I don't. You should have your hands broken for that. For digging in my wife's purse. You won't do that again. I promise you that. 5

5 Employer Exhibit No. 20.

As regards P__, the Grievant posted the following, "Where's P__? You got nothing to add? For [sic] your [sic] going to [sic] boss. If anything I can do your [sic] going too. You took up for your corrupt desk jockey. You [sic] either with me or against me. I know where you stand now. Your [sic] one of them." 6

6 Id.

Examples of the Grievant's expressions of anger toward APD and other institutions included the following:

• And ada pd do not park across the street from my house for your speed trap. I don't want to be associated with your corruption. Stay away or I'll push you down the street.

• It's no wonder people are bombing and shooting everyone. People are getting TIRED of this bull shit. You can only push so far before somebody busts your head.

• Had I kept my mouth shut this would have been swept under the table. It's [sic] happens. All the time. I see it. But where's the fairness in that. I don't want it swept under the table. I wanted it stopped. And I want R__ [sic] quittin papers. These officers, like R__ [sic], are what gives pd a bad name. We have a bunch of R__ [sic] tho I'm afraid.

• When you have people in law enforcement that are not capable of discretion we have problems. She was not drunk. Not disorderly. Not belligerent. Had a ride and still was taken to jail. R__ and P__ will say she was. P__ told me she was drunk last night. He is a liar. A liar. I hope they both burn in their silly little hell. No morals. No truth. Just pseudo egos and scared little boys. Bullying people around. The bullying campaign ought to start with ada pd.

• To the justice center. Your [sic] on my list. The sheriffs [sic] department. I'll get to you shortly. Be patient. You know. All of you do. 7

7 Id.

The Grievant's interaction with R__ and P__ was brought to the attention of Fire Chief H__ on April 25. After H__ was advised on April 30 that the Grievant had been arrested, he assigned the Grievant to desk

duties with pay. 8 Thereafter, on May 3, during a meeting between H__, the Grievant, the Grievant's supervisor Ross and a Union representative concerning the Grievant's use of sick leave on April 24, the Grievant was issued a verbal reprimand for inappropriate use of sick leave. 9

8 The Probable Cause Affidavit filed on April 29 asserts the Grievant "did, Willfully use a computer, computer system, or computer network to put another person in fear of physical harm or death," alleging that to be "a felony offense according to O. S. 21, 70-1953.9." See, Employer Exhibit No. 5. Subsequently, according to Union Exhibit No. 3, on February 21, 2014, the Grievant was found not guilty of the aforementioned charge or the lesser included charge of "use of the computer to annoy, abuse, threaten or harass another person."

9 Two days before, the Grievant had received a verbal reprimand from Assistant Chief Ross for failure to arrive at work on time and failure to answer his telephone. The record contains references to earlier complaints sounded against the Grievant for making rude comments and using profane language toward a superior, both occurred in 2009, more than 3 years before the activities at issue here and thus not citable according to Article X, Section 4 of the Agreement.

Later that morning, H__ and the Grievant met in H__'s office without Union representation at the Grievant's request to talk about the evening of his wife's arrest. The Grievant advised H__ that he had taken to Facebook because he believed his wife had been wronged and H__ advised the Grievant that he needed to stay off Facebook, that he should consider hiring an attorney and that his termination for harassment of another City employee was being considered.

On the same date, i.e. May 3, after the aforementioned meeting with the Grievant and after reviewing the Grievant's arrest affidavit and receiving input from P__ as well as Assistant APD Chief Crosby who reported that R__ was concerned for his safety, H__ wrote City Manager Holcomb requesting that the Grievant be terminated for "numerous violations of workplace harassment." 10 Although Holcomb had already been aware of the events of April 24, he waited until after he had received H__'s May 3 recommendation before determining to assign Fire Marshall Priest to investigate the allegations of workplace harassment leveled against the Grievant.

10 Employer Exhibit No. 6.

Priest then conducted an investigation. That investigation included speaking with City Manager Holcomb, reviewing the Grievant's file, looking at the video recordings made by R__'s and P__'s body cameras and visiting the Fire Station to speak with the Grievant on May 6. According to Priest, when he informed the Grievant on May 6 that he was performing an investigation of workplace harassment claims against him and asked if he wanted to make a statement regarding the allegations, the Grievant stated that he wanted to talk "off the record" and that he believed his wife's arrest had been inappropriate but he declined to make a statement without an attorney present. The Grievant testified that, although he did tell Priest that he did not wish to make a statement without an attorney present,

he did not realize the occasion of Priest's visit was intended to be an interview with him; rather, he thought Priest was just there to schedule an interview in his office.

Priest ultimately determined that the Grievant had committed a number of Class B offenses commencing on April 24, including abusive or threatening language or gestures while on the job; offensive, vulgar or profane language or gestures; inability to work with others; participating in any action which hinders, disrupts or stops normal operations; abuse of sick leave; and engaging in workplace harassment. 11

11 The City of Ada Employee Handbook, Chapter 7, Section 7.1E identifies "engaging in workplace harassment" as a Class B offense and states that discharge may occur for a 1st offense depending on the circumstances.

On May 13, after Priest had completed his investigation, Holcomb decided to approve H__'s request that the Grievant be terminated. Holcomb's letter of that date to H__ stated, in relevant part, "In regards to your request in the letter dated May 3, 2013, the investigative report as well as other information provided to me, I approve your request for termination of S__." 12 Holcomb, with whom the ultimate authority regarding termination from the Fire Department rests, testified that he reached his decision on the basis of the Grievant's activities on and after April 24 and gave no consideration to any previous discipline appearing in the Grievant's record.

12 Employer Exhibit No. 9.

Two days later, on May 15, at a meeting convened by H__ with the Grievant, Union Executive Board Member Walls and the Grievant's supervisor Captain Claxton, the Grievant was informed of his termination. H__ testified he informed the Grievant at the beginning of the meeting that he was being charged with workplace harassment and "this was his opportunity to tell his side of the story." According to H__, the Grievant refused to speak. Walls testified that because H__ told them at the outset that he was being terminated and then asked the Grievant if he had anything to say the Grievant looked stunned and responded, "I don't guess I do. I don't know what to say." Walls also recalled that, after he told H__ that it was hard for the Grievant to defend himself if he didn't know why he was being terminated, H__ responded that he "… wasn't going to get into all of that, it wasn't necessary, S__ was being terminated for workplace harassment." H__ disputes that he made such a response, testifying he said something more along the lines of, "I hope I can get that to you." The Grievant was not asked about the specifics of that exchange and Claxton did not testify. At the end of the meeting, H__, Claxton and the Grievant signed a Termination of Service document indicating the Grievant was being terminated that day for workplace harassment. Although the Union requested a copy of the termination document, H__ refused to provide one because it had not been signed by the City Manager. 13

13 A copy of the document eventually was provided pursuant to a subpoena requested by the Union and executed by the undersigned.

The Union grieved the Grievant's termination on May 30, alleging the Grievant had been terminated without due process and seeking reinstatement and a make whole remedy. H__ denied the grievance in

writing on June 4. IAFF moved the grievance to the next step in writing on June 7. A hearing subsequently was held with Holcomb on June 18 as

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required by Article VII, Section 3D of the Agreement and was attended by City Attorney Stout and Union President Haines. The Grievant did not attend, testifying he was not told about the meeting. Holcomb responded by letter dated June 27, noting, in relevant part, "It is determined that the City of Ada did not violate any provisions of the contract or City Handbook in its termination of S__." 14 The parties processed the grievance through the remaining steps of the grievance-arbitration procedure without success. The Union then invoked arbitration and the dispute came on for hearing before the undersigned as set forth above.

14 Union Exhibit No. 4, p. 6.

Discussion and Analysis

Position of the Employer

The Employer contends the termination of the Grievant occurred for just cause as required by the Agreement. In support of that basic position, it asserts the Grievant interfered with R__'s traffic stop and undertook an extensive campaign of harassment against R__ and APD that interfered irreparably with the working relationship between APD and the Ada Fire Department. In the City's view, not only did the Grievant not deny the conduct of which he was accused, the Grievant admitted at the hearing that he was aware of the City's policy against harassment and that his conduct amounted to harassment. Thus, according to the Employer, discharge was a reasonable, appropriate response to offenses that showed a severe lack of good judgment and caused interdepartmental conflict within the City.

As regards the Union's various defenses raised on behalf of the Grievant, the City argues first that the Grievant was not denied due process inasmuch as he both knew from numerous sources that he was being investigated for workplace harassment and was given multiple opportunities, most of which he chose not to take advantage of, to respond to the allegations against him both before his termination and during the arbitration proceeding, thereby satisfying the requirements of Cleveland Board of Education v. Loudermill, 470 U.S. 532 [1 IER Cases 424] (1985). Nor, according to the Employer, did the Grievant have a First Amendment right to make the Facebook posts contained in the record since the majority of those post did not address a matter of public concern but rather the Grievant's personal tirade against R__, P__ and others. Moreover, the City notes that even if his posts had addressed a matter of public concern, the Department's interest in maintaining efficiency, control and its working relationship with the APD would outweigh the Grievant's free-speech rights in any event.

Moreover, in the Employer's view, H__'s history as Chief is not relevant since the incidents of alleged unprofessional behavior engaged in by H__ are completely unlike the acts of which the Grievant stands accused and the Chief and Grievant are not similarly situated since H__ is not a member of the collective

bargaining unit and subject to the same disciplinary procedures as the Grievant. Lastly, the City contends the fact of the Grievant's acquittal in criminal court does not control, given the different quantum of proof applied there, and asserts that the Grievant's conduct also would not be excused even if it had been shown that his wife had been wrongfully arrested since there were better, less disruptive avenues for addressing that question.

Accordingly, the Employer requests that the Arbitrator uphold the Grievant's termination and dismiss the grievance.

Position of the Union

The Union asserts the discharge of the Grievant was not for just cause as required by Article V, Section 2C of the Agreement. In the first place, according to IAFF, the Grievant was denied requisite due process identified in Loudermill, supra, and Patrick v. Miller, 953 F.2d 1240 (10th Cir. 1992), among others. The Union argues that conclusion is required by the failure of the City either to identify the precise nature of the charges against the Grievant or to afford him the opportunity to respond to the specific allegations against him before the decision to terminate him was reached. In this connection, the Union notes it was not provided with much of what it requested of the City in a timely fashion during its effort to process the grievance, including, among other items, Priest's investigative file and the videotapes of the Grievant's activities on the evening of April 24, the Employer claiming they were confidential pursuant to 51 O.S. §24A.7.A(1). IAFF points out that the Employer even failed to provide it and the Grievant with a copy of the termination notice, although it was specifically requested at the May 15 meeting with H__ and thereafter, until a subpoena was issued by the Arbitrator prior to the arbitration hearing at the Union's request.

The Union also contends the Employee Handbook that historically has been used by the parties as a guide regarding the administration and severity of discipline even though it does not constitute an employment contract was not followed here since progressive discipline was not applied by the City when it moved immediately to a discharge rather than some lesser measure of discipline. Nor, in the Union's view, was the specific disciplinary measure of termination chosen appropriate since it amounted to disparate treatment of the Grievant when compared to the City's failure to discipline the Chief notwithstanding his unrefuted career of bullying, making disparaging remarks and using vulgar language to members of the Fire Department and other City departments as demonstrated by the testimony of Union witnesses and the documents entered in the record in connection therewith.

Finally, IAFF asserts the Facebook activities of the Grievant were engaged in during office-duty hours and should have First Amendment protection since they were aimed at expressing dissatisfaction with the APD and its officers. It notes in this connection that the Grievant was acquitted of both the felony and misdemeanor charges brought against him in criminal court and it argues that consideration should weigh in favor of overturning the Grievant's termination.

Accordingly, the Union asserts the Arbitrator should sustain the grievance, reinstate the Grievant and make him whole.

Decision of the Arbitrator

Having now had the opportunity to consider the entire record in this matter, including the arguments of the parties voiced at the hearing and on brief as well as the numerous arbitral and legal decisions cited, I have determined to agree with the City that the termination of the Grievant did not violate the Agreement. Although I have studied the entire record in this matter carefully and considered each argument and authority cited, the discussion that follows will address only those considerations I found either controlling or necessary to make my decision clear.

[1] In short, I am convinced the Grievant cannot prevail here notwithstanding the Union's valiant efforts. In reaching this conclusion I have divided this dispute into two parts, namely the Grievant's interaction with R__ and P__ on the evening of April 24 and his series of Facebook posts thereafter. 15

15 Although the record demonstrates that the Grievant's Facebook posts continued after the date of his termination, at the hearing I found that consideration irrelevant to the substantive question of the appropriateness of his discharge but advised the Employer that it could resurrect its offer of these posts to argue that the Grievant should not be a candidate for reinstatement in the event I overturned the discharge. Accordingly, the post-discharge Facebook posts were not received into evidence.

Events of the Evening of April 24

As to these events, I understand and can empathize with the Grievant's emotions on the evening of April 24 since I believe a reasonable person would not find it pleasant to witness his or her spouse being arrested for public intoxication, particularly if he/she was not known to be a heavy drinker, as the Grievant claims was the case. However, Officer R__ had a job to do, a job that included enforcing Section 50-101 of the Ada Municipal Code prohibiting public intoxication. In this regard, there is absolutely no showing in the record that R__ was going about that duty inappropriately at the time the Grievant arrived on scene. Thus it is not as though the Grievant's wife was in some imminent physical danger from which a reasonable person could have felt compelled to rescue her. As a result, once R__ directed the Grievant to return to his vehicle, the Grievant was obligated to comply. Unfortunately, the Grievant's initial responses required R__ to repeat his directive many times before the Grievant did so. Even then, the Grievant repaired to his truck only while spewing expletives at R__. Thereafter, when the Grievant arrived at the Justice Center and engaged P__, he called R__ a “dick” and a “cocksucker” and threatened to “knock his fucking ass off” and promised to “smear this shit all over the place.”

[2] These actions of the Grievant on April 24 were, in and of themselves, worthy of some discipline. Because the Grievant was not independently disciplined for those activities, it is unnecessary to determine what level of discipline would have been appropriate. However, I agree with the City that it was proper to include them within the conduct for which the Grievant was ultimately disciplined.

Facebook Posts

Moving on to the Grievant's Facebook posts, I see no way the Grievant could have believed the majority of his posts were appropriate

and should not have jeopardized his job. Indeed, according to the Grievant's testimony, he was willing to sacrifice his job to engage in his Facebook campaign. He testified further that he chose to continue his tirade unabated—even long after his arrest—knowing it was wrong and expecting it would cost him his job. 16 That tells me that he understood not only that he was prohibited by City policy from harassing fellow City employees, as he admitted at hearing, but that he also understood that a firefighter is required to interact frequently on the job with other City employees such as officers of APD and that, if he were to continue to be a firefighter, it would be important not to upset that relationship.

16 On May 1, for example, after his arrest and placement on desk duty, the Grievant posted a message that stated, in part, “I have been advised to shut up, finally.” Employer Exhibit No. 20, p. 54 of 111. Yet he did not, defying logic by continuing to post on subsequent days.

[3] Clearly, some of his posts, such as that the City is “infested with leeches,” were merely inane and unprofessional. Others, embodying opinions such as that unnamed department heads leave work early, officials don't do their job and city buildings are in shambles, even without supporting details, touch on matters of public interest, as the Union notes, and, absent a showing they were knowingly false or recklessly made, were arguably protected. Pickering v. Bd. of Ed., 391 U.S. 563 [1 IER Cases 8] (1968). Others, however, are both 1) lacking as regards the public concern test since they exhibited the Grievant's personal anguish over his wife's arrest and 2) constitute personal attacks on R__, P__ and others that had the effect of disrupting the workplace and thus were not protected. As the Elkouris note in How Arbitration Works, BNA (7th Ed., 2012):

In determining if the exercise of First Amendment rights constitutes just cause for discipline, courts often adhere to the following principle: speech that is disruptive of the workplace or demoralizing and reflects the expression of a private complaint is not protected speech, whereas commenting on a matter of public interest is protected speech, but must be balanced against the government's interest in the effective and efficient fulfillment of its responsibilities to the public. 17

17 Id., at p. 19-3, citing Pickering, supra.

Example of those falling within this category are cited at the bottom of page 6 and the top of page 7 of this Opinion.

Still others, including many of those quoted at the bottom of page 5 and the top of page 6 of this Opinion, contain what I believe a reasonable person would consider to be threats uttered directly at R__. In particular, posts threatening to find out where R__ lives, to take R__’s head, to take R__’s wife and to break R__’s hands are beyond merely troublesome. Indeed, R__ testified that, after becoming aware of the posts, he feared for his and his girlfriend's safety and he varied his drive home at night and started carrying a firearm when he mowed his grass in response to them. In similar vein, P__ testified

that he commenced carrying two firearms while off duty, showed the Grievant's picture to his family and instructed them to contact him if they were to see him approach after seeing the Grievant's posts directed at him.

As the Employer argues, the Grievant does not deny making the Facebook posts contained in the record. As to the substance of this dispute, therefore, the only question to be decided is whether his posts constituted workplace harassment. Chapter 9, Section 9-10 of the Employee Handbook, a set of policies that the Union concedes has agreeably been used by the parties as a guide for disciplinary purposes, contains an extensive workplace harassment policy. Subsection C.1 of that policy provides:

Workplace harassment is a form of offensive treatment or behavior, which to a reasonable person creates an intimidating, hostile or abusive work environment. It may be sexual, racial, based on national origin, age, disability, religion or other factors. It may encompass other forms of hostile, intimidating, threatening, humiliating, or violent behavior, which are not necessarily illegal discrimination, but are nonetheless prohibited by this policy.

Subsection C.2 then notes, “It is misconduct for an employee to direct the subject behavior at another employee, or to customers, contractors or visitors.” Thereafter, subsection C.6 notes:

Workplace harassment can also be verbal or physical behavior which is derogatory, abusive, disparaging, “bullying,” threatening or disrespectful, even if unrelated to a legally protected status.

[4] I believe it is simply beyond cavil that the Grievant ran afoul of the Employer's workplace harassment policy via his Facebook posts. Having reviewed them many times, I am absolutely convinced that, taken as a whole, they were offensive, intimidating, hostile, abusive, derogatory, disparaging, bullying,

disrespectful and, most importantly, threatening. The Grievant's effort at the hearing to excuse them because he didn't actually carry out any of his threats, testifying, “There's a big difference between running your mouth and actually doing it,” cannot change that. As the Employer correctly notes on brief, it has an interest in maintaining efficiency and control over its operations and it was not obligated to wait until the Grievant's activities caused actual harm or disruption to those operations before taking action. Connick v. Meyers, 461 U.S. 138, 150-152 [1 IER Cases 178] (1983). Engaging in workplace harassment is classified as a Class B offense in Chapter 7 of the City's Employee Handbook and the Grievant admitted at hearing that he was aware of the prohibition against such conduct. He nonetheless engaged in an extensive campaign of workplace harassment. Although it is not completely clear to me whether and, if so, how many of the posts occurred during the Grievant's duty hours, I find that consideration irrelevant in the circumstances of this case. It is not the timing of the posts but rather their content that crossed the line. Thus I believe the collection of Facebook posts were deserving of discipline.

Appropriateness of Penalty of Discharge

That leads to the question of what level of discipline was appropriate. Chapter 7 of the Employee Handbook provides that Class B offenses such as engaging in workplace harassment can be grounds for penalties ranging from an oral reprimand all the way up to discharge for a first offense and will lead to discharge for a fourth offense. The same chapter also provides at Section 7-1, subsection E, "The seriousness of an offense will often vary with the circumstances. All factors shall be considered when determining the appropriate action to take in a particular situation." That language gives the City wide latitude to select a penalty in keeping with the offense. Whether the Grievant's posts are considered individually (in which case they numbered far more than four, the point at which the Employee Handbook specifies the sole penalty of discharge) or taken as a single offense (which would naturally increase in seriousness as successive posts are added), they were egregious. In my view, it is inarguable that this course of conduct necessarily would impede the ability of the Grievant to work alongside the APD as firemen are frequently and indisputably required to do in responding to fires, medical emergencies, vehicle accidents and other calls. Thus I cannot fault the Employer for choosing the penalty of termination. As the Employer asserts, Arbitrator Whitley P. McCoy found some seventy years ago:

Where an employee has violated a rule or engaged in conduct meriting disciplinary action, it is primarily the function of management to decide upon the proper penalty. If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it. The mere fact that management has imposed a somewhat different penalty or a somewhat more severe penalty than the arbitrator would have, if he had had the decision to make originally, is no justification for changing it.

* * *

The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those were discrimination, unfairness, or capricious and arbitrary action are proved—in other words, where there has been abuse of discretion. 18

18 Stockham Pipe Fittings Co., 1 LA 160, 162 (1945).

That logic continues to be applied today by this and other neutrals. See, e.g., Borg-Warner Corp., 78 LA 985 (Neas, 1982); Meredith Corp., 78 LA 589 (Talent, 1982); Grand Haven Brass Foundry, 68 LA 41 (Roumell, 1977). As a result, absent a finding that the Employer abused its discretion, i.e. that it acted discriminatorily, unfairly, capriciously or arbitrarily, or where management acted in bad faith by not performing a fair investigation or by meting out a penalty that was out of line with penalties given other employees in similar situations, either of which would run afoul of just cause notions, I am bound to uphold the Employer's choice. 19

19 I am not convinced otherwise by the fact of the Grievant's acquittal of all charges against him in criminal court in view of the use of the "beyond a reasonable doubt" standard of proof applied by that court that is not applicable here. In this case, whether one applies the standard of "a preponderance of the evidence" or the heightened standard of "clear and convincing evidence" frequently applied by arbitrators in cases involving allegations with potential criminal implications or involving socially

stigmatizing conduct, I am satisfied the Employer has met its burden. See, discussion in How Arbitration Works, supra, at pages 15-24 through 15-27.

Union's Procedural Challenges

In the dispute before me, IAFF alleges the City failed to perform a fair investigation because

it did not identify the precise nature of the charges against the Grievant or afford him the opportunity to respond to the specific allegations against him before the decision to terminate him was reached. IAFF also argues it was not provided much of what it requested from the City in a timely fashion including, among other items, Priest's investigative file and the videotapes of the Grievant's activities on the evening of April 24. The Union also contends the City subjected the Grievant to disparate treatment by dealing with him more harshly than it had with Chief H__ who allegedly had committed all sorts of acts worthy of discipline.

As to the question of the City's investigation, I disagree with the Union. The first fate to befall the Grievant was his arrest on April 30. At that point, H__ did nothing more than place the Grievant on desk duty, a move not questioned by the Union. On May 3, three days after the Grievant was in a position to have learned the specifics of the criminal charges against him, he and the Fire Chief discussed the Grievant's activities at issue. 20 That occurred in a meeting with H__ requested by the Grievant. After they discussed the incidents taking place on the evening of April 24, the Grievant's Facebook posts and his reason for engaging in both, H__ suggested to the Grievant that he should stay off Facebook and consider hiring counsel. At that point, H__ shared with the Grievant the fact that consideration was being given to his termination. While it can be argued that H__ should not have shared that observation with the Grievant since no investigation other than the conversation he had just engaged in with the Grievant had occurred, it is clear that as the Ada Fire Chief, H__ had no authority to terminate the Grievant. He could only recommend such an action to Holcomb. Indeed, it was after that meeting with the Grievant, at which the Grievant could have shared any information with H__ that he wished, that H__ did just that and Holcomb subsequently appointed Priest to perform an investigation. At that juncture, no decision with respect to disciplining the Grievant had been made. To be clear, it is obvious from his recommendation to Holcomb that H__ believed that discipline was necessary. However, because his recommendation to Holcomb was discharge, the City's decision cannot be said to have been reached prior to Priest's investigation.

20 The record does not disclose precisely who told him to “shut up,” the directive mentioned in the aforementioned May 1 post, although it is obvious he had gotten the word to do so from someone by then.

Once Priest was assigned to perform the investigation, one of the people he sought out was the Grievant. This occurred at the Grievant's Fire Station on May 6 when it is undisputed that Priest informed the Grievant that he was performing an investigation of workplace harassment claims against him. However, other than making some general “off-the-record” comment to Priest that he thought his

wife had been arrested improperly on April 24, the Grievant declined to discuss the matter without an attorney being present. While I understand the Grievant's concern in light of the criminal charges which had been brought against him, Priest neither prevented him from acquiring an attorney nor directed the Grievant to speak with him without an attorney present. 21 Instead, Priest honored to Grievant's request. At that point, the City still had not made a decision to terminate the Grievant. Indeed, it did not do so until May 13 after Priest concluded his investigation.

21 Thus there also was no violation of the Grievant's Fifth Amendment protection identified in Garrity v. New Jersey, 385 U.S. 493 (1967), by virtue of Priest's failure to administer a Garrity warning to the Grievant.

Then, after Holcomb approved H__' request and the Grievant and his Union representative were called to H__'s office on May 15, the Grievant once again failed to provide information in his defense. Even if the Union's recollection of the sequence of events during that meeting, and not H__', is the correct one, and the Grievant was informed at the outset that he was being terminated before he was asked whether he had anything to say in his defense, the Grievant could have taken the opportunity to say something in his defense. Instead, he remained mute. Indeed, it develops the Grievant did not even attend the grievance hearing conducted before City Manager Holcomb on June 18. Whether it was the Union or the Grievant who dropped the ball on that occasion, the Grievant's failure to attend, where he would have had yet another opportunity to speak in his defense, cannot be laid at the feet of the City.

[5] I recognize, of course, that the Grievant contends he was never told the nature of the charges against him. However, that argument does not hold water. The Grievant's own statements to H__ on May 3 and to Priest on May 6, both of which he concedes concerned his wife's arrest and his subsequent Facebook posts, not to mention his reassignment to the

desk that immediately followed his arrest and the detailed local newspaper account of his arrest that the Grievant admitted he also knew stemmed from his Facebook posts since it related that he had been charged with "use of a computer to put another in fear of physical harm or death," make clear that he knew precisely what he was accused of and what activities of his were being questioned.

It is as though the Grievant decided at the outset to keep himself as ignorant as he could of the City's reaction to his decision to interfere with R__ on April 24 and to engage in his self-described smear campaign against the City in order that he might be able to use it as a defense in any subsequent employment action against him. Thus, rather than request copies of all the legal documents prepared in the criminal case and seek the assistance of counsel, the Grievant concedes he merely went back to work after making bond on the day of the arrest, did not later seek out an attorney for representation and did not go to the courthouse at any time between the date of his arrest and the date of his termination to find out what he had been charged with in the criminal arena, notwithstanding any reasonable person would have perceived, at least by May 6 if not by April 30 or May 3, that the City's expressed concerns regarding workplace harassment were related to those matters. He testified

instead, “I didn't really do anything about it whatsoever.” To then blame the City for his lack of knowledge is unconvincing.

As the Supreme Court made clear in Loudermill, supra, due process requires notice and an opportunity to be heard. Moreover, as the 10th Circuit subsequently held in Powell v. Mikulecky, 891 F.2d 1454 (10th Cir. 1989), the required notice may be oral as it was here and this was not changed by the later opinion of the same court in the case cited by the Union, Patrick v. Miller, 953 F.2d 1240 (10th Cir. 1992). It is also clear from a reading of the Oklahoma Supreme Court's decision in Barnthouse v. City of Edmond, 73 P.3d 840 [19 IER Cases 1622] (2003), citing Hennigh v. City of Shawnee, 155 F.3d 1249 [159 LRRM 2236] (10th Cir. 1998), that in turn had cited that court's earlier decision in Benavidez v. Albuquerque, 101 F.3d 620 [12 IER Cases 411] (10th Cir. 1996), that one is not entitled to an extensive or formal pre-termination hearing where there exist adequate post-termination procedures such as this arbitration proceeding.

[6] The same is true of the City's failure to provide the Union promptly with all that it requested. Although I agree the Employer could have been more forthcoming in responding to the Union's various requests for information inasmuch as that might have permitted an informal resolution of this dispute, given the approach of the Grievant detailed above and the completely obvious fact the Grievant was disciplined for his interference with R__’s duties on April 24 and the Facebook campaign mounted by the Grievant thereafter, concerning all of which the Grievant had intimate first-hand knowledge, I believe the Employer's sluggishness in providing information is an insufficient reason to overturn the discipline since I find the Union and Grievant were not prejudiced thereby in view of the extensive post-termination proceedings conducted here.

Disparate Treatment Argument

[7] Finally, I agree with the Employer that the substantial evidence in the record regarding Chief H__’s alleged historic conduct cannot be used to demonstrate that the Grievant was subjected to disparate treatment when he was discharged for his conduct here. Although I permitted to Union to place that evidence in the record and advised I would consider whether it could be used to prove the existence of disparate treatment, I have decided it cannot be. That is because, as the City argues, H__ is not an employee member of the collective bargaining unit and thus is not subject to the same disciplinary procedures as the Grievant. Having been provided with no authority to the contrary by the Union, I am constrained to follow what I believe is the universally applied logic, i.e. if the Union is to make its case in this regard, the comparison must be between similarly situated employees. 22 That is not to say that the conduct of the Chief, if all the testimony laying out his historic outbursts were credited, would find approval with this

Arbitrator. 23 I simply cannot use it to find the Grievant was afforded disparate treatment.

22 See, discussion in How Arbitration Works, 7th Ed., supra, at pp. 15-76 through 15-79. The facts leading to the decision cited by the Union in Lockheed Corporation and Aeronautical Industrial District

Lodge 727, I.A.M.A.W., 75 LA 1081 (Kaufman, 1980), do not assist its argument that the Chief's purported conduct may be used to show disparate treatment since they involved that employer's historic failure to crack down on the use of drugs during breaks in the company parking lot that was found to prevent the employer from suddenly deciding to do so without notice vis-à-vis the relevant employees.

23 To be clear, I have not decided whether the Chief's conduct on any of the occasions described amounted to workplace harassment.

[8] In view of all the above, I find that the discharge of the Grievant occurred for just cause as required by Article V, Section 2C of the Agreement. That is to say I find the City has established that the Grievant engaged in behavior warranting discipline and that, in light of all the circumstances, the discipline imposed was appropriate. International Union of Operating Engineers Local No. 351, AFL-CIO and CP Kelco US, Inc., Okmulgee Facility, FMCS Case No. 12-57297 (Reed, 2012), citing Elkouri and Elkouri, How Arbitration Works, BNA (6th Ed. 2003) at p. 948. Thus I must find that the discharge of the Grievant did not violate the Agreement.

AWARD

I. It is the Award of the Arbitrator that the termination of the Grievant did not violate the Agreement.

II. It is therefore Ordered that the grievance be, and it hereby is, dismissed.

- End of Case -