***City of Bay City,* 134 LA 276 (Daniel. 2014)., Full Text**

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**THIS CASE CITED IN**

* NEWS

**134****LA****276**

**City of****Bay****City**

**Decision of Arbitrator**

MERC Case No. A14C-0012

September 22, 2014

**In re****CITY OF****BAY****CITY [Mich.] and INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 116**

**Arbitrator(s)**

Arbitrator: William P. Daniel

**Headnotes**

**WORK RULES**

**[[1]](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490572&vname=lelacases&wsn=504838400&searchid=24309155&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0e1g5j0_1ref" \t "_self)Social media policy**[**▸100.15**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490572&fname=laco_100_15&vname=lelacases)

City reasonably decided to promulgate social media policy for firefighters, since purpose of such policy is appropriate concern for city and may be addressed by policies for purpose of giving guidance to employees on their conduct.

**[[2]](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490572&vname=lelacases&wsn=504838400&searchid=24309155&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0e1g5j0_2ref" \t "_self)Social media policy — Free speech**[**▸100.15**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490572&fname=laco_100_15&vname=lelacases)[**▸100.552505**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490572&fname=laco_100_552505&vname=lelacases)[**▸100.552525**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490572&fname=laco_100_552525&vname=lelacases)

Rule limiting firefighters' rights to express themselves on social media “to the degree that their speech does not impair working relationships of this Department for which loyalty and confidentiality are important” is reasonable on its face, since it is generally appropriate for purposes intended and whether it is violated depends entirely upon particular facts and circumstances.

**[[3]](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490572&vname=lelacases&wsn=504838400&searchid=24309155&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0e1g5j0_3ref" \t "_self)Social media policy — Confidential information**[**▸100.552505**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490572&fname=laco_100_552505&vname=lelacases)[**▸100.552525**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490572&fname=laco_100_552525&vname=lelacases)

Rule barring firefighters from disseminating “any information to which they have access as a result of their employment. . .” on social media is generally permitted, with proviso that it not apply to information that is already publicly known or has been published by any other organization under right of Freedom of Information Act.

**[[4]](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490572&vname=lelacases&wsn=504838400&searchid=24309155&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0e1g5j0_4ref" \t "_self)Social media policy — Objectionable speech**[**▸100.552510**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490572&fname=laco_100_552510&vname=lelacases)

Rule barring firefighters from using objectionable language on social media is reasonable on its face, with proviso that whether in particular case such matter would be found to be “reckless and irresponsible” would depend upon facts and circumstances and subject of separate proceeding before arbitrator.

**[[5]](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490572&vname=lelacases&wsn=504838400&searchid=24309155&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0e1g5j0_5ref" \t "_self)Social media policy — ‘Snitch rule'**[**▸100.5523**](http://laborandemploymentlaw.bna.com/lerc/display/link_res.adp?fedfid=60490572&fname=laco_100_5523&vname=lelacases)

Rule requiring firefighters to report violations of social media policy to supervisor is unreasonable, since it is unreasonable to threaten or to discipline employees for failure to “rat out” some other employee; it is for employer to conduct investigations.

**Attorneys**

For the employer—Steven H. Schwartz, attorney.

For the union—Michael L. O'Hearon, attorney.

**Opinion Text**

**Opinion By:**

DANIEL, Arbitrator.

**Facts**

The parties have a long standing collective bargaining relationship and prior to January 1, 2013, the employer operated separate police and fire departments and this union represented all of the employees in the fire department, except the fire chief. Effective January 1, 2013, by direction of the CityCommission, the police and fire departments were consolidated into a Public Safety Department. It was necessary for the employer to make a comprehensive review of all operational policies and applications to either of the departments noting differences in operations as being applicable. There had been a policy, drafted in 2011, following a model advocated by the International Association of Chiefs of Police, establishing a social media policy in regard to police departments in various municipalities, and when the departments were merged the employer undertook to apply such existing policy also to employees of the Fire Department.

In mid October, 2013, the draft was distributed to the fire union and in accordance with the collective bargaining agreement it was reviewed for 30 days with the parties meeting several times to discuss the subject matter, some revisions were undertaken. The final version of the policy was implemented commencing March 4, 2014.

The union, believing that the policies application to fire fighters was an unreasonable interference with their constitutional and employment rights, filed a grievance which is the subject of this proceeding. While there was no objection specifically by the union as to the authority of the employer to publish and promulgate and enforce policies, it did object in this instance to the reasonableness of the policies, which is the standard of the master agreement and the intended application in individual cases. This case does not concern any individual or specific case of application or enforcement of the rule, but rather raises the issue of whether the policy, as set forth, meets the master contract standard of reasonableness.

**Page 278**

**Pertinent Contract Provisions**

***Article 1
Section 1:7—Management Rights***

Except when limited by the expressed provisions elsewhere in the Agreement, nothing in this Agreement shall restrict the City in the exercise of the functions of management under which it shall have, among others, the right … to require employees to observe departmental rules and regulations….

\* \* \*

***Article 12
Personnel/Duties/Promotion***

\* \* \*

***Article 12:2
Duties/Rules/Regulations***

After affording the Union an opportunity to negotiate with the City over any new rule or regulation, or amendment to an existing rule or regulation, dealing with the subject of position responsibilities, general work rules, and offenses and penalties therefore, the City may implement any such rule or regulation or amendment thereof. If, in the opinion of the union, any such rule, or regulation, or amendment thereof is unreasonable, the Union may grieve the reasonableness of the rule or regulation or amendment thereof as well as its application by submitting it to arbitration under Step 3 of Article 9, Grievance and Arbitration procedure. No such rules or regulations shall become effective until at least thirty (30) days after announcement.

This Agreement shall supersede any rules or regulations inconsistent herewith.

\* \* \*

***Article 14
Reprimands/Discipline/Punishment***

No employee shall be removed, discharged, reduced in rank or pay, suspended or otherwise punished except for just cause. Any Firefighter subject to discipline may be suspended immediately by the Chief or Public Safety Director/Public Safety Deputy Director; however, within twenty-four (24) hours, a written notification from the Fire Chief or Public Safety Director/Public Safety Deputy Director with reasons for the suspension will be forwarded to the Union and the employee.

\* \* \*

*Section 19:1—Void Provisions*

This agreement is subject to the laws of the State of Michigan with respect to the powers, rights, duties, and obligations of the City, the Union, and the employees in the bargaining unit, and in the event that any provision of this Agreement shall at any time be held contrary to law by statute or a court of competent jurisdiction from whose final judgment or decree no appeal has been taken within the time provided, therefore, such provision shall be void and inoperative; however, all other provisions of this Agreement shall, insofar as possible, continue to [sic] full force and effect.

*The Objectionable Provisions of the Social Media Policy*

*Paragraph A:* Department personnel are free to express themselves as private citizens on social media sites to the degree that their speech does not impair working relationships of this Department for which loyalty and confidentiality are important, impede the performance of duties, impair discipline and harmony among coworkers, discuss the home addresses of Departmental personnel, or negatively affect the public perception of the Department.

*Paragraph C:* Department personnel shall not post, transmit, or otherwise disseminate any information to which they have access as a result of their employment without written permission from the Public Safety Director or their [sic] designee.

*Paragraph E:* When using social media, Department personnel should be mindful that their speech becomes part of the worldwide electronic domain. Therefore, adherence to the Department's code of conduct is required in the personal use of social media. In particular, Department personnel are prohibited from the following:

*1.* Speech containing obscene or sexually explicit language, images, or acts and statements or other forms of speech that ridicule, malign, disparage, or otherwise express bias against any race, any religion, or any protected class of individuals.

*2.* Speech involving themselves or other Department personnel reflecting behavior that would reasonably be considered reckless or irresponsible.

*3.* Personnel shall not publicly criticize or ridicule the Department, its guidelines, or other personnel by speech, writing, or other expression, where such speech, writing or other expression undermines the effectiveness of the Department, interferes with the maintenance of discipline, or is made with reckless disregard of the truth.

*Paragraph K:* Reporting violations—any employee becoming aware of or having knowledge of a posting or updating website or web page in violation of the provision of this policy shall notify his or her supervisor immediately for follow-up action.

**Page 279**

**Positions of the Parties**

***Union:***

The union recognizes the employer's right by policy to limit and sometimes prohibit certain forms of speech which might otherwise be protected under the Constitution for non-employees. However this right is not absolute and there are provisions cited herein to which the union objects, which constitute absolute prohibition of speech. There are no protections of speech on public issues and the employer's action has a chilling effect on employee's rights and their rights as citizens. The standard for review by the arbitrator should be as set forth in the contract as “reasonable” and it is the position of the union that these rules are not reasonable either in their promulgation or in their anticipated application and enforcement.

It should be found that these rules are unconstitutional both federally and on a state basis and that such constitute a violation of the Public Employees Relations Act (PERA).

For these reasons the union urges the arbitrator to find that the policies, as written, are unreasonable and should be rescinded. Moreover the arbitrator should direct that members of the bargaining unit should not be disciplined for any violations of the policy because it is invalid and unreasonable. The grievance should be granted.

***Employer:***

The Management Rights clause of the contract clearly gives the employer rights to promulgate certain department rules and regulations and to require the employees to comply. The social media policy is not unreasonable, nor does it constitute a violation of PERA, or any constitutional rights of the employees. Nor is that an issue that can be presented to the arbitrator in this grievance.

The policy is narrowly designed and permissible and therefore the grievance in this matter should be denied.

**Issue**

Is the employer's Social Media Policy reasonable? If not, what is the remedy?

**Opinion**

The arbitrator is a creature of the contract between the parties and has only that authority and jurisdiction granted him. When the contract is clear and unambiguous it is his obligation to apply and enforce its terms. It is only if there is some uncertainty or lack of detail that the arbitrator may look elsewhere for the purpose of interpreting or discerning the intent of the parties.

Clearly the intent of the employer in this case was to set forth certain guidelines to employees in relation to their jobs and public media statements or disclosures. The only general qualification found in the master contract is that such be “reasonable.” Of course the term “reasonable” is one that may be regarded and applied subjectively by people, depending upon how they perceive such. But in this case the arbitrator is called upon to view the language in broad and general terms seeking to determine whether in that regard it is reasonable.

**[****[1](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490572&vname=lelacases&wsn=504838400&searchid=24309155&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0e1g5j0_1" \t "_self) ]**The arbitrator finds generally that the purpose of such a Social Media Policy is an appropriate concern for the employer, and therefore, may be addressed by policies for the purpose of giving guidance to employees on their conduct. That is not to say that every such policy must be regarded as valid and reasonable. Rather, any such policy is subject to challenge by the union as to its impact upon its members. The impact must also meet the standard of reasonableness and this can only be considered in terms of potential effect. In this case it is the burden of the union to prove, by a preponderance of the evidence, that the policy is unreasonable, either in its promulgation or in its possible application.

In this regard and considering paragraph A, the arbitrator finds that the policy “does not impair working relationships” by its terms. Whether or not such does in a particular case invites subjective interpretation and individual response. That is not presented to this arbitrator, nor is he authorized to engage in conjecture as to what might happen in future instances. It is entirely possible that provisions of this policy applied in one case might be found proper and yet in another case upon the circumstances found to be unreasonable. The issue then is not in the promulgation of the rules, but rather in the application and enforcement and in this regard the union has the right to object on behalf of its individual members.

**[****[2](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490572&vname=lelacases&wsn=504838400&searchid=24309155&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0e1g5j0_2" \t "_self) ]**The arbitrator finds that under A there are some issues that would have to be considered, such as the meaning of the word “loyalty.” The mere fact that some member of management doesn't like what is said is not sufficient, since objective standards must be used. It certainly is fair for the employer to be

**Page 280**

concerned whether “the public perception of the Department” is adversely involved. The apparent intent of the employee may be of valid concern as to whether it is his purpose to demean and undermine the authority of the Department, or simply to inform and make public certain facts and circumstances. Certainly an employee would not be permitted to make disclosures of confidential Department matters or information, but where certain information is publicly known, or has been obtained through FOIA, it is an entirely different matter. Of course if the intention of the employee is apparent to do damage to or undercut the reputation of the Department, the policy may certainly be applied within the limited way as set forth in the policy. As to Paragraph A, the arbitrator finds that while it is generally appropriate for the purpose intended and whether it is violated depends entirely upon the particular facts and circumstances. The promulgation of that rule did not violate any obligation of the employer or violate the contract or law.

**[****[3](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490572&vname=lelacases&wsn=504838400&searchid=24309155&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0e1g5j0_3" \t "_self) ]**Rule C is found to be permitted as noted above but not if the information involved is publicly known anyway or has been published by any other organization under the right of FOIA. While it speaks in terms of obtaining permission from the employer prior to dissemination, the arbitrator finds that that would be an unreasonable requirement in most cases, and would hold that such permission shall not be unreasonably withheld, unless there is a valid concern for public impact, and in this regard it is recognized that the publication may have a different standard in regard to firefighters as versus police department personnel, and such should be considered by the employer in application. The arbitrator finds that this paragraph is generally permitted and not a violation of any employment right as long as the certain limitations that it contains are reasonably and fairly applied under particular facts and circumstances.

**[****[4](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490572&vname=lelacases&wsn=504838400&searchid=24309155&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0e1g5j0_4" \t "_self) ]**Paragraph E, is found to be directed at certain objectionable language. Exactly what would constitute in an employment sense unreasonable ridicule or personal attacks on others seems to be different then the primary purpose of the policy, which is to protect the public repute of the Department, and not disclose confidential information. Whether in a particular case such a matter would be found to be “reckless and irresponsible” would depend upon the facts and circumstances and the subject of a separate proceeding before an arbitrator. Certainly the union would have the right in that circumstance to raise the point and present evidence. The danger in all of these cases is the application of subjective opinion of the management as to what is right and wrong and the more appropriate objective view of things as to purpose and intent of the rules generally.

**[****[5](http://laborandemploymentlaw.bna.com/lerc/2444/search_doc_hit_highlight.adp?fedfid=60490572&vname=lelacases&wsn=504838400&searchid=24309155&doctypeid=1&type=court&mode=doc&split=0&scm=2444&pg=0" \l "a0g0e1g5j0_5" \t "_self) ]**Lastly, the arbitrator views Rule K appropriately to be referred to as a “snitch rule.” Essentially it seeks to require employees to report the actions of other employees that they may think are objectionable and in violation of Department Rules. This is no right of the employer to require, and in fact very well may interfere with the rights of union members among themselves. It is unreasonable to threaten or to discipline employees for failure to “rat out” some other employee. It is for the employer to conduct investigations into matters that come to its attention, and it is not the obligation of the union or its members to raise such issues. It is for this reason the arbitrator finds that Rule K is unreasonable, unenforceable, and in violation of the rights of the employees of the unit. It shall be rescinded and the employer may not act upon the provisions of that former rule to initiate or support disciplinary action against any member of the unit.

**AWARD**

The grievance is granted and the arbitrator finds that Rules A, C, and E, have been properly promulgated and may be applied and enforced upon appropriate evidence in a particular case. It is noted, however, that the burden of proof would be on the employer in those cases and that it would be very substantial considering the potential interference with the rights of individual members of the unit to which they are entitled by citizenship, constitutionality and PERA.

It is found that Rule K, is unreasonable and may not be applied or enforced against any member of this unit for the reasons stated. The grievance is granted in part and denied in part.

- End of Case -