

## **Decision of the Arbitrator**

**In re City of Omaha, Nebraska and Professional Firefighters Association of Omaha, Local 385; FMCS Number:190419-06346, August 14-16, 2019.**

**Arbitrator: Peggy A. McNeive**

Appearances:

For the Employer: Heide A. Gutttau and George Martin of the Baird Holm Law Firm

For the Union: Michael P. Dowd of Dowd and Corrigan

### **Issue Statement:**

The parties did not agree to an issue statement so the arbitrator finds the issue to be:

Was the grievant, Steve LeClair, terminated for just cause under the collective bargaining agreement between the City of Omaha and Professional Firefighters Association of Omaha, Local 385 and if not, what is the remedy?

It should be noted that Mr. LeClair's counsel alleged the City of Omaha's mayor and/or the City's attorneys engaged in witness intimidation prior to the trial. This issue is outside of the arbitrator's purview so will not be addressed or discussed in this decision.

### **Summary of the Party's Positions:**

The Arbitrator summarizes the positions of the parties as follows:

City of Omaha:

The City of Omaha contends it had good cause to discharge the grievant for the following reasons:

1. His conduct at Tiger Tom's on the evening of November 9, 2018 was embarrassing and unfavorable to the City of Omaha when he made a racially charged statement to an

- African American female and physically assaulted her. He also publicly accused the woman of lying about the incident and made statements about her criminal record;
2. He violated a direct order from the Fire Chief to refrain from contacting Omaha Fire Department Captain Remus when he was placed on administrative leave;
  3. Mr. LeClair was not treated differently than other firefighters who were disciplined because there are no cases in which a firefighter is accused of making a racial slur, assaulting a woman and engaging in subordination; and
  4. The Grievant's witnesses' assertions concerning the political motivations for his termination did not alter the City's grounds for termination.

The City requests the termination be upheld.

Professional Firefighters Association of Omaha, Local 385 on behalf of Steve LeClair:

The Grievant admits his conduct was not appropriate during the incident at Tiger Tom's but contends his termination was not for "just cause" because:

1. LeClair's service record in the Fire Department and the United States military, the lack of prior discipline and his service to the community were not taken into account when the decision to terminate him was made;
2. Mitigating circumstances existed which should have been considered by the City including his intoxication, the fact he did not hold himself out as a firefighter during the incident with Ms. Jackson, the City's encouragement for Ms. Jackson to file a complaint and the intense investigation of the incident;
3. LeClair was not afforded due process under the collective bargaining agreement because he was not given a hearing by an impartial city decisionmaker as required by the contract, and
4. The letter of termination states he was terminated for violations of public policy; however, the Fire Chief could not enunciate which public policy was violated.

The Union requests the grievance be sustained and the Grievant be reinstated with full back pay.

**Relevant Contract Provisions:**

The following collective provisions are relevant to the Arbitrator’s decision:

ARTICLE 2: MANAGEMENT RIGHTS

Except where limited by express provisions elsewhere in this Agreement, nothing in this Agreement shall be construed to restrict, limit, or impair the rights, powers, and the authority of the CITY as granted to it under the laws of the State of Nebraska, the Home Rule Charter of the City of Omaha, 1956, and the CITY’S ordinances. These rights, powers, and authority include, but are not limited to the following:

...

- 5. The right to hire, examine, classify, promote, train, transfer, assign, and retain employees; suspend, demote, discharge, or take other disciplinary action against employees for just cause, and to relieve employees from duties due to lack of work or funds.

...

ARTICLE 6: DISCHARGE, DISCIPLINE AND COUNSELINGS

SECTION 1: DISCIPLINARY ACTION-CLAUSE: Any action which reflects discredit upon the service or is a direct hindrance to the effective performance of the CITY government functions shall be considered good cause for disciplinary action. ...

...

- (e) Offensive conduct or language toward the public or toward City Officers or employees;

...

- (i) Violation of any lawful and reasonable official regulation made or given by his superior officer, where such violation or failure to obey amounted to an act of insubordination or a serious breach or proper discipline or may result in, or might reasonably have been expected to result in loss or injury to the City or to the public;

...

- (j) Commission of acts or omissions unbecoming an incumbent of the particular office or position held, which render his reprimand, suspension, demotion, or discharge necessary or desirable for the economical or efficient for the business of the City or for the best interest of the City or for the best interest of the City government;

...

SECTION 5: DISCIPLINARY ACTIONS-DISCHAARGE: ... Prior to the discharge becoming effective such employee shall be entitled to present his side of the fact surrounding the discharge to an impartial City decision maker.

SECTION 6: ...However, anytime an employee is questioned regarding a matter which may, in the reasonable belief of the City, result in employee being disciplined, the employee shall be entitled to the following rights:

### FIREFIGHTERS BILL OF RIGHTS

...

9. The name of the employee involved in the interrogation shall be kept confidential and shall not be released to the news media by the City without his/her express consent.

...

#### **Background:**

The Grievant has been a firefighter with the Omaha Fire Department for 17 years. He served several tours of duty in Iran which caused him to be away from his job duties for several years. During his career with the Omaha Fire Department he worked in the North Omaha/Florence District. Several witnesses testified it is an economically disadvantaged area with a high concentration of minorities.

No complaints were filed concerning the Grievant's conduct prior to Ms. Jackson's complaint. The Grievant's evaluations were good and he had no prior discipline in his record except for a letter of reprimand in December of 2011 for being tardy for work. A number of witnesses testified he was very involved in community outreach programs and worked diligently to better the working conditions of firefighters through legislation and initiatives with in the Fire Department during his career. They also testified he had not exhibited any racist tendencies either in his work relationships or to people who served with him in the military. In addition, several African American individuals state they would trust the Grievant to take care of their families. Finally, a number of witness wrote character letters for the Grievant and several stated they believed he was an asset to the Fire Department and should be retained as a firefighter.

The incident at Tiger Tom's occurred on November 9, 2018. The video tape of the incident reveals the Grievant was speaking to many of the people in the bar and greeted them in various ways. He does not appear to be wearing any clothing that identifies him as a Fire Department employee. A security camera at the bar recorded the incident between Mr. LeClair and Ms. Jackson. The video does not have sound. The Grievant is seen speaking with a woman, who is later identified as Ms. Jackson; he then elbows her in the back and leaves the area. The Grievant states he said "What white power" to Ms. Jackson. She stated he only said "white power". The bar owner's son stated he heard the Grievant say only "white power"; however, he was not standing near the two individuals involved in the exchange. There seems to be an altercation after this incident with a man who is later identified as the bar owner's son. Although Mr. LeClair initially stated he did not believe he was intoxicated he did admit he had been drinking shots prior to coming to Tiger Tom's and had several beers while he was there. Several witnesses contacted during the investigation stated the Grievant was intoxicated.

Ms. Jackson initially contacted the Union hall concerning filing a complaint when she found out the Grievant was the President of the Union. She then called the Mayor's hotline and was, ultimately, contacted by Captain Remus. She filed her complaint with Captain Remus on or about December 8, 2018. Captain Remus did not conduct the investigation; it was conducted by Mr. Grauman. He was not present at the hearing to testify to how it was conducted because he had moved to Florida.

A number of witnesses, including the Grievant, testified he was remorseful concerning the incident. Both the Grievant and his attorney contacted, or attempted to contact, Ms. Jackson to apologize to her. Ms. Jackson made the statement to the Grievant's attorney that he was lucky she had not filed a criminal charge.

Ms. Jackson filed a criminal complaint against the Grievant on January 8, 2019; the day after Mr. Grauman spoke to Ms. Jackson's friend who was at the bar with her on November 9, 2019. Since Mr. Grauman did not testify it cannot be established what transpired between the two of them during that conversation. The Mayor was sent a preliminary police report which she discriminated to several people on January 9, 2019. On that same day the Omaha World Herald ran a story about the incident after receiving the preliminary police report. The Mayor's office was contacted by the press and her office issued a press release naming the Grievant as being

under an internal investigation concerning the incident. The Grievant issued a press release of his own in response to reporter's inquiries. The press release questioned the validity of Ms. Jackson's statements. Both the Mayor and Chief Olsen issued subsequent press releases and the Mayor gave an interview concerning the matter either in person or over the telephone. The Grievant did not give the City permission to name him in the press releases.

The City decided to put the internal investigation into abeyance when the criminal charges were filed to let the criminal investigation run its course. During the criminal investigation the Grievant's attorney was provided a copy of the video which came from the surveillance camera at Tiger Tom's; he obtained the video from Prosecuting Attorney Kuhse. Mr. Young, the Human Resources Director for the City, later told Mr. Kuhse he was not happy about the video being provided to the Grievant's attorney. The police department requested Kuhse view the video and Kuhse gave them some direction on the information he would like to know before he decided if charges were to be filed. The Police Department finished its investigation and turned the file over to the City's Prosecuting Attorney. The file did not include the original statement Ms. Jackson gave to the Fire Department.

The Grievant was cited with assault and battery and disorderly conduct under the Omaha Municipal Code. He and his attorney came to the Prosecutor's Office to pick up the citation. He later plead "no contest" to the citation. The Judge put him on six months' probation, instructed him to follow any evaluation recommendations and had him pay court costs.

Once the criminal investigation was complete the Human Resources investigation resumed. Chief Olsen issued a letter on December 21, 2018 placing the Grievant on administrative leave and directing the Grievant not to discuss the case with anyone and, specifically, not to contact Captain Remus. The Grievant contacted several people after receiving the letter, including Captain Remus.

Mr. Young contacted several people to conduct the hearing required by Article 6, Section 5 of the collective bargaining agreement wherein a City decision maker would hear the Grievant's side of the story. He then decided he would contact Mr. King to conduct the hearing even though Mr. King was not a city employee. Mr. King provided a letter to Mr. Young which concurred the Grievant should be terminated.

The grievant was terminated was terminated effective April 5, 2019.

**Discussion:**

It should be noted from the outset that this arbitration was unusual in the number of witnesses, exhibits and length of the transcript. It would be extremely difficult to analyze all of the testimony given by the witnesses and the arguments made by the parties. Therefore, I will concentrate of the evidence and arguments necessary to make an informed decision.

Article 2 of the Collective Bargaining Agreement allows management the right to discipline employees for “just cause”. The seminal definition of “just cause” is set forth in the decision entitled In re Enterprise Wire Company and Enterprise Independent Union<sup>1</sup> issued by Arbitrator Carroll Daugherty. In that decision Arbitrator Daugherty enunciated the following questions of be answered to determine “just cause”. These are:

1. Was the employer’s rule or managerial order reasonably related to the orderly, efficient and safe operation of the business?
2. Did the employer give any warning as to any possible discipline or consequences that could result from that employee’s action or behavior?
3. Prior to administering discipline, did the employer conduct an investigation to determine whether the employee did in fact violate or disobey a rule or order?
4. Was this investigation fair and objective?
5. Did this investigation uncover any substantial proof or evidence that the employee was guilty of violating or disobeying a direct order?
6. Did the employer apply all rules, orders and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline reasonably related to either the seriousness of the employee’s offense or to the record of past service?

The Grievant admitted that when he veiwed the video in which he made inappropriate comments to a patron at Tiger Tom’s and shoved her after the statement was made, he had violated the provisions of the collective bargaining agreement. Therefore, the answer to the first question is yes. In addition, he should have known such violations may result in discipline so the second question is also answered in the affirmative.

The parties both address the issue of whether the Grievant self-reported the incident. According to the Merriam-Webster dictionary “self-report” is defined as “a report about one’s

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<sup>1</sup> 46 LA 359, 1966

behavior especially by one who is a subject of research”<sup>2</sup>. Applying that definition, the Grievant did “self-report” the incident. My review of the record and the exhibits finds no requirement to self-report potential complaints and the parties did not explain why this issue is important. Therefore, it will not be taken into consideration in the decision.

There is no doubt an investigation into the incident was done. The question is whether the investigation was fair and objective.

The initial contact Ms. Jackson had with the Fire Department was to leave a message for Internal Affairs Investigator, Captain Remus. Captain Remus returned her call; the notes of the conversation are entered as Exhibit R-24. Captain Remus explained how to file a complaint, offered to mail her a copy of the complaint and instructed her on how to download it from the website. She attempted to speak to Ms. Jackson a second time to make sure she was able to obtain the complaint form. She stated this was not typical.<sup>3</sup> She did say she had done this before but could not remember any specifics about the incident<sup>4</sup>. Mr. Young also called the attorney for Ms. Jackson to see if her client was going to file a complaint and reminded her there were timelines which needed to be adhered to and he could not just arbitrarily investigate the matter<sup>5</sup>.

Mr. Grauman took over the case at some point and asked Captain Ramus several times if Ms. Jackson had filed a complaint. It is only after Ms. Jackson obtained an attorney that she decided to file a complaint with the City.<sup>6</sup> The witness’s original complaint states:

Steve approached me several times through the night at the bar initially telling me I smelled good and hitting on me. At the end of the night he walked up to me again at the bar put his around me stating White/Power and then he shoved me into the bar he was immediately put out by the owner others were there who saw what happened<sup>7</sup>

Captain Remus observed the interview conducted by Mr. Grauman and stated she had some reservations concerning Ms. Jackson’s account of what happened.<sup>8</sup> Although it is

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<sup>2</sup> <https://www.merriam-webster.com/dictionary/self-report>

<sup>3</sup> Transcript of the Arbitration Proceedings in the matter of Steve LeClair and the City of Omaha pages 25-29 (hereinafter Transcript).

<sup>4</sup> Transcript pages 60-61.

<sup>5</sup> Transcript page 457.

<sup>6</sup> Transcript pages 30-34.

<sup>7</sup> Exhibit R47. It should be noted the exhibit states it was filed on November 13, 2018 and attests it was filed at the time of her interview; however, Captain Remus did not speak with Ms. Jackson’s attorney until December 7, 2018.

<sup>8</sup> Transcript pages 47-50.

normal practice for the complainant's interview to be taped, it was not in this instance because Ms. Jackson's attorney objected to it.<sup>9</sup>

Captain Remus testified several items in the police report filed by Ms. Jackson<sup>10</sup> including that she was struck so hard she fell out of her chair and that LeClair whispered "white power" to her<sup>11</sup> was not consistent with her initial statement. The video does not show Ms. Jackson falling out of her chair, nor does it show her dropping her telephone.

The internal investigation was put on hold when a criminal complaint was filed by Ms. Jackson. During the internal affairs investigation the Human Resources Department refused to provide the video of the incident to the attorney for the Grievant and Mr. Young was unhappy that Deputy City Attorney Kuhse provided the video to the Grievant's attorney during the criminal investigation<sup>12</sup>.

Ms. Jackson filed a criminal complaint against the Grievant on January 8, 2019; The Chief of Police, Todd Schmaderer, testified the investigation was handled in the usual way<sup>13</sup>. However, Kuhse testified he had, at least, one meeting with the police investigators and that it was unusual for them to follow up in this manner when the charges were misdemeanors<sup>14</sup>. Lieutenant Ott testified there were inconsistencies in the information provided to him during the investigation and what actually happened as reflected in the video tape<sup>15</sup>. Several of the City's witnesses stated they believed the investigation to be fair and impartial although there are inconsistencies in the witness's statements and the investigation seemed to be unusual for a minor offense the basic facts of the case do not change.

Once the investigation was completed Kuhse assigned the case to City Prosecutor Sladek. Kuhse and Sladek decided to cite the Grievant with assault and battery

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<sup>9</sup> Transcript pages 54-57.

<sup>10</sup> See Union exhibit 78.

<sup>11</sup> Transcript pages 71-73.

<sup>12</sup> Transcript pages 547-548.

<sup>13</sup> Transcript pages 82-83.

<sup>14</sup> Transcript pages 321.

<sup>15</sup> Transcript pages 185-187; 218.

and disorderly conduct under the Omaha Municipal Code<sup>16</sup>. Mr. Kuhse obtained a list of media contacts from the Mayor's office and informed the public of the citations; he did this because he thought it was the efficient way to deal with the media<sup>17</sup>. The Grievant plead "no contest" to the citation<sup>18</sup>. Mr. Kuhse testified this is normal in a criminal matter when a civil matter may also be associated with it<sup>19</sup>. The Grievant was placed on probation, fined and ordered to follow recommendations of evaluations<sup>20</sup>. This process was not complete until June 20, 2019<sup>21</sup>.

The Grievant alleges the City violated his contractual rights and these violations should be the basis for setting aside his termination. Since there is a pre-disciplinary process in the collective bargaining agreement, the discussion of the allegation the Grievant's rights concerning the hearing fits within this section. The first allegation is that the City did not provide him the opportunity to present his side of the case to an impartial City decisionmaker as required under Article 6, section 5. Instead, Mr. King, a former colleague of Mr. Young, conducted a hearing for the City.

The Grievant discussed the City's "interview" with him concerning the incident at Tiger Tom's. He stated Mr. Grauman did not ask him about the incident. Instead, he told him he had read all the reports and only wanted to know about what contacts he had with other members of the City Administration<sup>22</sup>

Mr. Young stated he did not want to do the hearing because he was in negotiations with the union and Mr. Grauman could not do it because he had done the investigation so he could not do the<sup>23</sup>. He contacted Fred King because he thought he was an ethical man<sup>24</sup>. The testimony of Mr. Young established he knew the hearing was not in compliance with the contractual requirements and also indicated that, although he could have access to Mr. King, he did not want the Grievant's attorney to have the same

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<sup>16</sup> Transcript pages 325.

<sup>17</sup> Transcript pages 338.

<sup>18</sup> Transcript pages 336.

<sup>19</sup> Transcript pages 338.

<sup>20</sup> Transcript pages 337.

<sup>21</sup> See Exhibit R62.

<sup>22</sup> Transcript page 993.

<sup>23</sup> Transcript page 471.

<sup>24</sup> Transcript page 472.

access<sup>25</sup>. Mr. King met with the Grievant and his counsel, as well as representatives for the Fire Department, on March 19, 2019 and issued his decision to Mr. Young. Mr. King's letter states he did not consider prior discipline of other firefighters in his decision<sup>26</sup>.

In Goshen Rubber and United Rubber, Cork, Linoleum and Plastic Workers of America<sup>27</sup> Arbitrator Briggs discusses whether an employee was discharged for good cause when the due process rights of the employee were not afforded to him. Specifically, he finds:

But on balance, the Grievant's due process rights-both by contract and Company policy-were simply ignored.... Her fundamental rights to due process were violated by the Company. Under such circumstances, the record has not convinced the Arbitrator that the Grievant was discharged for just cause.

I find the City did not meet its burden of proving it conducted a fair and impartial investigation for several reasons and did not provide the Grievant due process.

First, both Captain Remus and Mr. Young contacted Ms. Jackson and/or attorney several times to discuss filing a complaint against the Grievant. Ms. Remus testified it was not normal for the Internal Affairs Department to contact a potential complainant unless the citizen initiated the contact. Mr. Young stated he called the attorney for Mr. Jackson and reminded her of the need to file a complaint before he could investigate the matter. Mr. Young testified he received a call from someone named Ms. Jackson's attorney who inquired about how to file a complaint. He also stated he got the impression from Ms. Jackson's attorney wanted to go straight to the courtroom<sup>28</sup>.

If Ms. Jackson had not filed the complaint there would not have been an investigation and the matter would have been closed. It is obvious from the actions of the City's representatives' actions that they wanted Ms. Jackson to file a complaint. In addition, Mr. Young attempted to prejudice the Grievant during the investigation by refusing to allow his attorney access to the video of the incident at Tiger Tom's. Finally, the "interview" of the Grievant by

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<sup>25</sup> Transcript pages 551-560.

<sup>26</sup> Exhibit R34.

<sup>27</sup> 99 LA 770 (Arbitrator Steven Briggs, 1992)

<sup>28</sup> Transcript pages 456-457.

Mr. Grauman was not one of substance. Instead, he only wanted a list of names of other City Administrators to whom the Grievant had discussed the matter.

Second, the City violated the Grievant's rights under the collective bargaining agreement when they did not provide him with a hearing by an impartial city decisionmaker as required under Article 6, Section 6 of the collective bargaining agreement. It was obvious through Mr. King's statement that he was not familiar with the process and was unsure of duties<sup>29</sup>. It is also obvious he is not a City employee. Mr. Young testified he took it upon himself to find someone outside of the City structure to conduct the hearing because he was too close to the issue. While the Arbitrator understands his reasoning, it does not excuse a blatant violation of the collective bargaining agreement. The result was the Grievant was not given the opportunity to present his side of the story effectively.

This violation could be, in and of itself, determinative of the issue of "just cause". However, the remainder of the seven tests of just cause are analyzed below.

The investigation did confirm the Grievant committed some of the offenses listed as ones for which a firefighter can be disciplined. In particular he engaged in conduct that was offensive to a citizen of Omaha. In addition, he violated a direct order by contacting Captain Remus after Chief Olsen had instructed him not to discuss his case with other city employees, including Captain Remus. The City meets the burden of investigation which uncovered substantial proof or evidence that the employee was guilty of violating or disobeying a direct order.

The sixth question is: did the employer apply all rules, orders and penalties evenhandedly and without discrimination to all employees?

The city contends the Grievant was treated the same as or equal to other employees because his situation is unique; no other employee has ever been accused of assault and battery, disorderly conduct and insubordination. The City also argues the discipline was warranted because, if the video came out in public, it could be detrimental to the reputation of both the City

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<sup>29</sup> Transcript pages 288-311.

and the Department. The union argues the Grievant was singled out for harsh discipline because of his status as the Union President and his adversarial relationship with the mayor.

The City's second argument will be addressed first. At no time did the City contend any of the participant's involved in the incident threatened to go to the press and discuss what happened at Tiger Tom's on the evening of November 9<sup>th</sup>. On the contrary, it was the City who made the public aware of the incident.

The preliminary Police Report filed by Ms. Jackson was sent to Mayor Stothert on January 9, 2019; these police reports are not supposed to be given to the public by the Police Department.<sup>30</sup> The Mayor sent the preliminary supplemental report to several people including her Chief of Staff and the Deputy Chief of Staff for Communications. Somehow the Omaha World Herald received a copy of the preliminary police report. As a of receiving the report, the Omaha World Herald runs a story about the Grievant's involvement in the incident. Chief Schmaderer acknowledges he did not know how the Omaha World Herald obtained the preliminary report concerning the charges filed against the Grievant and did not investigate the incident<sup>31</sup>.

After the Omaha World Herald ran an article concerning the police report the Mayor's office issued a press release stating the Grievant was the subject of an internal investigation<sup>32</sup>. Young testified the Grievant did not give his permission at any time to release his information to the press<sup>33</sup>. Mr. Kuhse also issued a press release to the media contacts the Mayor's office had given to him<sup>34</sup> as did Chief Olsen<sup>35</sup>. Finally, the Mayor gave an interview, either in public or in person, concerning the Grievant's situation<sup>36</sup>.

The Grievant issued a press release after the article appeared in the Omaha World Herald. He testified he felt compelled to respond to the accusation because he thought he was

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<sup>30</sup> Transcript pages 85-95.

<sup>31</sup> Transcript pages 93-97.

<sup>32</sup> Transcript pages 873-877.

<sup>33</sup> Transcript page 540.

<sup>34</sup> Transcript page 890.

<sup>35</sup> Transcript page 881.

<sup>36</sup> Transcript page 882.

being tried in the press. He also stated he did not have access to the preliminary police reports to which the City had access at the time of his press release<sup>37</sup>.

The City's argument seems to be circular. The Mayor states she was kept informed concerning the case because it was high profile. However, the media would not have known about the case unless the Omaha World Herald had not mysteriously been given a copy of the supplemental police report, which was not supposed to be provided to the public, immediately after the it was sent to the Mayor and she forwarded it to individuals on her staff. The Mayor said she was compelled to issue a press release because the media requesting information. The City's argument on this issue is rejected.

The other argument forwarded by the City is that the Grievant was treated differently because no other employee engaged in exactly the same conduct. A number of disciplinary actions have been taken by the current administration and prior administrations concerning firefighters. An extensive list of them are included in the Union's exhibit number 76. This exhibit was developed from information obtained from the City Attorney. Contained in that exhibit are a some which are very close to the actions engaged in by the Grievant: for example, number 10, 31, 33, 34, 39 and 43.

Mr. Young agreed the progressive discipline process was designed to be corrective, not punitive, in nature. He further stated the Grievant was not terminated for hitting a woman; he was terminated for racial slur/assault and for the subordination<sup>38</sup>. He also testified the City did not have to follow all of the steps in progressive discipline if the actions of the employee were egregious enough<sup>39</sup>. On cross examination he testified there were no other employees who were terminated for minor crimes and some employees who had committed felonies who were not terminated; instead they were suspended. In addition, some of the employees were disciplined because of racists comments<sup>40</sup>.

Since Chief Olsen was not in his current position or the Acting Chief position when the above referenced discipline was issued, I will concentrate on more current offenses. Taking into

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<sup>37</sup> Transcript page 884-885.

<sup>38</sup> Transcript pages 50-507.

<sup>39</sup> Transcript pages 568.

<sup>40</sup> Transcript pages 569-572

account the City's argument that one reason for the termination of the Grievant was possibility of the public's concerns about his actions two specific instances will be discussed; those labeled as Number 52 and Number 58. The names of individuals will not be discussed to ensure their privacy. In the first case the firefighter was charged with violation of social media policy. He was at his desk and in uniform when he "liked" a post on Facebook that denigrated Black Lives Matter and characterized Barrack Obama as a terrorist. He was given a suspension of 1 duty day. In the second case a firefighter was showing a picture of a couple who had been burned to death to an auditorium full of high school students; the couple were in an explicitly provocative position. He made the comment something to the effect that at least they went out doing something they loved when they died. That firefighter was given 1 duty day suspension. Although these employees actually conducted themselves in such a manner the public knew about their statements, rather than speculating what they did would become public, they only received minor discipline.

In addition, although the Mayor did not seem to remember any specific disagreements between herself and the Grievant during her testimony the record reflects they certainly existed. Exhibit 77 has a substantial amount of information concerning these conflicts including the fact the Grievant's organization opposed the re-election of the Mayor. During the Mayor's testimony she confirmed Mr. Young and both the Chief of Police and the Fire Chief are appointed by her and report directly to her<sup>41</sup>. Although the City makes a point of the fact the City's witnesses testified the Mayor did not direct them to take actions against the Grievant it is not a difficult leap to conclude they want to make her happy. The Mayor did not have to tell the individuals in these positions to terminate the Grievant; they would have surmised her wishes based on the history of the Grievant and the Mayor. In addition, Chief Olsen had his own reason for terminating the Grievant; as President of the firefighter's organization he had sued the Mayor over her appointment of the Chief<sup>42</sup>

Based on the above reasons the Employer did not establish it applied all rules, orders and penalties evenhandedly and without discrimination in the case of the Grievant.

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<sup>41</sup> Transcript pages 863-869.

<sup>42</sup> See Exhibit 78.

The final question is: was the degree of discipline reasonably related to either the seriousness of the employee's offense or to the record of past service?

In Elkouri and Elkouri, How Arbitration Works,<sup>43</sup> the factor of an employee's length of service and the appropriateness of discipline is discussed at length. With regard to an employee's length of service the following factor should be considered:

Arbitrators generally believe that an employee with long, satisfactory service deserves some additional consideration, especially if the penalty is discharge<sup>44</sup>.

The appropriateness of a penalty is addressed in a number of passages:

Most arbitrators will evaluate the discipline imposed by the employer to determine whether the penalty (or corrective measure) is excessive. Discipline may be considered excessive if it is disproportionate to the degree of the offense, if it is out of step with principles of progressive discipline, if it is punitive rather than corrective, or if mitigating circumstances are ignored.<sup>45</sup>

Finally,

As described by one arbitrator:

In disciplinary matters, a penalty that is markedly too harsh for the offense is unreasonable and an abuse of managerial discretion. A penalty that flows from incomplete analysis of both the misconduct and the individual employee is arbitrary.

Arbitrators have consistently held that an excessive harsh penalty for misconduct violates the requirement that discipline be imposed for just cause.<sup>46</sup>

Mr. Young stated he recommended termination of the grievance based on review of the video, reports and interview notes. He did not review prior discipline<sup>47</sup>. Mr. Young assisted with revisions to the termination letter and agreed with the recommendation for termination. He did not consider the Grievant's length of service, his prior disciplinary history or his performance evaluations<sup>48</sup>. When asked about the work in the community in which the Grievant had engaged and the advancements in working conditions made during the Grievant's tenure, he testified he did not have any knowledge about them; he

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<sup>43</sup> Bureau of National Affairs, 7<sup>th</sup> Edition.

<sup>44</sup> Id at page 84-85.

<sup>45</sup> Id at page 85

<sup>46</sup> Id at page 86.

<sup>47</sup> Transcript page 457.

<sup>48</sup> Transcript pages 496-501.

did not take any of these into consideration when making his decision to support the Grievant's termination<sup>49</sup>.

Chief Olsen stated he went into his office and reviewed the file and the collective bargaining agreement prior to making his decision to terminate the Grievant<sup>50</sup>. He also stated he did not follow the precedent of Chiefs who served before him<sup>51</sup>. He stated he made his decision, in part, because the Grievant's actions would damage the public trust<sup>52</sup>. This factor did not seem to weigh as heavily in the prior discipline he agreed to in cases where he was either the Acting Fire Chief or the Fire Chief. His testimony is devoid of any reference to consideration of the Grievant's service record or a consideration of whether discipline other than termination may be appropriate. Finally, in the past the Chief would ask Captain Remus what had been done in previous situations concerning discipline under similar circumstances. He did not on this occasion.<sup>53</sup>

The Grievant's termination letter<sup>54</sup> references only the administrative hearing conducted by Mr. King and his recommendation to terminate the Grievant's employment. As noted previously Mr. King did not take into account discipline given to other firefighters.

There are no complaints against the Grievant prior to Ms. Jackson's, nor did he have any after her complaint and the time he was put on administrative leave<sup>55</sup>. In addition, the only discipline in the Grievant's file is a reprimand for being late for work in 2011<sup>56</sup>. There is a significant amount of testimony concerning the Grievant's work in the community and his acceptance of and ability to work with people of all races and sexes. In addition, there is a significant amount of evidence that he the inclusion of minorities in the fire department. His history is not taken into consideration when the City decided on his punishment. At no time did the City officials mention it might be a good idea to try to rehabilitate the Grievant through the use of a lessor form of punishment.

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<sup>49</sup> Transcript pages 512-514

<sup>50</sup> Transcript page 729.

<sup>51</sup> Transcript page 738.

<sup>52</sup> Transcript page 742.

<sup>53</sup> Transcript pages 53-54.

<sup>54</sup> Exhibit R36.

<sup>55</sup> Transcript pages 504-505.

<sup>56</sup> See Exhibit 74.

Counsel for the City urges the arbitrator to accept the to accept the definition of the Nebraska Supreme Court concerning the definition of “good cause” which is included in the cases she cites in her brief. Although arbitrators will follow the rulings in state court rulings such rulings must be “analyzed to determine whether they are really distinguishable from this case at hand.”<sup>57</sup> This case is distinguishable from the cases cited in the City’s briefs for two reasons. First, none of the cases involve the interpretation of a collective bargaining agreement which requires just cause for termination of an employee. Second, the Supreme Court in Stejskal v. Department of Administrative Services<sup>58</sup> the Court acknowledges it has not defined “just cause”.

For these reasons the City has not met its burden of proofing the degree of discipline reasonably related to either the seriousness of the employee’s offense or to the record of past service.

One issue which must be addressed is the Grievant’s failure to follow a direct order by contacting. It is clear the Grievant did, in fact, fail to follow the Chief’s direction. I have accounted for his actions in my award.

**Award:**

After consideration of the evidence, exhibits and briefs concerning the parties positions the Arbitrator finds the City of Omaha did not discharge the Grievant for just cause. As a remedy, the City is directed to reinstate the Grievant to his former position with no loss of seniority. The Grievant shall receive full backpay except for the loss of five (5) shifts which is discipline for his violations of the contract and his act of insubordination. The City may deduct the Grievant’s interim earnings from the his backpay.

The Arbitrator retains jurisdiction in this case for a period of 120 calendar days to hear and decide disputes which might arise between the parties concerning the interpretation or application of the above remedy.

Executed this 11<sup>th</sup> day of November, 2019 by Peggy A. McNeive, Arbitrator

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<sup>57</sup> See Elkouri and Elkouri, supra, at page 539.

<sup>58</sup> 665 N.W. Rep. 2<sup>nd</sup> 576 (2003)