CHAPTER 143 LABOR ARBITRATION HEARING DECISION

Police Officer Jason Chiappardi	)
	) Review of Austin Police
	) Department IA # 2016-0336
Vs.	) conducted pursuant to Chapter 143 of the
	) Local Government Code
	)
The City of Austin	)

PROLOGUE

This matter came on for arbitration before the Honorable Chuck Miller on stipulated facts and written briefs and, by agreement of the parties, without a hearing. Briefs and joint exhibits were submitted on or about June 28, 2017. Chuck Miller, serving as Arbitrator chosen by the parties, is a member in good standing with the Federal Mediation and Conciliation Service. Police Officer Jason Chiappardi was represented by CLEAT attorney Nadia Stewart. The City of Austin was represented by City attorney Michael Cronig. This arbitration was the result of an appeal by Chiappardi of a three day suspension imposed upon him by Chief of Police for the City of Austin, Art Acevedo, on August 17, 2016. Upon consideration of the stipulated facts, briefs and exhibits presented by the parties the Arbitrator renders the following decision.

ISSUES

The issues submitted by Chiappardi are, verbatim:

1. Did Detective Chiappardi correctly presume that his social media postings in question were made pursuant to his Constitutional right to engage in protected speech under the First Amendment to the Constitution of the United States?
2. Does the Austin Police Department policy on social media, Policy 972.4(b), constitute a prior restraint on speech which voids any discipline issued in this case?
3. If the Arbitrator determines that the acts do not constitute protected speech, did the City prove by a preponderance of the credible evidence that one or more of the allegations charged in the written statement of suspension are

true[1]?

4. If the Arbitrator finds that one or more of the allegations charged are "true", what is the appropriate discipline?

The issues submitted by the City, being somewhat convoluted, are rephrased as follows:

1. Does the Arbitrator have the authority/jurisdiction to declare a department policy unconstitutional?
2. If the Arbitrator does have such jurisdiction, is Austin Police Department Policy 972.4(b) Employee Speech, Expression, and Social Network, an impermissible prior restraint on speech?
3. If Police Department Policy 972.4(b) constitutes a prior restraint on speech, does that finding void the Appellant's discipline under the specific facts of this case?
4. If not, are the postings at issue protected speech under the First Amendment to the United States Constitution?
5. If the Arbitrator does not have the authority/jurisdiction to declare a department policy unconstitutional or if the Appellant's speech is not protected speech, did the City prove by a preponderance of the credible evidence that one or more of the allegations charged in the written statement of suspension are true [did that speech violate APD Policy 972.4(b)]?
6. If the Arbitrator finds the Appellant violated APD Policy 972.4(b), does the Arbitrator have the authority to mitigate punishment?[2] [3]
7. If the Arbitrator has such authority, what is the appropriate remedy under the Just Cause standard?

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[1]LGC Section 143.053 provides:

> (g) The commission may suspend or dismiss a fire fighter or police officer only for violation of civil service rules and only after a finding by the commission of the truth of specific charges against the fire fighter or police officer.

LGC Section 143.057 provides:

> (f) In each hearing conducted under this section, the hearing examiner has the same duties and powers as the commission …

[2]Article 18, Section 1 (a) (2) of the 2013 Meet and Confer Agreement between the City and the Austin Police Association provides that the Hearing Examiner has "no authority to mitigate the punishment" (But see footnote 3 supra).

[3] LGC Section 143.053 provides: (e) In its decision, the commission shall state whether the suspended fire fighter or police officer is: (1) permanently dismissed from the fire or police department; (2) temporarily suspended from the department; or (3) restored to the person's former position or status in the department's classified service. (f) If the commission finds that the period of disciplinary suspension should be reduced**, the commission may order a reduction in the period of suspension. (emphasis supplied)**

The issue as phrased by President Casaday:

> "We look forward to doing the arbitration. Not because there wasn't an issue with what he said, but we're interested in what an arbitrator would say about what First Amendment rights do officers have and not have." Austin Police Association President Ken Casaday quoted in a local FOX News article dated August 19, 2016.

FACTUAL BACKGROUND

On March 21st, 2016, Austin Chief of Police Art Acevedo Indefinitely suspended Police Officer Geoffrey Freeman for events leading up to and including the shooting by Freeman of David Joseph on February 8, 2016. Freeman and Chiappardi were good friends at the time. In the early evening of March 21st Chiappardi, having become aware of the indefinite suspension of his friend and fellow officer, began posting a series of social media statements using pseudonyms instead of his real identity.

At 7:14 pm on March 21st, he posted the following Twitter message under the fictitious name of "Frank Vincent":

> "My family and friends are glad to hear that the high school dropout, drug using, neighborhood terrorizing, naked guy will never scare anybody else again."

Later on March 21s, the Appellant posted the following messages on his Facebook account using the fictitious name of Jason Paul:

> "I emailed the boss in support of Geoff. I made it clear that a firing was not necessary and would be a major blow to the department. The boss replied saying Geoff was lucky to have the support of friends like me. It's too fucking bad that the boss has no support for his officers. I hope he leaves soon. He better not ask me how my daughter or family are since I know it doesn't really matter if another political group gets his attention. As a union rep I will support Geoff forever."
>
> "I just watched the video of the press conference. Very telling that the boss is feeling for the dropout's family but makes no mention of Geoff's family."

* * *

On March 24th Chiappardi posted the following messages on his Facebook account using the fictitious name of Jason Paul:

> "A couple of days ago I made a statement in support of my good friend. I'm saddened by the fact that someone had to be childish and tattle tailed on me. It's a shame that whoever did it, does not have a pair. Time to grow up. Guess someone never learned that bringing an apple to the teacher doesn't always work.
>
> Saddest part is now I must delete most, if not all, my work "Friends." No disrespect meant to anyone. Just want to keep thought to those that matter most."
>
> * * *
>
> "People can't seem to mind their own business. Once again, I was notified that someone brought last night's post to the attention of one of my supervisors. Really? WTF was so special about it? Nothing. The earlier 'Test' message was testing the privacy of my account. So here is some advice to those who thing being an adult tattle tale is cool.
>
> Get a life.
> Wipe the shift off your nose.
> Call yourself Jermain H. He tried the same things. He lost. You will too.
> Go ahead and tattle. Yes I said it. I don't want to deprive you of your daily dose of ass kissing.
> Say something directly to me. Have a backbone. Send me a message and I'll send you my phone number so we can actually speak.
>
> I have received so much support the last two days. I've been shocked with all the texts, calls, and messages from real friends. Thank you."

These pseudonyms or aliases were used by Chiappardi to hide his identity from people in general and a police watchdog group in particular. It is noted however that his posts were read and sometimes responded to via Facebook "Likes" or comments by Chiappardi's Facebook "Friends" (but not the general public) including APD officers and civilians. Chippardi's list of Facebook friends numbered in excess of 800 (he purged the list and deleted his Facebook posts on the morning of March 22nd.). It should be noted that neither Chiappardi's Facebook page nor his twitter account identifies him by his full name or photograph, nor does it allude to the fact that he is an Austin Police Officer.

To put these posts in context, the shooting of David Joseph by Austin Police Officer Geoffrey Freeman was a highly controversial and publicized event in Central Texas because Joseph, who was a black man, was clearly unarmed when shot. This country had just been through a series of highly controversial and publicized deaths of unarmed black men perceptively at the hands of police. The day after the shooting Chief Acevedo help a press conference surrounded by members of the black community presumably to assuage the situation and avoid the type of demonstrations/riots that had occurred elsewhere following such events. To say the least, feelings ran strong among some citizens at the event's occurrence.

On March 28th a complaint concerning Chiappardi's social media posts narrated above was filed with APD Internal Affairs by Lieutenant Michael Eveleth and assigned to Lieutenant Justin Newsom. This complaint asserted that the posts may have compromised or damaged the mission, function, reputation or professionalism of the Austin Police Department in violation of departmental policy.

The complaint was followed by two Internal Affairs interviews of Chiappardi on April 20th and June 15th. On July 27th Chiappardi's Chain of Command sustained the allegation against Chiappardi, violation of APD Policy 972.4(b) – Prohibited Speech, Expression and Conduct, and recommended a 3 day suspension. Immediately following a disciplinary meeting on August 17th Acevedo temporarily suspended Chiappardi for three days. Just as immediately on August 17th Cleat attorney Grant Goodwin appealed the suspension in a letter, jointly signed by Chiappardi, to a third party hearing examiner [Arbitrator].

APD Policy 972.4(b), titled: Employee Speech, Expression and Social Networking: Prohibited Speech, Expression and Conduct, states the following:

> To meet the Department's safety, performance, and public-trust needs, the following is prohibited:
>
> > (b) Speech or expression that, while not made pursuant to an official duty, is significantly linked to, or related to, the Austin Police Department and tends to compromise or damage the mission, function, reputation or professionalism of the Austin Police Department or its employees.[4]

[4] In the new APD Police Manual, issued July 20, 2017, Policy 972.4(b) remains unchanged. *See* July 20, 2017 edition of The Austin Police Department Policy Manual, p. 704.

THRESHOLD ISSUE

May an Arbitrator decide the constitutional issues concerning whether the policy constitute a prior restraint on speech (See Chiappardi's issue #2) which voids any discipline issued in this case, or whether the policy AS APPLIED does the same (See Chiappardi's issue #1)?

Determination of Chiappardi's issues number 1 and 2 involves an arbitrator in a constitutional determination of the APD Policy 972.4(b)'s validity. Also involved are the City's issues number 1, 2, 3 and 4. Before undertaking the Herculean task of deciding these matters, some wisdom from our Texas court system is in order.

Historically and for various legal reasons Texas courts do not decide matters of constitutionality of a law unless they just have to. "We are reluctant to decide constitutional questions unless absolutely necessary." *See* Meshell v. State, 739 S.W.2d 246, 250 (Tex.Crim.App.1987); *See also* Burton v. State, 805 S.W.2d 564, 574 (Tex.App.--Dallas 1991, pet. ref'd). As a prudential matter, courts generally refrain from passing on constitutional questions unless necessary to the disposition of a case. *See* In re B.L.D., 113 S.W.3d 340, 349 (Tex.2003) ("As a rule, we only decide constitutional questions when we cannot resolve issues on non-constitutional grounds."). *See also* Turner v. State, 754 S.W.2d 668, 675 (Tex.Crim.App.1988) (providing that the constitutionality of a statute is not to be determined in any case unless such a determination is absolutely necessary to decide the case in which the issue is raised).

Such wisdom from both of our state's "Supreme Courts" deserves respect in and of itself. It is of no moment that arbitration is governed by different rules, or at least is not subject to or bound by this judicial practice. Decision making wisdom is wisdom, regardless of the forum. Here this Arbitrator will adhere to the judicially imposed practice of Texas appellate law and will not decide the above referenced issues that involve either a constitutional question or the question of the Arbitrator's authority to decide the above referenced issues that involve constitutional law unless absolutely necessary.

By absolutely necessary in this case means that Chiappardi's suspension would be upheld absent determination of those issues. It then becomes incumbent upon the Arbitrator to make that determination and resolve Chiappardi's issues number 3 and 4, and the City's issues 5, 7 and potentially 6.

Therefore in order to determine whether it is absolutely necessary to decide the constitution related issues it is necessary to discover if Chiappardi, assuming for the moment that the APD Policy 972.4(b) is constitutionally sufficient per se and as applied, can be disciplined because of alleged violation of the policy. This question involves determination under the time honored "Just Cause" standard of review of any employee discipline. If his suspension survives the Just Cause analysis, then a determination of whether the policy itself is void (if you will) as unconstitutional or unconstitutional as applied and the determination of whether the Arbitrator has the power and/or jurisdiction to do so becomes ripe for determination.

STANDARD OF REVIEW UNDER THE JUST CAUSE TEST.

In the public sector the criteria used in the review of discipline and discharge is much the same criteria as that used in the non-public or private sector, assuming the absence of statutory restriction to that criteria. *See* Public Employee Discharge and Discipline, Silver, Wiley Law Publications, 1989, Sec. 3.18 Arbitration, P3.31-32.

The standard of review in non-public sector proceedings is the "Just Cause" standard. A discharge or discipline is justified if it is for "Just Cause." In those non-public employee discipline cases the Company must show Just Cause for both the finding of culpability and the punishment assessed. Just Cause therefore requires at least two primary determinations: (1) Whether there is a reasonable basis under the collective bargaining agreement to impose discipline on the employee in the first instance, and (2) if there is a reasonable basis upon which to impose discipline and whether the penalty imposed is reasonable under the totality of the circumstances. These are two distinct inquires and must be dealt with separately.

"Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he or she was discharged or disciplined. Other elements include a requirement that an employee know or reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline or discharge, the existence of a reasonable relationship between an employee's misconduct and the punishment imposed, and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

Commonly cited elements of this standard are roughly phrased as follows:[5]

Factual support to show a basis for discipline;
Reasonable rules within the employer's discretion about which the employee has been given fair notice;
Did the employer, before administering discipline to an employee, make an effort to discover whether the employee violated or disobeyed a rule or order of management (i.e. was there an investigation);
Was the employer's investigation conducted fairly and objectively;
At the investigation, was there substantial evidence or proof that the employee committed the conduct as charged;
Equal and consistent treatment of employees (but see discussion ante in footnote 12); and
Progressive, corrective discipline related to the nature of the offense and to the employees personnel record, with discharge for serious wrongdoing, or, in other cases, as a last resort when improvement cannot be foreseen (but see discussion ante in footnote 12)

See Federal Mediation and Conciliation Service Institute: Putting Theory Into Practice, Revised.

A more modern trend is to get away from a formulistic approach to Just Cause in favor of a more principled analysis wherein the objectives of the Company, the employees, and the union are weighed. The Company's interests may be boiled down to securing satisfactory work from its employees. The employee and the union's interest are in securing a fair wage and job security. In a given case, the Company's actions in disciplining an employee must relate to a legitimate business interest such as rehabilitation, deterrence and/or protection of the Company's Good Will. The Union's opposition to that action is grounded in obtaining industrial due process, industrial equal protection, and individualized treatment. *See* "Toward a Theory of 'Just Cause' in Employment Discipline Cases," Abrams and Nolan, 1985 Duke L.J. 594, 611-12 (1985).

The Standard of Review of a police chief's decision to suspend a police officer is not well addressed in the Texas statute. *See* Local Government Code, Sec. 143.053 (f), (West Supp. 2005). That section of the code, dealing with punishment (germane here) states only that "If the [appellate body] finds that the period of disciplinary suspension should be reduced, the [appellate body] may

[5] The wording of the elements is often differently set out, but the concept of each of the seven always remains intact.

order a reduction of the period of suspension." *See* Id. If anything, the scant case law interpreting TEX. LOCAL GOV'T CODE ANN. § 153.053(f) seems to give unbridled discretion to the reviewing authority. *See* City of Laredo v. Leal, 161 S.W.3d 558, 563 (Tex. App.-San Antonio 2004, writ denied)("So far as we have been able to determine, this authority is not limited by any statutory provision; and it has not been limited by any court decision.").

Because the Texas Legislature has not restricted the reviewing criteria to be used by an Arbitrator hearing a suspension case, it is therefore the consistent determination of the Arbitrator that the standard of review of a Chief's decision to suspend an officer is the Just Cause standard. *See* Id., Public Employee Discharge and Discipline.

For the quantum of proof necessary for the employer to meet in employee discipline cases, there are three possible: Preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt. As between preponderance of the evidence or clear and convincing evidence, disagreement can be found even in the same treatise over which should apply in a given arbitration. *See* The Common Law of the Workplace: The Views of Arbitrators, National Academy of Arbitrators, St. Antone, BNA (1998). St. Antone's compilation of various contributing authors is meant, says the Preface, to put forth some generally recognized approaches to common problems as well as alternative ways of thinking about them. On the subject of amount or quantum of proof necessary, one contributing author stated that it is:

> "... often said to be by a preponderance of the evidence in contract interpretation cases and either clear or convincing evidence or, less often, evidence beyond a reasonable doubt in discipline and discharge cases." (at page 50)

A few chapters later, another contributing author stated:

> "For most arbitrators, the normal quantum of proof required in disciplinary cases is 'preponderance of the evidence.' For a minority, it is 'clear and convincing evidence."
>
> When the employees alleged offense would constitute a serious breach of the law or would be viewed as moral turpitude sufficient to damage an employee's reputation, most arbitrators require a higher burden of proof, typically expressed as 'clear and convincing evidence.'" (at page 178).

Although preponderance of the evidence is the historical burden of proof and is applied in most cases, some see a trend to apply a higher burden of proof where alleged conduct is especially stigmatizing or seriously criminal (such as theft, sexual harassment, selling drugs, industrial sabotage, etc.). *See* How Arbitration Works, Volz & Goggan, BNA Supp. 199, p. 143; Discipline and Discharge in Arbitration, Brand, BNA 1999, p. 335. Though this is not a universal trend, many legal scholars seem to support requiring preponderance of the evidence or clear and convincing evidence, but not beyond a reasonable doubt, where the activity is punishable by criminal law. *See* How Arbitration Works, Volz & Goggan, BNA 5th ed. 1985, p. 907-08 and footnotes.

Therefore the City's burden of persuasion is carried by showing, at a minimum, that a preponderance of the evidence justifies the discharge or discipline. "Preponderance of the evidence" has been historically defined as the greater weight and degree of credible testimony. *See* Compton v. Elliott, 126 Tex. 232, 88 S.W.2d 91, 95 (Tex. 1935). At a maximum, the City must show that the discipline imposed is justified by clear and convincing evidence. Clear and convincing evidence has been defined as that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. This is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings. *See* State v. Addington, 588 S.W.2d 569, 570 (Tex.1979).

Either burden may be met by circumstantial evidence as well as direct evidence, for "Circumstantial Evidence may have as much probative value as testimonial or direct evidence." *See* Problems of Proof in Arbitration, Proceedings of the 19th Annual Meeting of the NAA, BNA Books, 1967, p. 98.

Assuming that an employee's misconduct is successfully proven, on the issue of discipline the Just Cause standard as it relates to punishment goes on a different track. The concept that the hearing examiner should not merely substitute his or her own judgment for that of the employer is often misapplied in the Just Cause analysis. Its proper place is in that part of the Just Cause analysis relating to discipline imposed. *See* for example BHP Glasco, 102 LA 321, 326-27 (1994)("Finally, on the penalty of discharge ... the City's decision to discharge Grievant must be sustained." [citing as authoritative on the question of discharge as the appropriate action, the language in Standard Oil Company, 14 LA 516, 521 (1950)(Where Management testified that it would be extremely dangerous to retain

grievant the arbitrators concluded “It is our considered opinion that under all the circumstances of this case, we should not attempt to substitute our own judgment for that of Management’s expert knowledge and judgment ....”)].

Under the topic of non-public sector proceedings it is popularly understood then that the hearing examiner should not merely substitute his or her own judgment for that of the employer. Put another way, it is not enough to support a negative finding in the Just Cause test that the examiner, were he or she the employer, might have made a different decision. The true question is whether the employer was within the bounds of reasonableness and whether there is compelling evidence that the employer abused its discretion. *See* Labor Arbitrator Development, Barreca, Miller and Zimny, ABA Section on Labor and Employment Law, 1983, p.418.

The above discussions of burden of proof are generalized. Specific to this case, given that Chiappardi’s alleged actions do not amount to conduct that is societarily unusually stigmatizing or seriously criminal, the City’s burden should be preponderance of the evidence.

BACKGROUND FACTS, APD POLICY PROVISIONS AND CIVIL SERVICE PROVISIONS

Chiappardi was charged with violating the following statutory and code provisions of the respective documents:

> Texas Local Government Code, Chapter 143, Section 143.051:
> Cause for Removal or Suspension
>
> A commission rule prescribing cause for removal or suspension of a fire fighter or police officer is not valid unless it involves one or more of the following grounds:
>
> (12) Violation of an applicable fire or police department rule or special order.
>
> Sec. 143.052. DISCIPLINARY SUSPENSIONS.
>
> (b) The head of the fire or police department may suspend a fire fighter or police officer under the department head's supervision or jurisdiction for the violation of a civil service rule.

Civil Service Commission Rule 10.03:

> "No employee of the classified service of the City of Austin shall engage in, or be involved in, any of the following acts or conduct, and the same shall constitute cause for suspension of an employee from the classified service of the City:
>
> > Violation of any of the rules and regulations of the Fire Department or Police Department or of special orders, as applicable."

Again, the written Memorandum of suspension alleges that Officer Chiappardi violated the following Austin Police Department policy provisions:

> Austin Police Department Policy 972.4(b): Employee Speech, Expression and Social Networking: Prohibited Speech, Expression and Conduct:
>
> To meet the Department's safety, performance, and public-trust needs, the following is prohibited:
>
> > (b) Speech or expression that, while not made pursuant to an official duty, is significantly linked to, or related to, the Austin Police Department and tends to compromise or damage the mission, function, reputation or professionalism of the Austin Police Department or its employees.

The specific acts of misconduct alleged concerned the posts beginning with "My family and friends are glad …" and "It is too fucking bad that the boss …" The memorandum also asserts that Chiappardi stated that members of the Department and general public were aware that he was an Austin Police Department Officer when he made the posts. These two actions were the factual grounds upon which the suspension was premised.

DISCUSSION

Returning then to the Just Cause factors set out infra, several may be momentarily set aside in this analysis since the case is based on stipulated facts.

Factual support to show a basis for discipline;

Did the employer, before administering discipline to an employee, make an effort to discover whether the employee violated or disobeyed a rule or order of management (i.e. was there an investigation);
Was the employer's investigation conducted fairly and objectively;
Equal and consistent treatment of employees; and
Progressive, corrective discipline related to the nature of the offense and to the employees personnel record, with discharge for serious wrongdoing, or, in other cases, as a last resort when improvement cannot be foreseen.

At least two of the factors rather jump out:

Reasonable rules within the employer's discretion about which the employee has been given fair notice;
At the investigation, was substantial evidence or proof furnished that the employee committed the conduct as charged;

Reasonable rules and fair notice will be discussed first.

The City points out that Policy 972.4(b) is not just made up locally out of whole cloth,[6] but rather is from the Lexipol created standardized policy manual. In fact the policy seems to be pulled virtually verbatim from Lexipol Policy 1030.4 which states:

> PROHIBITED SPEECH, EXPRESSION AND CONDUCT
> To meet the safety, performance and public trust needs of the Texas State Master Policy Manual, the following are prohibited unless the speech is otherwise protected (for example, a member speaking as a private citizen … on a matter of public concern):
>
> (b) Speech or expression that, while not made pursuant to an official duty, is significantly linked to, or related to, the Department and tends to compromise or damage the mission, function, reputation or professionalism of the Department or its members. Examples may include:
>
> 1. Statements that indicate disregard for the law or the state or U.S. Constitution,
> 2. Expression that demonstrates support for criminal activity,

[6] "Something made completely new, with no history, and not based on anything else." *See* www.Wiktionary.org.

> 3. Participation in sexually explicit photographs or videos for compensation or distribution.[7]

The obvious implication from the City is that the policy 972.4(b) carries an imprimatur of validity because it was created by Lexipol. So what about Lexipol and is such validity warranted? From the Lexipol web site:

> Customizable, Up-to-Date Risk Management Policies
> Lexipol is America's leading provider of defensible policies and training for public safety organizations, delivering our services through a unique, web-based development system. Lexipol offers state-specific policy manuals, regular policy updates and daily scenario based training against policy. Gordon Graham and Bruce Praet founded Lexipol. Since 2003, our proven policy and training solutions have helped public safety agencies across the country reduce risk and avoid litigation. The Lexipol system helps public safety organizations reduce risk and stay ahead of litigation trends, while communicating clear and concise policy guidance to their personnel. Lexipol is the only company that offers this level of customization and value in managing, disseminating and tracking a public safety organization's policies and training.

Setting aside for a moment that Lexipol's employees only give the company as 2.6 out of 5 stars as a place of employment,[8] with comments ranging between great company to work for and company has a toxic environment, the Arbitrator notes that no court case has been found where Lexipol was even mentioned, much less judged according to its policy manual. In fact, the Pasadena Independent newspaper did an in depth analysis (read: hatchet job) of the for-profit company and the reliability of its manual vis-a-vis constitutionality and its "real" mission.[9] So even though many police departments pay money for the use of Lexipol's policy guidance, the fact that the City did so in promulgating policy 972.4(b) gives no weight to the policy's ability to survive the Just Cause test.

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[7] Note that the examples given, while assumedly not exhaustive, are by nature exceedingly egregious (disregard for the law, support for criminal activity, participation in sexually explicit photographs or videos). A far cry from the nature and tenor of Chiappardi's posts.

[8] https://www.glassdoor.com/Overview/Working-at-Lexipol-EI_IE279493.11,18.htm.

[9] *See* review by newspaper: http://www.pasadenaindependent.com/opinion/lexipol-constitutional-villain/ Volume I and II et seq.

Returning to stipulated facts in the case at bar, Chiappardi pulled down the March 21st Facebook posts the next morning (March 22d) as they were drawing the kind of attention Chiappardi didn't want. At that point Chiappardi's direct supervisor, a Sergeant Vineyard, advised him that he did not think that the posts were a violation of policy but that Chiappardi's chain of command wanted to see him the next morning. After that meeting, with a Sargent White, Vineyard and Lieutenant Justin Newsom, Chiappardi had the clear impression that Lieutenant Newsom also believed that he had not violated policy. Chiappardi was however cautioned against making future posts of the same nature as not a smart thing to do. The Arbitrator points this out as a factor to be considered in answering the Just Cause fair notice question/issue.

Also of note are quotes attributed to Austin Police Monitor Margo Frasier in an Austin Chronicle newspaper story about Chiappardi's suspension written on August 26th, 2016. In the article Frasier is quoted discussing the APD policy pertaining to Prohibited Speech, Expression and Conduct. Frasier is quoted as saying that she has noticed a significant "inconsistency in terms of what gets you in trouble and what doesn't. … The problem is that I can't talk about the ones who don't get disciplined." Frasier is further quoted as recommending to Chief Acevado "either tighten up the language or tighten up the way [he] applies this policy." (referring to APD policy Prohibited Speech, Expression and Conduct).

The Office of the Police Monitor was created and developed to promote mutual respect between the Austin Police Department (APD) and the community it serves. The OPM is an independent City of Austin administrative office that works exclusively with APD as opposed to any other Travis County or State of Texas law enforcement agency. The OPM is not a part of APD. The OPM deals exclusively with cases related to alleged violations of APD departmental policy, and is charged with, among other things, monitoring APD policies and practices and making recommendations on policy, procedures and discipline. Yet in spite of Frasier's demonstrated concerns about the language and enforcement of APD Policy 972.4(b), in the new APD Police Manual, issued July 20, 2017, Policy 972.4(b) remains unchanged.[10]

As previously mentioned, Chiappardi took great pains to hide his identity and conceal that he was an Austin Police Officer. His immediate chain of command, two sergeants and one Lieutenant, did not believe that he had violated policy (else they should have and would have filed an IA investigation complaint).

[10] *See* footnote 4 concerning the July 20, 2017 edition of The Austin Police Department Policy Manual, p. 704

The IA only got involved days later when an extraneous Lieutenant, Michael Evelith, a Violent Crimes Commander, filed a complaint. Chiappardi further points out that the Internal Affairs investigation report dated June 1, 2016, did not mention anything about the general public being aware of Chiappardi's posts or that they were made by a police officer.

Returning for a moment to the APD Policy Manual, Policy 972.4(b) begins with the following caveat:

> EMPLOYEE SPEECH, EXPRESSION, and Social Networking
> 972.1 PURPOSE AND SCOPE
> This policy is intended to address the issues associated with employee's use of social networking sites and **TO PROVIDE GUIDELINES** for the regulation and balancing of employee speech and expression with the legitimate needs of the Department. (emphasis supplied)

Guidelines. Does 972.4(b) provide guidelines? Lexipol attempted to give guidelines in their publication of the rule when they set out as examples posts that indicate disregard for the law or that demonstrates support for criminal activity or that constitute participation in sexually explicit filming. If this was Lexipol's idea of the breadth of 972.4(b) then Chiappardi's actions fall way short of a violation of that policy.

As previously stated, the civilian Police Monitor herself criticized the policy as too vague to give notice of what conduct constituted a violation, and further complained that the policy is inconsistently interpreted. Additionally three of Chiappardi's immediate superiors did not believe his posts violated policy (lest they would have had a duty to file a complaint with Internal Affairs). So just how definitive must a policy be in order to pass the Just Cause requirement of fair notice of what is prohibited? Perhaps some guidance from the appellate court system would be helpful in answering that question.

In looking at the criteria employed in determining the constitutional validity of a law it is popularly stated that the "void for vagueness" concept applies to a statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden AND its vagueness promotes arbitrary or erratic application by superiors. As stated by the Houston Court of Appeals:

> The vagueness doctrine is an outgrowth not of the First Amendment, but rather of the Due Process Clause of the Fifth Amendment. Under the void-for-vagueness doctrine, a statute will be invalidated if it fails to give a

> person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited.
>
> * **
>
> Laws do not require mathematical precision, as long as they give fair warning in light of common understanding and are sufficiently definite to avoid arbitrary and erratic enforcement. (citations omitted)

See State v. Stubbs, 502 S.W.3d 218, 235-236 (Tex. App.-Houston [14th Dist.] 2016, pet. ref'd). The Dallas Court of Appeals states the constitutional concept this way:

> A criminal conviction fails to comport with the Due Process Clause of the Fifth Amendment, as applied to the states by the Fourteenth Amendment, if the statute of conviction fails to provide a person of ordinary intelligence fair notice of what the statue prohibits, or it authorizes or encourages seriously discriminatory enforcement. A statute is unconstitutionally vague if persons of common intelligence must necessarily guess at its meaning and differ about its application. All criminal laws must give fair notice about what activity is made criminal. However, a statute need not be mathematically precise; it must only provide fair warning in light of common understanding and practices. (citations omitted)

See Ex parte Bradshaw, 501 S.W.3d at 677-78. (Tex App Dallas 2016)

This is criteria for a challenge to a law because it runs afoul of the U.S. Constitution. Here we have a policy that potentially runs afoul of a critical part of the Just Cause test. Can it be argued that criteria for a Just Cause violation is a higher standard than the Constitution's? No. The Just Cause standard is a creature of labor/management relations. It is born out of fairness and the respective goals of both factions, securing satisfactory work from employees and securing a fair wage and job security from employers. See the discussion of Toward a Theory of Just Cause infra. It seems beneficial to know the Constitutional test verbiage, but no authority has promoted the idea that meeting the Just Cause test of notice is as stringent as the test for constitutional violation due to vagueness.

Policy 972.4(b), in prohibiting **any speech** or expression that … is significantly linked to, or related to, the Austin Police Department and **tends to compromise or damage** the **mission, function, reputation or professionalism** of the Austin Police Department or its employees is so obscure that persons of common intelligence must necessarily guess at its meaning. (emphasis supplied).

On its face the policy fails to give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. Facially it authorizes or encourages seriously discriminatory enforcement because the possibilities of violating the policy are endless. A violation is potentially anything the Chief says it is, or at least the policy gives the Chief that much latitude.[11]

CONCLUSION OF THE ARBITRATOR

The Arbitrator finds that Police Monitor Margo Frasier was more right than she knew. Under the Just Cause Standard of labor relations APD Policy 972.4(b), renewed July 20, 2017, fails the crucial criteria of fair notice of just what the Department prohibits. As such. Officer Chiappardi cannot be faulted for his posts relied upon in the memorandum of suspension.

DECISION OF THE ARBITRATOR[12]

The grievance is granted.

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[11] Citing a current police related issue important enough to have attracted the press; what if 8 months ago an officer had complained to his doctor that the Department continued to make him ride in a Patrol Ford SUV that was making him sick, and then posted his doctor's advice on a social media page that ended up alerting other officers. Violation of 972.4(b)?

[12] One additional issue needs to be discussed because it will be a recurring one and is therefore not moot.

ISSUE

The authority of the hearing examiner to reduce the 3 day suspension.

Article 18 of the Agreement between the City of Austin and the Austin Police Association, Section 1. a) (2) clearly states (as set out in footnote 2) that suspensions of three days or less may not be mitigated by the Hearing Examiner if the charges against the officer are found to be true.

Texas Local Government Code Sec. 143.053. APPEAL OF DISCIPLINARY SUSPENSION, Section 143.053(f) clearly states "If the [Hearing Examiner]12 finds that the period of disciplinary suspension should be reduced, the [Hearing Examiner] may order a reduction in the period of suspension. Appellate courts agree. The issue in an appeal of disciplinary suspension pursuant to section 143.053 is the "propriety of a disciplinary suspension or the length of the suspension." *See* City of Waco v. Bittle, 167 S.W.3d 20, 30 (Tex.App.-Waco 2005, pet. denied).

However, consider the following: Texas Local Government Code CHAPTER 174. FIRE AND POLICE EMPLOYEE RELATIONS, Sec. 174.109. EFFECT OF AGREEMENT. An agreement under this chapter is binding and enforceable against a public employer, an association, and a fire fighter or police officer covered by the agreement.

Harmonizing the two sections of the Texas Local Government Code would seem to mean that while police officers have the right to have a Hearing Examiners reduce a 3 day suspension if the Examiner deems it appropriate, that right can be bargained away in an agreement contemplated by LGC Chapter 174.

Logical conclusion: A Hearing Examiner may not lower a three day suspension to a lesser punishment. The issue was not joined in this arbitration and the Arbitrator makes no decision on the matter, but the issue should be decided when properly joined by both parties.

The three day suspension of Chiappardi is set aside and it is ordered that the Department make him whole from this experience.[13]

Signed and entered on this the 26th day of July, 2017

/S/

Chuck Miller, Arbitrator Assigned

[13] The Arbitrator retains jurisdiction for 30 days from the issuance of this award in order to settle any dispute over the relief granted.