IN THE MATTER OF ARBITRATION	)	
	)	
BETWEEN	)	**GRIEVANCE: Kevin Burke**
	)	
OCSEA LOCAL 11/AFSCME-AFL-CIO	)	**Grievance: Discharge**
	)	**Grievance #DRC 2020-03836-03**
AND	)	**BEFORE: ROBERT G. STEIN, NAA**
	)	**ARBITRATOR**
OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS, PICKAWAY CORRECTIONAL INSTITUTION	)	

FOR THE UNION:

James Hauenstein OCSEA Staff Rep.
OCSEA LOCAL 11, AFSCME-AFL-CIO
390 Worthington Rd. Ste-A
Westerville, OH 43082-8331

FOR THE EMPLOYER:

Don Overstreet.
Labor Relations Officer 3
ODRC
Operations Support Center
770 W. Broad Street
Columbus, OH 43222

INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement ("Agreement" or "CBA") between The State of Ohio ("Employer") and The Ohio Civil Service Employees Association, OCSEA LOCAL 11/AFSCME-AFL-CIO ("Union" or "OCSEA" "Pickaway" "PCI"). That Agreement was effective from May 12, 2018, through February 28, 2021, and included the conduct which is the subject of this grievance. The department involved in this matter was the Department of Rehabilitation and Corrections ("ODRC," "Employer," "Department") Robert G. Stein was mutually selected by the parties to impartially arbitrate this matter, pursuant to Article 25 of the Agreement. A hearing on this matter was conducted on October 26, 2021, was held virtually. The parties mutually agreed to that hearing date and that virtual format, and they were each provided with a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing, which was not recorded via a written transcript, was subsequently declared closed upon the parties' individual submissions of post-hearing briefs.

No issues of either procedural or jurisdictional arbitrability have been raised, and the parties have stipulated that the instant matter is properly before the arbitrator for a determination on the merits. The parties have also agreed to the submission of eighteen (18) joint exhibits and four (4) joint stipulations.

ISSUE

Was the Grievant removed from his position of Correction Officer for Just Cause? If not, what shall the remedy be?

I. RELEVANT CONTRACT LANGUAGE

The relevant contractual sections identified are:

25 Grievance Procedure

24 Discipline

5 Management Rights

BACKGROUND

The Grievant, in this matter is Kevin Burke ("Burke" or "Grievant"), he was terminated from his position as a Correction Officer with ODRC, Pickaway Correctional Institution ("PCI") on 10/14/2020. According to Employer, the Grievant was removed for violating the Standards of Employee Conduct (SOEC) Rules 13- Improper conduct or acts of discrimination or harassment on the basis of race, color, sex, age, religion, national origin, disability, sexual orientation, gender identity or military status, and Rule 39- Any act that would bring discredit to the employer. (Jx. 3) The Employer in its brief introduces this matter as follows:

On June 15, 2020, the Ohio Department of Rehabilitation and Correction ODRC Director Annette Chambers-Smith received an email from an anonymous sender complaining about the content of Kevin Burke's recent Facebook posts. Kevin Burke was employed as a correction officer at the Pickaway Correctional Institution at the time. As a result of the complaint, an investigation was initiated and assigned to be completed by the ODRC Chief Inspector's Office. As part of the investigation Global Tell Link (GTL) Analyst, Brian Santiago was given specific instructions to search for any racist, violent, or offensive related content on publicly viewable accounts of Kevn

Burke. Mr. Santiago identified and captured a multitude of Facebook posts from May 18, 2020, to June 17, 2020, from Mr. Burke's page that he deemed questionable and forwarded them to the Chief Inspector's Office for follow up. The investigation involving the Facebook posts of Kevin Burke was then completed by Deputy Chief Inspector, Roger Wilson.

In its findings following the investigation the Department determined that the who in his Facebook postings identified himself as working at the State of Ohio, OCSEA Chapter 6550 President, Pickaway Correctional Institution violated the Standards of Employee Conduct, section social media and the Standards of Employee Conduct Rules 13 and 39 (Jx. 3)

Based upon its findings the ODRC terminated the Grievant and the Union subsequently filed a grievance on behalf of Burke, and it was processed pursuant to Article 25 of the CBA. The grievance remained unresolved, and it was submitted to final and binding arbitration.by the Union. The parties have stipulated that the matter is properly before the Arbitrator for a determination on the merits.

SUMMARY OF THE EMPLOYER POSITION

For purposes of accuracy and completeness the following postings identified by the Department are largely reproduced from p. 3-6 of the Employer's brief and represented the central basis for the Employer's findings in this matter:

The Employer presented numerous racist and incendiary Facebook posts dated from 5/28/2020 to 6/17/2020 that Kevin Burke readily admits to posting to his Facebook page. The Employer also presented audio recordings of the administrative investigation conducted by Roger Wilson, Deputy Chief Inspector. Many of the posts made by the grievant are not only racist,

but they're also offensive, insulting, discriminatory, threatening and filled with hate, argues the Employer.

- Kevin Burke' Facebook Profile: profile: "Works at State of Ohio and OCSEA Chapter 6560 President - Pickaway Correctional Institution"
- Post/Comment: "Again, arm yourself to shoot the worthless fucks is society in the face. Only violence will put a stop to the bull shit" (pertaining to a photo of an apparent George Floyd protester)
- Post/Comment: "Fuck You" (statement pertaining to a picture of Colin Kaepernick with a defamatory quote stating "HERE IS A BLACK MAN THAT WAS RAISED BY WHITE PEOPLE AFETR HIS BLACK FAMILY ABANDONED HIM. GAVE HIM A LIFE HE WOULD NEVER HAD. THEN HE TUNED AROUND AND BLAMED ALL HIS PROBLEMS ON WHITE PEOPLE AND COPS."
- Post/Comment: (Picture) "NEVER APOLOGIZE FOR BEING WHITE" written directly over a picture of the Confederate flag.
- Post/Comment: (Picture) "THE NFL IS NO LONGER A SPORT…IT'S A BUNCH OF THUGS & RACISTS TO INSULT OUR FLAG, OUR NATION & VETS! BOYCOTT THE NFL"
- Post/Comments: "Antifa has taken over Seattle. Please try that in my neighborhood. You will be killed for fun"
- Post/Comment: "Do it. Defund law enforcement. The animals will kill, rape, steal and burn your leftist's cities to the ground. Country folk are prepared for this bullshit and will stack bodies without remorse. When it's over with America will be great again."
- Post/Comment: (Picture) "I HEAR THE RIOTS ARE COMING TO THE COUNTRY. IS THERE A BAG LIMIT AND DO WE HAVE TO TAG THEM?"
- Post/Comment: "Put the snowflake rioters down… If you throw anything at police a bullet to the head should be the response."

- Post/Comment: “Oh protestors didn’t heat the warnings to move back and not throw projectiles at police. Are you kidding me… Throwing things at police is a riot… Police should send projectiles back at rioters In Jack copper jacketed form.”
- Post/Comment: (Picture) “If you decide to riot in my neighborhood, just remember – sticks and stones may brake windows but hollowpoints expand on contact.”
- Post/Comment: “It’s time to put the rioters in the grave”
- Post/Comment: “Being nice to those attempting to cause chaos, destroy property, steal and assault citizens of America isn’t working. If you peacefully protest great. If you choose to be violent it needs to be dealt with by greater violence.”
- Post/Comment: (Picture) “Rural America, we are coming.” Followed by “Rural Americans: Do you know that hog will devour an entire human body so there is nothing left?”
- Post/Comment: “Antifa does not have the stones to visit rural America. We will put worthless asses in the grave.”
- Post/Comment: (Picture) “If anyone attacks a Police Officer, Corrections Officer or first responder the application of immediate death penalty should apply.”
- Post/Comment: “Kill yourselves animals. When you get out of the city, we will do it for you” and “Bullets, Napalm, Claymores, Air strike, Mortars… Or my personal favorite flame throwers would be perfect to teach these pussies a lesson that their worthless daddy should have.” (Both comments pertaining to a photo that was attributed to #BlackLivesMatter and #GeorgeFloyd.)
- Post/Comments: (Picture) “What is wrong with the comment when the looting starts the shooting starts. Is this not a true statement.”
- Post/Comments: “America needs to put the animals down. PEROID.”
- Post/Comments: (Picture) “So called protestors destroying property deserve a bullet to the head.”
- Post/Comment: (Picture) Arm yourselves Ohio – The Jackals are at our doors.”
- Post/Comment: “Animals need put down” (Pertaining to a photo that was attributed to #BlackLivesMatter and #GeorgeFloyd and referencing riots that ended in looting and destruction of property.)

- Post Statement: "This bullshit is not a protest. It's an excuse for animals to loot and set fire. Too bad citizens aren't picking them off from the rooftops." (Pertaining to a photo that was attributed to by #BlackLivesMatter and #GeorgeFloyd supporters)

` The Employer argues the importance of considering context regarding these particular postings made by the Grievant. On May 25, 2020, George Floyd, an African American male, died after being handcuffed and having been pinned to the ground by a white Minneapolis Police officer during an arrest in Minneapolis, Minnesota. The Employer asserts that according to the June 4, 2020, issue of Time Magazine, the killing of Mr. Floyd sparked "civil unrest in America at a scale not seen since the assassination of Martin Luther King in 1968.

The Employer acknowledges the First Amendment right of Americans to free speech, but it avers that even in public sector employment that fundamental right has some limitations. In particular the Employer cites the limitations of what the courts have identified as "hate speech" (*Brandenburg v. Ohio, 395 US 444 (1969)).* As further support for its position in the instant matter, the Employer also cites a 2020 Sixth Circuit Court of Appeals case in which the Court upheld the termination of an employee for a single racial slur posted on Facebook. (Bennett v. Metro Gov't of Nashville, October 2020) The Employer cites the Court's application of a balancing test in its decision (i.e. the degree of protection of the speech warrants, i.e. the level of importance the speech has in the community) The Employer argues that in the Bennet case and in the instant matter, the speech did not meet a high level (or "highest rung") of public concern therefore, the burden of demonstrating disruption in the workplace is lessened and is not protected speech under the Constitution's 1st Amendment.

The Employer makes two distinct points about Burke's posts, they are racist, and they are violent, promoting the hurting and killing of others. They betray the confidence and trust of the public and Burke's fellow employees as well as being hurtful to employees and their families. (Employer brief, p. 11) The Employer also points out that Burke was a Transportation Officer in charge of transporting inmates (many of whom are minorities) and while doing so he is armed with a firearm. Given his racists and violent posts advocating the shooting and killing of people the Grievant can no longer be trusted to do his job. The Employer avers that the Grievant's incendiary and violent Facebook postings affect the Department's ability to have an efficient and harmonious work environment, which outweigh Burke's free speech rights. (See testimony of Warden, Emma Collins)

The Department concludes, *"…Mr. Burke created a nexus to his job when he personally identified himself as a representative of the State of Ohio on his Facebook profile. The violent and racist views expressed by Mr. Burke not only discredits the agency but also undermines the vision and mission of the department. Essentially, Burke has compromised his ability to ever work as a correction officer again." (Employer brief, p. 13)*

The Employer respectfully asks that the grievance be denied in its entirety.

SUMMARY OF THE UNION'S POSITION

The Union makes several arguments in this case to support its arguments that the Grievant was no discharged for just cause. The social media postings by the Grievant were on Facebook were protected under the 1st Amendment of the United States Constitution, were not discriminatory and did not bring discredit to the Employer. The Union avers that the Grievant

was discharged from his position for violation of Rule 13-Improper conduct or acts of discrimination or harassment on the basis of race, color, sex, age, religion, national origin, disability, sexual orientation, gender identification, or military status, and Rule 39 -Any act that would bring discredit to the Employer. The Union citing Article 24.01 of the Agreement argues that this provision *"…directly instructs the employer to provide their case for establishing just cause prior to disciplining the employee."* (CBA, p. 93) The Union further argues that the Employer is obligated under Article 24.04 and 25.01 to inform the steward of the purpose of an investigation and to notify the Union of the full and final case for discipline. Additionally, Article 25.01 includes language that limits the parties' ability to change arguments and bring up new facts or evidence at a later stage of the grievance process. (CBA, p. 95 and 99)

In its brief the Union makes the following arguments, which are produced verbatim here to avoid any errors of omission:

Rule 13

The case for a violation of Rule 13 as presented by Management relies heavily on emotion rather than logic and the shock of a first pass rather than the sober consideration of a contextual analysis. Eighteen individual posts culled by an employee of Global Tel Link from the personal Facebook page of the grievant were presented in arbitration through the testimony of Management witness Roger Wilson that supposedly supported their allegations against Kevin Burke. The fact that these were posts on Mr. Burke's Facebook account brought in discussion of the Department's "Social Media" language contained in their SOEC.

Management presented no other policy in effect at the time of the incidents other than that of the "Social Media" paragraph in the SOEC. Management provided a signed document showing that the employee had received the SOEC and was responsible for reading it. For context, the SOEC is a nineteen-page document. The one paragraph about social media is buried around page four. The passage provides no specific examples or general guidelines as to what Management considers discrimination or harassment. Management provided no evidence of any training on the SOEC in general, the Social Media language specifically, or any policy regarding discrimination or harassment. The lack of training is crucial to the Union's case because it shows that employees of the Department are not instructed as to what constitutes a discriminatory or harassing act based on a protected class. This is a classic example of a lack of notice and a key element of Just Cause that is missing from the record.

The lack of training wasn't the only road sign that a lack of notice existed. Roger Wilson testified that prior to the spring/summer of 2020 and the increasing number of social media investigations undertaken by his office, that the Department had no guidance on how to conduct such investigations and what material to look for. The memo by Chief Inspector Chris Lambert (ME #7) was specifically designed to aid investigators in these pursuits. This memo was dated June 26th of 2020, which was after the anonymous complaint filed against Mr. Burke. Mr. Wilson also testified that the Department's very first policy specific to social media was rolled out in September of 2021 to address, as Management's advocate put it, "an increase of inappropriate social media activity by employees."

It is clear that Mr. Wilson and the Department relied on the contracted investigatory service, Global Tel Link Corporation (GTL), and representative Brian Santiago to adjudicate what was "questionable" and "inflammatory" on Mr. Burke's Facebook page. ODRC Chief Inspector Chris Lambert requested as such according to Mr. Santiago's testimony. However, the Union was able to show during the cross of Mr. Santiago that GTL had no set standard or general guidance as to what constituted questionable and inflammatory material. In deciding what to include and exclude in his report to the Department, Mr. Santiago testified, "I used my best judgement what was going to be included in the report." As far as what guided his best judgement, the Union asked about what formal training he received on identifying politically charged and racist material—the witness denied having any such training.

Thus, in May and June of 2020, employees of ODRC had little to no guidance as to what ODRC would deem inappropriate on their pages. In the instant case Management charged that the grievant's cherry-picked posts were racist in nature, yet they did not preemptively explain to their employees what they deemed racist content to be or how the Department defined racism. In order to have Just Cause for Mr. Burke's removal the State at minimum should have notified the grievant of that definition.

In the absence of a Department-ordained definition of racism, an employee is to reasonably rely on the common accepted denotation of the word to instruct their conduct. Merriam Webster defines racism as "a belief that race is a fundamental determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular

race." If using this common definition we can see that Mr. Burke's social media posts are in many cases inflammatory but in no case do any espouse racism.

In Roger Wilson's interview of Mr. Burke, which was played start to finish at arbitration, Mr. Burke was asked about two specific posts in connection with racism. The first was a post with the statement, "Never apologize for being white" with a picture of a flag of the Confederacy and the second post conveyed that "The NFL is no longer a sport. It is a stage for a bunch of thugs and racists to insult our flag, our nation, and our vets." Neither post called out one race or another as being inferior or superior. Neither post attributed traits and capacities to racial differences. In the interview, Mr. Burke was asked about what message he was attempting to convey with both posts. For the first he explained that no one should have to apologize for their race. His response does not posit that white people are better or worse than any other, only that people who are designated as "white" or any other designation should not have to feel guilt about that designation. Mr. Wilson asked Burke directly about the personal significance of the Confederate flag and Mr. Burke responded that the post was sent to him in that form and that it had no significance to him (p. 48-49 of the transcript). He goes on to say that to him, it is a the "battle flag of the South," and that without the second post mentioned no race at all but was a comment on a matter of public concern: the NFL, which of course is a national sports league and business. When asked about the message he was attempting to convey regarding this post he responded in much the same way he did when asked about a Colin Kaepernick post earlier in the interview, he responded, "the NFL and other sporting venues, you know, kneeling for the National Anthem for every veteran that's ever served and giving them the right to have diarrhea of the mouth, I'll say that. You know, veterans fight for this flag. And

anybody, again, that's going to disrespect it or desecrate it, you know, offends me. It offends me greatly."

As stated in the interview several times over, Mr. Burke is himself a combat veteran and naturally has strong personal feelings for the United States and its symbols. More to the point, to even entertain the idea that Mr. Burke meant this as a racist message one would have to assume several premises that Management doesn't attempt to establish. He is told in the interview, not asked, that the majority of players in the NFL are Black. Management does not bother to find out whether Mr. Burke understands the reasoning behind the NFL kneeling protest. They do not bother to ask if he understands the dynamics and history of the protest between owners, players, and commissioners in the league. When Mr. Wilson presses further on this post, it becomes apparent that Mr. Burke does not have this knowledge, he states in the interview, "what I was speaking on was the flag and our veterans, it's a stage, I don't know about the bunch of thugs thing…"

The remainder of the texts in the record are discussed in the interview but without any mention of race or racism. At arbitration, Management had the opportunity to use their witnesses to explain how they felt that these posts were racist but did not do so. Only once is Mr. Wilson asked if "the [many of the] posts and statements made by the grievant, Kevin Burke, on his Facebook page [are] outright racist and offensive?" Mr. Wilson replies "yes" but makes no attempt to explain how. On cross, Mr. Wilson agreed with the Union that the posts were mainly about rioters:

"[Union] So the topic of—and throughout this the topic of these posts has been rioters? I mean, there have been some miscellaneous posts, but these have been about rioters? I mean, there's a general theme that you could gather from these posts. [Wilson] My response would be that I believe Officer Burke broadly characterizes many of these as riots or rioters."

Management's case for a violation of Rule 13 is nearly non-existent. Instead of providing any evidence or eliciting any meaningful analysis from their witnesses Management instead assumes that the grievant just should have known. That isn't notice, that isn't Just Cause. As the Union proved through cross-examination of the witness, Management had to conflate anti-rioter content with racism in order to create a work rule violation. This bait-and-switch does not establish Just Cause and should be grounds for dismissing the rule violation. Additionally, it isn't even clear that Management seriously believed that these posts were discriminatory as their own policy 32-EEO-01 (referenced in the SOEC passage concerning social media) mandates that any discriminatory activity be reported per federal law. Therefore, Management's overall objective is not clear except they disagree with the content he posted and believe it warrants termination.

Rule 39

The other rule for which Mr. Burke was discharged was "Rule 39. Any act that would bring discredit to the employer." In this allegation again, Management's arguments were virtually non-existent at arbitration. Akin to their arguments for the violation of Rule 13, Management believed it would be sufficient to present Mr. Burke's social media posts, say that

these "create and perpetuate a negative public perception on ODRC," and then call it a day. Yet again, in doing so, Management fails to provide Just Cause for the allegation.

The Union was able to highlight this lack of evidence in vivid color. Time and time again, on direct Management elicited testimony from Roger Wilson that each post reviewed was violent in nature or an advocation for violence. The context that Management left out in their presentation was evident in the Burke interview and in the Union's cross. That information being that in each instance that an act of violence was mentioned, the grievant was speaking specifically about rioters, most often ANTIFA (a group that then-President Trump repeatedly said committed acts of terrorism), and generally about people who broke the law in ways that harmed other people, be it through property damage and vandalism or physical assaults deadly and otherwise. Furthermore, it was established through cross-examination that meeting rioters with force, even deadly force, is a course of action that is taught and expected in ODRC as was the case in the Lucasville Prison Riots of 1993:

"Hauenstein: So during the riot do you arm correctional officers"

Wilson: Yes

Hauenstein: Okay. During a riot, would correctional officers be authorized to shoot inmates to regain control of the facility?

Wilson: Under certain circumstances, yes."

Additionally, the grievant made clear with evidence he brought to the pre-disciplinary hearing (p. 14 of JX #3) that the posts on his page were not reflective of his employer or anyone's views but his own.

Beyond labeling individual posts as violent and providing evidence that the grievant identified himself as a State employee, Management spent no further time on presenting evidence of a rule 39 violation. Warden Collins for her part did not reference the rule or the possible effects of a violation of said rule during her testimony. Her testimony primarily concerned how Mr. Burke would not be able to perform his job duties if he were brought back to work because fellow employees would not trust him and that he would become a target for the inmates. Not only does this testimony not support a rule 39 violation, but this is also testimony that is completely uncorroborated by the evidence. Management did not produce a single coworker with a complaint about Mr. Burke or his posts in writing or in person. Furthermore, the CBA in Article 24.06 forbids Management from discussing an employee's discipline with other employees or any individual in the care or custody of the State.

The Union made the point in it's opening that a Rule 39 is a broad and ill-defined rule. Once again, what Mr.Burke did was not illegal, unethical, or immoral. A slippery slope argument can be made but this is more akin to blindfolding the employee and pushing him down the Matterhorn; it is not a reasonable rule to enforce. Employees have no real notice of what constitutes a violation of the rule. In this instance, Management's analysis of the evidence is flawed in that it does not consider the context surrounding Mr. Burke's posts or the fact that he was voicing his opinion on matters of public concern, which is his First Amendment right under the U.S Constitution.

The 1st Amendment Application

The Union believes that this case is won by a reasonable analysis of the traditional tests of Just Cause however, by virtue of the United States Constitution there is another test that is to be applied. Of course, the oft-cited language is, "Congress shall make no law…abridging the freedom of speech." This right has been tested in the court of law and the controlling decision comes from the Supreme Court decision in Pickering v. Board of Education (1968) which states in pertinent part, "The interests of the [employee] as a citizen, in commenting on matters of public concern" must be balanced against "the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees."

This weighing of interests includes a prescribed series of analyses that the arbitrator is obliged to consider in rendering his decision on the matter. The first of these questions is whether or not the employee was speaking pursuant to their ordinary job duties. In this instance, the employee was speaking to events well outside the prison walls. Whether it was riots or the NFL, policing or the justice system, none of the posts can be construed as a comment on his ordinary job duties.

The second test is whether or not the grievant was speaking on a matter of public concern. According to the Pickering decision, this is defined as one in that "free and open debate is vital to informed decision-making by the electorate." In every instance, the posts that were showcased by Management in this case, revolve around some news item, some national editorial, or in some cases, straight from the then-President's Twitter feed. 2020 was an exceptionally violent and dangerous year for this country (https://time.com/5922082/2020-gun-

violence-homicides-record-year/) and citizens were discussing these matters daily. These were not issues personal to the grievant or his employer. As courts have adjudicated in previous cases, "whether speech is shocking or inappropriate is irrelevant to whether it concerns a public matter." (Rankin v. McPherson, 483 U.S. 378, 387 (1987). Marquardt v City of Cleveland 971 F.3d 546 (6th Cir. 2020))

The third test is more complicated and subjective to the arbitrator but nonetheless is clear to be in the grievant's favor. The analysis is whether on balance, the employer's or the employee's interests prevail. This question in particular is where the Union believes Management has bent over backward to try and expand their case from what it was originally at the time of discipline. To find for the employer, courts have looked at the impact that the employee's speech has had on the workplace. The analysis is not hypothetical, courts look at the actual impact/fallout of the employee's speech. Thus, a finding for an employer would include evidence of disharmony among employees, evidence of the employee not being able to carry out his duties, evidence of a detrimental impact on close working relationships. For their part, Management has produced an anonymous statement that they say was written by an employee. However, this must be rejected as we have no way of verifying this claim, we have no way of testing this person's credibility, or asking them additional questions regarding anything specific. Beyond this anonymous note, Management has provided nothing but complete conjecture and speculation as to how the grievant's speech could impact the workplace. Without any evidence of a negative effect on the workplace, the employee's interests in their freedom to speak should prevail.

The fourth and final test is whether the employee's protected speech was a substantial or motivating factor in the discipline received. In this instance, there can be no question. Without the grievant posting on Facebook, Management would never have removed him from employment. With the answer to these tests in mind, the Union believes that the arbitrator can only come to one conclusion, Kevin Burke had a constitutional right to post these statements without fear of retaliation from his Employer. Under ordinary circumstances, employees nor arbitrators should have to be constitutional scholars however these are not ordinary circumstances and the grievant's basic freedoms as guaranteed by the Federal government have a role to play.

For all the foregoing reasons, the Union respectfully requests the Arbitrator to sustain the grievance. In addition, the Union asks to make the Grievant whole, including backpay and benefits. Finally, the Union requests that the Arbitrator retains jurisdiction to ensure the proper calculation of any backpay award.

DISCUSSION

In the instant matter, the parties have collectively bargained for the inclusion of the "[just] cause" provision in Article 24 of the Agreement, entitled "Discipline." By utilizing those terms, the signatories have consequently also made an informed decision apportioning the burden of proof. *City of Saginaw and Police Officers Ass'n of Mich*., 00-1 Lab Arb. Awards (CCH) P 3443 (Dobry 2000). Even though the parties did not include a definition of the "just cause" standard in the language which they elected to include, commonly-accepted principles routinely used by arbitrators in disciplinary matters "are intended to ensure a higher level of fairness and due

process for employees accused of wrongdoing. They are also intended to increase the probability of workplace justice." *Paper, Allied Indus., Chem., and Energy Workers Int'l Union, AFL-CIO, Oren Parker Local 8-171, Vancouver, Wash. and Petra Pac, Inc.,* 05-1 Lab. Arb. Awards (CCH) P 3078 (Nelson 2004).

"While it is not an arbitrator's intention to second-guess management's determination, he does have an obligation to make certain that a management action or determination is reasonably fair." *Ohio Univ. and Am. Fed'n of State, County, and Mun. Employees, Ohio Council 8, Local 1699*, 92 LA 1167 (1989). In the absence of contract language expressly prohibiting the exercise of such power, an arbitrator, by virtue of his authority and duty to fairly and finally resolve disputes, has the inherent power to determine the sufficiency of a case and the reasonableness of a disciplinary action or penalty imposed. *CLEO, Inc. (Memphis/Tenn.) and Paper, Allied-Indus., Chem., and Energy Workers Int'l Union, Local 5-1766*, 117 LA 1479 (Curry 2002).

The central issue in this matter is the off duty conduct of the Grievant during the period of 5/28/20 to 6/17/20 on the social media platform Facebook. According to the Union brief this was a period when the Grievant was on short term disability leave. (Joint Stipulations, and p. 1 of the Union brief) This case involves the "sticky wicket" problem of balancing conflicting rights of an employee to privacy and an employer's right to maintain its reputation and operational integrity. An employer is not generally entitled to pass judgment on the private lives of its employees and what an employee does outside of work is normally no business of an employer. Cases of off-duty conduct are to be construed narrowly and must be fact and circumstantially specific. In order for a nexus to be established in this case it must be based upon the unique facts

herein presented and must be discernable and be rendered reasonable within the distinctive context created by such facts. (St. Paul Pub. Sch. Indep. Sch. Dist. 625 101 LA 503, 506 (Imes, 1993) However, when that conduct, even though conducted off-duty creates a nexus (or link) between the employee's conduct and the legitimate business interests of his/her employer, then the employer may have valid concerns.

In analyzing a case of this nature arbitrators often reach back at time long before the internet came into being in what has come to be known as the Kesselman Factors, outlined in a landmark arbitration decision by Arbitrator Lewis Kesselman. (*W.E. Caldwell Company. 28 LA 434 (1957))* Although developed decades ago, these factors remain relevant today. In analyzing alleged off-duty conduct Arbitrator Kesselman identified the following critical analytical factors to determine whether off-duty conduct may create a nexus to employment.

(1) harm to an employer's reputation or product,

(2) the ability of an offending employee to perform assigned duties or to appear at work, or

(3) the refusal or reluctance of other employees to work with the employee cited for misconduct while off-duty.

The first of these factors is the impact on ODRC's reputation. What is often consider in cases like this to be critical is the source and degree of publicity, the type or seriousness of the alleged misconduct, the nature of the Grievant's position and the nature of the employer's business. *(The Long Arm of the Boss: Employee Off-Duty, LERC Monograph Series, 1998, Carlton J. Snow)*

The Facebook postings of the Grievant as included in the summary of the Employer's position statement are a direct contradiction to the very nature of his work and that of his fellow

employees. (Jx. 3) A reasonable person would fairly conclude his postings are at their very essence alarmingly violent in content and in intent, filled with disturbingly racist comments, and innuendos, and dehumanizing. Referring to people as animals, thugs, worthless fucks, who need to be put down, or be picked off from rooftops, given an immediate death penalty, be put in a grave, and killed for fun has to be viewed in the context of an off-duty employee who identifies himself as a Corrections Officer employed at the Pickaway Correctional Institution in Ohio, charged with maintaining order in the supervision of inmates of various races.

The Union in making its arguments made valid points as to Employer's flaws in making its case. The Union stated in pertinent part,

> "Management presented no other policy in effect at the time of the incidents other than that of the "Social Media" paragraph in the SOEC… The passage provides no specific examples or general guidelines as to what Management considers discrimination or harassment. … lack of training is crucial to the Union's case because it shows that employees of the Department are not instructed as to what constitutes a discriminatory or harassing act based on a protected class. This is a classic example of a lack of notice …
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> … memo by Chief Inspector Chris Lambert (ME #7) was specifically designed to aid investigators in these pursuits. This memo was dated June 26th of 2020, which was after the anonymous complaint filed against Mr. Burke. Mr. Wilson also testified that the Department's very first policy specific to social media was rolled out in September of 2021 to address, as Management's advocate put it, "an increase of inappropriate social media activity by employees."
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> … Mr. Wilson and the Department relied on the contracted investigatory service, Global Tel Link Corporation (GTL), and representative Brian Santiago to adjudicate what was "questionable" and "inflammatory" on Mr. Burke's Facebook page. … the Union was able to show during the cross of Mr. Santiago that GTL had no set standard or general guidance as to what constituted questionable and inflammatory material. ..Mr. Santiago testified, "I used my best judgement what was going to be included in the report." As far as what guided his best judgement, the Union asked about what formal training he received on identifying politically charged and racist material—the witness denied having any such training.
>
> …they did not preemptively explain to their employees what they deemed racist content to be or how the Department defined racism. In order to have Just Cause for Mr. Burke's removal the State at minimum should have notified the grievant of that definition.
>
> In the absence of a Department-ordained definition of racism, an employee is to reasonably rely on the common accepted denotation of the word to instruct their conduct. Merriam Webster defines racism as "a belief that race is a fundamental determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race." If using this common definition, we can see that Mr. Burke's social media posts are in many cases inflammatory but in no case do any espouse racism."

These are all fair criticisms, requiring more targeted attention to be paid to communications and training in these areas along with more careful adherence to the

Agreement, and in a closer case that may have been problematic to the Employer's case. But the very content of the Grievant's postings and in particular Burke's public call for violence did not make this a close case. Endorsing and urging the use of lethal violence against individuals without due process does not require a definition to be considered wrong, particularly by an employee of the justice system. The majority of the Grievant's postings, which urge violent responses, have racial context, be it Blacks in the NFL (were Black players make up the majority of players), pictures of Colin Kaepernick, George Floyd, or references to Black Lives Matter, etc. These postings accompanied but what is reasonably hate speech (e.g., Posting "If anyone attacks a Police Officer, Corrections Officer or first responder the application of immediate death penalty should apply," "So called protesters destroying property deserve a bullet to the head" p. 6 and 7 of the Employer's brief).

The Grievant's duties that include transporting of inmates while he is armed takes this matter to another disturbing level. In his Facebook postings he specifically posts numerous messages some of which are accompanied by photos that convey, endorse, and encourage deadly violence to be exercised against protesters, looters, arsonists, to be shot and killed on site. Again, many of those postings involve protests centered issues involving Black people, which the Employer points out represents a sizeable portion of the wards (inmates) of the Department, and a sizable portion of the employees of the Department. (See Warden Collins testimony) It begs the question, as to how many of the inmates in PCI, who the Grievant must supervise, transport, or just come in contact with while he is armed and at times alone, are serving sentences related to property crimes, theft, or even crimes against law enforcement officers?

It is reasonable to believe that members of the public both inside and outside of ODRC would consider the stated beliefs and urged actions by the Grievant to be associated with ODRC and the Grievant, as a law enforcement official, and a Union leader at PCI. Burke's disclaimer that he is not a representative of the employer but at the same time is the elected leader (Chapter President) at an identified state correctional institution reasonably renders his disclaimer insufficient in separating himself from PCI in the eyes of a typical citizen inside and outside of the state corrections world.

It is the role of an arbitrator to observe the hearing witnesses and to determine who among them is telling the truth. *Givaudin Corp.,* 80 LA 835, 839 (Deckerman 1983). In addition to determining the credibility of witnesses, the arbitrator must also determine the weight to be afforded to their individual testimony, as well as all of the other evidence submitted by the parties. *Minn. Teamsters Pub. and Law Enforcement Employees Union, Local No. 320, and City of Champlin, State of Minn.,* 00-2 Lab. Arb. Awards (CCH) P 3499 (Berquist 1999).

The Grievant did not testify at the arbitration hearing and on its face each case is unique in terms of assessing whether there should be a negative inference from a grievant's failure to testify. (VRN Int'l, 74 LA 809) However, if an employer establishes a prima facie case against the grievant and he/she does choose to not testify it is common for arbitrators to draw an adverse inference. (Southern Bell Tel. Co., 26 LA 742, 746 (McCoy, 1956, NRM Corp., 51 LA 177 Teple, 1968)

The testimony of Warden Collins, an African American and former U.S. Army veteran brought a unique level of authenticity and personal perspective to this matter. She testified she has always had a satisfactory working relationship with Burke as a Union leader, but in regard to

his Facebook activity she unequivocally viewed his postings as racially motivated and extremely violent in nature. She concluded that he could never again be trusted to be fair and make impartial decisions and that his actions would always be under extra scrutiny. She also speculated that the staff morale would take a huge plunge. Warden Collins testified that the decision to remove Kevin Burke was ultimately hers and she had done so based only on the facts of the case; and added that Burke's position as a OCSEA Chapter President at PCI had nothing to do with it. There was no evidence or testimony entered into evidence to refute her statement. Collins added that Burke not only betrayed the trust and confidence of the public but also of the employees at PCI and that he could never be able to carry out the responsibilities and duties of a correctional officer and if returned to the position of correction officer, his presence would create a hostile work environment and a threat to his own safety and security as well as other employees and offenders alike.

This is an unfortunate outcome in what appeared to be a case of a veteran employee with an employment record free of active discipline. All people are capable of having and likely have thoughts that range from good to bad, or worse, but it's not the thoughts that matter in terms of employment, it's the actions. Protestors going beyond peaceful protesting, and unlawfully committing violence against persons and police, and who engage in looting, arson or other acts require a determined law enforcement response, to include prosecution, and punished if found to be guilty. Burke had a legitimate right to his opinion about such events, but when that opinion became a definitive public call for violence against protestors and prominently involved people of a particular race, which created a real threat to the reputation of ODRC and to Burke's ability to perform his work in the future.

Merriam-Webster (merriam-webster.com) provides a legal definition of hate speech as follows:

Legal Definition of *hate speech*

: speech that is intended to insult, offend, or intimidate a person because of some trait (as race, religion, sexual orientation, national origin, or disability)

The work of the Department as in as an integral part of the legal system and if you visit

https://ohio.gov/government/state-agencies/department-of-rehabilitation-and-correction

you will find this statement….

"Protects and supports Ohioans by ensuring that adult felony offenders are effectively supervised in environments that are safe, humane, and appropriately secure.

The Ohio Department of Rehabilitation and Correction's (ODRC) mission is to reduce recidivism among those they touch.

In partnership with communities, ODRC promotes citizen safety and victim reparation. The department seeks to instill in offenders a sense of responsibility and the capacity to become law abiding members of society through rehabilitative and restorative programming.

The State of Ohio, and in particular ODRC, is responsible and liable for every one of the inmates in its custody as well as being contractually committed to the safety and health of its employees as outlined in Article 11.01. Based upon the evidence and testimony the very purpose of the employer's business and the employee's responsibilities are such that the employer, if it continued to retain the Grievant in its employ, would "lose the confidence of the public."

AWARD

Grievance denied.

Respectfully submitted to the parties this _____ day of February 2022,

_____

Robert G. Stein, Arbitrator