IN THE MATTER OF ARBITRATION

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THE POLICE OFFICERS' FEDERATION of MINNEAPOLIS

-and-

THE CITY of MINNEAPOLIS
MINNEAPOLIS, MINNESOTA

OPINION & AWARD

Grievance Arbitration

Re: Employee Discipline

Representation-

For the Employer: Valerie Darling, Assistant City Attorney
Trina Chernos, Assistant City Attorney

For the Federation: Kevin M. Beck, Attorney

Statement of Jurisdiction & Uncontested Facts-

The Collective Bargaining Agreement duly executed by the parties provides, in Article 11, for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial steps of the procedure. A formal complaint was submitted by the Union on behalf of the Grievant on July 31, 2019, alleging that the Employer lacked just cause for terminating the Grievant’s employment. Eventually, the matter was
appealed to binding arbitration when the parties were unable to satisfactorily resolve their dispute during discussions at the intermittent steps.

The undersigned was then selected from a panel of neutrals mutually agreed upon by the parties, and a hearing was convened in Minneapolis on May 20, 2020. At the conclusion of the proceedings, the parties agreed to submit written summary arguments which were received on June 24, 2020. Thereafter, the hearing was deemed officially closed.

The parties have stipulated to the following statement of the issue.

The Issue-

Was the Grievant’s dismissal from the Minneapolis Police Department for just cause? If not, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The record developed during the course of the proceedings indicates that the Grievant, Mark Bohnsack has been a licensed peace officer on the City of Minneapolis’ Police Force ("City," "Employer," or "MPD") for approximately the past twenty years. As such, he is a member of the Minneapolis Police Officers Federation ("Federation," "MPOF" or "Union") who represents all sworn law enforcement personnel employed by the City
save for those appointed to positions of Chief of Police, Assistant Chief of Police, Deputy Chief, Inspector and Commander. Together, the parties have negotiated and executed a collective bargaining agreement covering terms and conditions of employment (Joint Ex. 1).

At the time of the incident, the Grievant was assigned to the 4th Precinct located in North Minneapolis where he had served for nearly all of his career with the force. On November 24, 2018, while on duty along with his partner, Officer Brandy Steberg, it was decided that they would play a "joke" on a fellow officer, Kris Thompson, who was also assigned to the 4th. The evidence demonstrates that Officer Thompson had a reputation in the precinct as a "clean freak" — one who was consistently observed cleaning up and straightening out the facility when the opportunity presented itself. On or just prior to that day, Officer Thompson had erected and decorated a Christmas tree in the precinct's main lobby as was her practice each year.¹

Not long thereafter, Bohnsack and Steberg gathered pieces of trash that were located in the back seat of their squad car along with a few other items they found in a nearby alley and proceeded to place them on the holiday tree. In all, there were approximately a half dozen items added. They consisted of (among others) a package of menthol cigarettes, an

¹ The 4th shares space with a community center established to serve as a gathering place for residents who live in the area to conduct meetings, activities, etc.
empty can of malt liquor, a paper cup from "Popeye's Kitchen," wrappers of "Takis" and "Funyans" and some police crime scene tape. Shortly thereafter a member of the public, and the north side community, noticed the tree's décor while at the facility and took a picture of it. The photo was then posted on social media. Soon it became a story produced on local news outlets as well as nationally and internationally.

Once the Department's leadership as well as the Mayor learned of the incident via social media posts, the Grievant was placed on administrative paid leave pending the outcome of an internal investigation. Ultimately it was determined that the actions of Officers Bohnsack and Steberg warranted termination for their "...multiple poor decisions that [he] made over a protracted time period," in violation of the MPD's Professional Code of Conduct, that was "racially derogatory and offensive and [that was] against department core values" (City's Ex. H).

Thereafter, in response the Federation filed a written complaint on July 31, 2019, with the Employer alleging that Officer Bohnsack's dismissal lacked just cause and seeking a make whole remedy (Department's Ex. J).

Eventually, the matter was appealed to binding arbitration when the parties were unable to reach a settlement of the dispute.
Relevant Contract & Policy Provisions:

From the Master Agreement:

Article 12
Discipline

Section 12.01 The City, through the Chief of the Minneapolis Police Department, will discipline employees who have completed the required probationary period only for just cause.

From the City’s Rules & the Department’s Code of Conduct:

Department Code of Conduct
Section 5-105

A. General

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2. Employees shall conduct themselves in the buildings and offices of the Department in a manner which would not discredit the Department.

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4. Employees shall use reasonable judgment in carrying out their duties and responsibilities. They need to weigh the consequences of their actions.

5. Employees shall be decorous in their language and conduct. They shall refrain from actions or words that bring discredit to the Department.

6. Employees shall not display material that may be considered discriminatory, derogatory, or biased in or on
City property. Specifically, discriminatory, derogatory or biased materials regarding race, color, creed, religion, ancestry, national origin, sex, affection preference, disability, age, martial status, public assistance. or familial housing are prohibited. Such materials include, but are not limited to, calendars, cartoons, and posters.

**Positions of the Parties**

The **CITY** takes the position in this matter that Officer Bohnsack's dismissal was for just cause. In support of their claim, the Department notes that by accepting the badge, Minneapolis police officers swear to uphold the Department's Code of Ethics to protect and serve the community through fair and impartial policing. Indeed, the Grievant was well aware of this requirement as a member of the force and yet the Employer's investigation resulted in a finding of multiple violations.

The City offers as undisputed fact, that Officer Bohnsack had been trained repeatedly on procedural justice skills and how police interactions with the public shape their perception of the Department. In this instance, however, his conduct on the day in question was a serious misstep resulting in damage to MPD's reputation and pain to the City's north side community he served.

The Employer maintains that Grievant's and his partner's decision to
place racially stereotypical trash items on a Christmas tree in the 4th Precinct's public lobby, was not only disrespectful but served to reignite past trauma within the community involving the 4th and the citizens it serves - the majority of whom are African American. Many who reside in the area were incensed by the so-call "prank" viewing it as racist and hurtful.

The Employer maintains that not only did Officers Bohnsack and Steberg's actions garner an extraordinary amount of attention to the Department's reputation on the North side, the event went "viral" through local, national and even international exposure via the media.

In summary, the Department argues that the Grievant's actions irretrievably broke the trust of the public that is so very important with a police force. What he and his partner did on November 24, 2018, can only be perceived as racist which cannot be tolerated and most certainly not condoned in community and the City in general. The published Code of Ethics require police personnel to recognize the badge of their office as a "symbol of public faith" and accept it as a "public trust." Policing, is also a very visible profession and the Department's image is extremely important in its relation to those whom it serves. For these reasons then, they seek a denial of the grievance in its entirety.
Conversely, the FEDERATION takes the position that the termination of Officer Bohnsack was excessive and therefore unjust under the terms of the parties' labor agreement. In support of their claim, the Union argues that the Grievant has acquired a lengthy and impeccable work record over twenty years with the Department. During that time he has been the recipient of numerous honors and accolades, while earning positive marks from superiors on his annual performance evaluations.

The MPOF notes that he has taken responsibility for his actions, and has acknowledged his wrong doing in connection with the incident once he was able to "look back on it." Further, the Union claims that he was completely cooperative with the internal affairs investigation and has accepted responsibility for his actions which he now acknowledges were a violation of the Code of Conduct.

The MPF argues however, that the penalty imposed is excessive when the Grievant's excellent work record is taken into consideration. This they claim, was not done by the Department in the course of their deliberations. Discipline, in the Federation's view, should be constructive and corrective, not punitive but that is precisely what Officer Bohnsack's firing is in this instance.
In addition, and importantly, the Union maintains that the Employer cannot demonstrate that the Grievant’s actions were deliberately intended to be racial or made with the knowledge that they would have an adverse impact on the community, the Department or his fellow officers.

Finally, the Federation claims that the Employer engaged in desperate treatment of this employee when they effectively terminated him. According to the MPOF the evidence demonstrates that other officers convicted of similar infractions received discipline not nearly as severe as that issued to the Grievant.

Accordingly, for the above-stated reasons, they ask that the grievance be sustained and Officer Bohnsack be returned to work and made whole.

**Analysis of the Evidence**

In a disciplinary matter such as this, it is nearly universal that management first establish the accused employee is indeed guilty as charged. Should that be accomplished, they then need to demonstrate that the discipline administered was fair and reasonable when all relevant
factors are considered (assuming, of course, that there is no language in the labor agreement that limits a neutral’s authority to review the penalty imposed). In this instance however, the initial evidentiary obligations of the City have been diminished by the unrefuted fact that the Grievant has readily and repeatedly taken ownership of the incident that lies at the core of this dispute.

The record shows that Officers Steberg and Bohnsack each stated more than once in the course of being interviewed by IA that their lone motivation for the “prank” was harmless and directed solely to Officer Thompson. There was, according to both of them, “no intent at all” to be discriminatory towards the African American community they served, nor were their actions driven by racism or to be considered insensitive in any manner. Rather, they maintained that they were simply “playing a joke on a coworker” that they had known for over 20 years (City’s Exs. 12 & 13).

The preponderant evidence demonstrates that while the motive may have been void of any ill will, it was clearly not viewed that way by the general population. Police Chief Arradondo testified that both he and the mayor considered the display to be discriminatory, derogatory and/or biased and that he had heard from many others – including elected officials
and members of the public, who had the same reaction. Furthermore, it was revealed the Administration received a message from other law enforcement personnel in the Department who claimed that "this is not who we are." Additionally, it is noted that the MPD’s Code of Conduct does not address intent so much as it speaks to the adverse impact an officer’s actions may have on the public’s perception of the police force as a whole. In this regard, using modern day vernacular, once news of the event reached social media, it went "viral."

I am satisfied that Officer Bohnsack’s conduct was not intended to have the adverse reaction that it did and that he and his partner were, as they stated, seeking to play a joke that was intended for only one other fellow officer. At the same time however, their conduct ran contrary to the training he had more recently received. Furthermore, he had worked out of the 4th Precinct nearly his entire career and should have had a heightened awareness of the adverse publicity such a prank could cause – particularly in light of the Jamal Clark incident. It is not unreasonable to conclude that the events of November 24, 2018, could be considered a breach of the

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2 At hearing, the Employer’s Director of Communications John Elder testified without challenge that the public’s reaction was "monumental;" that the impact of the event was "significantly negative," and; that it was "very detrimental" to the Department.

3 "Pranking" as it is often referred to by members of law enforcement, is not uncommon and often serves as something of a release from an otherwise highly stressful occupation.
public's trust which had been given high priority with the induction of the new Police Chief only a few years earlier (Employer's Ex. L).

In the final analysis the actions of the two officers on the day in question occurred without giving any thought to the adverse consequences that followed which were reasonably predictable. The "hot button" topic that has been in the public's eye - both locally and nationally - over the past several years is about biased or partial transgressions committed by certain police officers. Beyond a doubt, in my judgment, the Grievant's misconduct warranted discipline.

In light of the foregoing, the singular issue remaining concerns the fairness of the discipline meted out by the Administration. In connection with this aspect of the case, I find more than sufficient evidence militating against the harsh penalty that was imposed.

When considering this aspect of a disciplinary dispute, arbitrators often look for guidance by examining such factors as the grievant's work history, the investigatory procedure undertaken by the employer (due process), whether other employees have been disciplined for similar misconduct, and (assuming their adherence to the concept of progressive discipline) whether the penalty was excessive under the circumstances.

While not dispositive of this matter altogether, I find City's initial
reaction to the Grievant's conduct - that it was appalling and warranted his immediate termination - something of a rush to judgment without first carefully considering all the evidence. More particularly the following facts elicited from the record support this conclusion:

- Chief Arradondo testified that soon after the tree decorationins came to light, he received a message from Mayor Frey's office who was upset over the incident and wanted the two officers "fired by noon" that day.

- Within a few days following the incident the Chief issued a news release concluding that the conduct of the two officers was "racially insensitive" and that he was "ashamed and appalled" by their behavior. This occurred prior to either officer being given an opportunity to respond. Their Garrity statements were not taken until nearly two months later, at which time they were able to offer their side of the events.

- While it is certain that at the time both Chief Arradondo and the mayor were under significant political pressure and from the public as well, the investigation and subsequent process raises questions as to whether the Administration had already determined the fate of the Grievant well in advance of his formal termination.

- Officer Thompson was never interviewed as a part of the Department's investigatory process. At hearing she testified that she had worked with Bohnsack for the majority of her career, and while she was not humored by his actions relative to the tree trimming events, she added that she thought highly of his police work stating "I would follow him into battle" any time.

- Similarly, neither 4th Precinct Inspector at the time Aaron Biard nor Lt. Chris House were interviewed as part of the investigation into the Grievant's misconduct. This in spite of the fact both were Officer Bohnsack's supervisors with direct involvement in
the matter and who could have provided information that was related to the events of November 24th (Union Exs. 4 & 5).

- There is no evidence in the record that the Chief was debriefed following the Grievant’s Laudermill hearing conducted in late May last year nor received any communication regarding the discipline panel’s findings chaired by Deputy Chief Forst, contrary to the purpose of the Laudermill hearing and the revised disciplinary process outlined in the “Overview of the Discipline Process” (see: the Federation’s Exhibit 17).

- The focus of the Grievant’s misconduct was the racially insensitive litter placed on the Christmas tree. However, the décor also included a small bottle of vodka, two cans of regular beer and two bags of chips, none of which are intrinsically stereotypical. While the City’s emphasis was on four or five inflammatory items placed on the tree, the facts indicate that there were other pieces of garbage put there as well that were ignored and apparently not considered as part of the Department’s inquiry.

A wealth of cases stands for the proposition that an employer may be justified in imposing a penalty that is short of termination if he/she possesses a lengthy, credible work record as opposed to one whose length of service is relatively brief, or whose job performance is marred by other discipline. The former is entitled to heightened consideration as they are presumed to be capable of a satisfactory performance if given the opportunity and have a greater investment in their job. Conversely, the latter who has been around for only a short time may have less to lose. The administration of a
disciplinary system without making allowances for length of service and/or job performance has repeatedly resulted in the termination being overturned.

The record shows that Grievant's lengthy work record consisting of some 20 years with the Department as a patrol officer, has been void of any formal discipline and no recorded incidents of biased or partial policing. Indeed, it has been characterized as exemplary by his supervisors. The MPOF submitted Officer Performance Appraisals, dating back to 2012, demonstrating that overall he has consistently earned high grades, receiving either "outstanding" or "satisfactory" marks within the four separate categories delineated (Federation Ex. 2). Displaying a "positive attitude," being "looked upon as a leader in confronting the most challenging issues," knowledge of his job, "successfully deals with people from a wide range of cultures on a daily basis," and displaying "excellent judgment and decision-making" are indicative of the reviewing supervisors’ comments (id).

In his most recent evaluation authored by Lt. Mark Montgomery (who is African American) Bohnsacck was given the highest possible overall rating of "Exceeds." In doing so the reviewing supervisor noted that the Grievant "shows an outstanding sensitivity to the needs, feelings and capabilities of other people," and "consistently practices Procedural Justice
in dealing with people." Lt. Montgomery further commented that the officer, "....acts in ways that builds or enhances trust" making it "easier to form alliances with individuals and groups" (Union's Exs. 2 & 4). The record holds evidence of similar positive comments made by other supervisors in his earlier performance evaluations where he has been referred to as being "consistently one of our top statistical performers in proactive work" (id.; emphasis added).

Additionally it was shown that the Grievant has been a multiple recipient of departmental awards and commendations including the Medal of Valor in 2003 for demonstrating "outstanding heroism...unselfishness, courage....professionalism and self sacrifice" in the face of considerable risk to himself (id.).

Bundled together, Mr. Bohnsack's clearly outstanding and lengthy work record in the Department (and more particularly in the 4th Precinct where he has worked throughout his career) is most significant serving as strong evidence mitigating against his termination.

The Federation has also raised the defense of desperate treatment in this instance. Desperate treatment normally exists when employees engage in the same type of (alleged) misconduct under the same or substantially similar circumstances in the presence of the same or substantially similar
mitigating factors but are assessed with significantly different penalties.

The Union offered three examples where members of the force were charged with comparable infractions but received considerably less discipline than what was issued to the Grievant. Neither the Inspector serving the Precinct at the time of the incident (Biard) nor Lt. House have been terminated by the MPD as a consequence. Both were supervisors who had viewed the Christmas tree after it had been remodeled by Officers Steberg and Bohnsack, but took no disciplinary action against them.

In April of this year, another member of the force, Commander Kim Lund Voss, posted a picture of a t-shirt on her Facebook page that read: “Minneapolis Police Homocide [sp] Division; Our Day Starts When Yours Ends.” It included a drawing featuring a chalk outline of a body (Union’s Ex. 12). The post caused something of an “uproar” in the media while receiving rebukes from Chief Arrandondo as well as the NAACP who called it “extremely insensitive” (Union’s Exs. 12 & 13). Ms. Voss however, was not discharged from the force as a consequence.

All three examples listed here occurred after the Chief had been appointed and had issued his Vision Statement to the Department.
Award.

For the reasons set forth above, I conclude that there exists sufficient evidence in the record demonstrating clear misconduct warranting discipline of the Grievant. At the same time however, relevant documentation and testimony adequately supports a penalty short of termination for a senior member of the MPD who has otherwise compiled an admirable record of service.

Contrary to the City’s assertion, I find that Officer Bohnsack has taken responsibility for his actions and the harm they caused. Nor do I concur with the Administration’s posit that he is beyond rehabilitation via a lower level of discipline or that his many years in the 4th Precinct are an “aggravating factor” rather than a mitigating one. While his conduct on the day in question was clearly unprofessional and thoughtless, his outstanding work record along with other mitigating factors has weighed heavily on the decision reached here supporting a reduced penalty - one that is constructive – one that might serve to correct the behavior in issue rather than simply to punish. In the final analysis I conclude that his retention on the force should hopefully benefit both the Grievant and the Department going forward.

Officer Bohnsack’s grievance is therefore sustained in part to the
limited extent that his dismissal be forthwith reduced to a 320 hour suspension. Accordingly, the City is to forthwith direct reinstate the Grievant to his former status as a police officer in the MPD and reimburse him for the difference between the wages and attendant benefits (if any) originally withheld and the modified discipline ordered here. Their financial obligation however, shall be offset by any income he may have received while away from work beyond the award made here.

I will retain jurisdiction in this matter for the sole purpose of resolving any dispute that may arise between the parties in connection with the implementation of the award.

Respectfully submitted this 5th day of August, 2020.

[Signature]
Jay C. Fogelberg, Neutral Arbitrator