In the Matter of Arbitration

between

The City of Houston
Fire Department

and

Houston Professional Firefighters Association
Local 341

AAA 01 15 0003 1425

Engineer/Operator
Jaron Black
Five day temporary suspension

before

John B. Barnard
Hearing Examiner

For the City	Ms. Nirja S. Aiyer, Esq. Senior Assistant City Attorney
For the Union	Mr. Richard C. Mumey, Esq. The Mumey Law Firm, P.L.L.C.

August 5, 2015
Houston City Offices

The Issue

Has the City proven the truth of the charges as set out in the letter of suspension?

If so, does just cause exist for the 5 day suspension imposed?

If not, what is the appropriate remedy?

Authority

City of Houston Civil Service Commission
Rules Governing Members of the Fire
and Police Departments

Section 5 Disciplinary Suspensions

The head of either Fire or Police Departments shall have the power to suspend any officer or employee under his jurisdiction or supervision for disciplinary purposes for reasonable periods, not to exceed fifteen days...

Section 6 Causes of Dismissals
And Suspensions

No Fireman or Policeman shall engage in or be involved in any one of the following acts or conduct and the same shall constitute cause for the removal from service or the suspension of Fireman or Policeman.

d) That the employee has violated any of the provisions of the Charter of the City of Houston or has violated any of the provisions of the Firemen's Civil Service laws, or the rules and regulations of the Civil Service Commission, or the rules or special orders of the Fire and Police Department,

j) That the employee has been wantonly offensive in conduct or language towards the public or towards City or officers or employees,

or shows discourtesy to the public or to fellow employees while said employee is in line of duty, and

k) That the employee has been guilty of any conduct unbecoming to an officer or employee of the City of Houston.

Houston Fire Department Guidelines
Rules and Regulations
Volume I, Reference 1-01

5.04 Conduct and Behavior

Members, whether on or off duty, shall be governed by the ordinary and reasonable rules of good conduct of law abiding citizens. They shall not commit any act tending to bring reproach or discredit upon themselves or the department.

City of Houston Mayor's
Executive Orders

1-18 Policy on Use of
Social Media

10.9 The following guidelines apply to personal communications using various forms of social media.

10.92 The City expects its employees to be truthful, courteous and respectful toward supervisors, co-workers, and other persons associated with the City. Employees shall not engage in name calling or personal attacks or other such demeaning behavior.

Background

The grievant, Jaron Black, is employed with the Houston Fire Department, and is presently classified as an Engineer/Operator/EMT.

Chief Terry Garrison issued Block a five day temporary suspension dated February 23, 2015. Such suspension letter states in part,

> An OIG investigation based on a formal complaint revealed that on or about August 17, 2014, while on duty. E/O/E Black made threatening and bullying comments on a closed forum on "Facebook" towards Senior Captain (Sr. Captain) Bryan A. Sky-Eagle concerning him driving the union's maroon Chevy truck. E/O/E/ Black made a comment on "Facebook" that said, "I say we get a large group together, with a spare key, and go get it." when referring to the vehicle. E/O/E Black's actions and statements directed at Sr. Captain Sky-Eagle discussed plans with a group of four (4) other HFD members to retake or attempt to retake the union's truck Sr. Captain Sky-Eagle was authorized to use as President of Local 341.
>
> District Chief David Elliott was shown as the forum's only group adminstrator, which must allow the requestor membership. Though listed as a closed forum, at the time of the events at issue the forum members numbered over 1100. Chief Elliott said that he set up the "Facebook" group or form for fellow firefighters titled "Houston Firefighters", described as "Houston's Bravest". While the purpose of the forum was to be unofficial firefighter discussion group, neither the City nor the union is involved in its creation or maintenance. At the time of the events, Chief Elliott and other HFD members were upset about a by-law amendment that Sr. Captain Sky-Eagle tabled and then changed to make it virtually unenforceable. Several of the members were making comments regarding their feelings about the amendment while others posted mean-spirited, disrespectful and/or threatening remarks about Sr. Captain Sky-Eagle on "Facebook."
>
> In E/O/E Black's statement, he admitted that he learned that there was a union truck which Sr. Captain Sky-Eagle was using that he had not returned. Some other HFD respondents cited their unhappiness with Sr. Captain Sky-Eagle's actions as union president as the reason for their posts. Apparently, with much coaching from the union since all the respondents answers were extraordinarily similar, all respondents stated that they were just joking or venting in this "closed" forum and had no plans to harm Sr. Captain Sky-Eagle or damage the union truck he was authorized to drive.

Based on the information obtained during the course of the OIG investigation, there is sufficient evidence to prove the allegation that E/O/E Black did violated HFD Rules and Regulations. The OIG investigation revealed that E/O/E Black along with other HFD members discussed and commented on plans to retake the union truck that Sr. Captain Sky-Eagle was authorized to use as President of the Local 341. E/O/E Black behaved in an aggressive and threatening manner towards Sr. Captain Sky-Eagle when he threatened to take back the union-owned truck.

The Houston Fire Department is a professional organization that holds its members to a high standard of conduct. E/O/E/ Black's failure to follow HFD guidelines demonstrates conduct inconsistent with those standards. E/O/E Black's disregard for HFD guidelines and City of Houston procedure does not reflect well on him or the department. Therefore, E/O/E Black is reminded that, in all future matters, he is wholly required to respect and adhere to any and all HFD Rules and Regulations, and that any further violations will result in a more serious disciplinary action, up to and concluding indefinite suspension.

Such matter is now properly before the hearing examiner.

City Position

It is undisputable that the Policy put the Department's members on notice that their communications on social media sites, City sponsored or personal, would be subject to the Policy. The Policy admonishes employees to not post comments they would not want their supervisors or other employees to read or that would cause embarrassment to themselves.

Since the Policy mandates that personal account names not to be tied

to the City, by calling the group Houston Firefighters with the search term Houston Fire Department, the group tied itself to the City. Black cannot argue that there was an exception of privacy regarding his threatening comments toward Sky Eagle on Houston Firefighters. Black testified that he was aware of the Policy and agreed that it applied to his personal communications. He had a clear understanding of what was permitted and not permitted, but somehow felt no responsibility for his bullying and threatening comment towards a superior officer on the Houston Firefighters.

Black's comments were made while he was on duty. He laid out a plan for a large group to commit a criminal act by taking the Union truck without Sky Eagle's consent or knowledge. Such groups was planning to go to Sky Eagle's Station, a City facility to take the truck. Sky Eagle perceived this as a threat. He testified he believed a large mob would come to his station and forcibly take the truck. Further, he testified he would not trust Black at a fire incident with his safety. Sky Eagle testified that he reported the Facebook postings, including Black's, to the District Attorney's Office, but criminal charges were not filed. He went on to testify that his decision to resign his portion as Union president was due to the threats to him and his family, including Black's comments.

Black's threatening comment bought reproach and discredit upon the Department, and was clearly in violation of the Policy and the Department's rules on conduct and behavior. Black's comments seriously impaired the working relationships of the Department's members, especially in the Fire Department where trust and loyalty amongst member are paramount.

Black's grievance is without merit and should be denied. The Social Media Policy is a valid and reasonable policy that seeks to prevent workplace conflict that would negatively impact the efficient operations of the Department. Black's comment was threatening and bullying, had a nexus to the workplace, and was detrimental to working relationships. The OIG sustained the allegation that Black violated the Policy. The Department has consistently enforced the Policy, had just cause to issue discipline to Black, and took his work history into account. Black failed to meet his burden by not providing any evidence that to Policy was not applicable to his comment and that the discipline was not warranted.

As such, the City respectfully requests that the Arbitrator deny the grievance and upheld the five day discipline issued to Black.

Union Position

This story began in the backdrop of significant turmoil within the

firefighters' Union over an out of control President, Bryan Sky Eagle. One of the many contentious issues that arose concerned the Union owned vehicle. In late July, the Board of Trustees demanded Sky Eagle return the Union owned truck to the Union hall, since he had transferred himself back to the fire station, effectively abandoning his Union position. Under the Union's by laws, the Trustees have authority to control and manage all property owned by the Union. After Sky Eagle refused to comply with the Trustees' demand, the Board of Directors confirmed the directive at their next regular meeting, August 6, 2014, followed the next day by the full membership. The President was defying the duly selected Board of Trustees' demand for the return of the vehicle, the Board of Directors who likewise directed the President to comply with the Trustees' request, and the Union membership acting at an authorized meeting who insisted the President return the truck to the Trustees.

Naturally, word of this latest controversy spread rapidly throughout the firefighters. One of the many places the wayward President's actions were being discussed was in a closed Facebook group administered by District Chief David Elliott. Chief Elliott never allowed Sky Eagle access to his group.

During the controversy surrounding the Union truck, a firefighter named

George Salddana posted a picture of a similar Chevy Truck. In this post, Saldana sarcastically asked if anyone had seen the Union truck. He went on to reference the Trustees' demand for return of the truck and Sky Eagle's refusal to comply. This post prompted numerous comments by 18 different members over 3 days. One of those who commented was Black. While Black made several comments, the one he got suspended for was,

> ...I say we get a large group together, with a spare key, and go get it...

Then evidence at the hearing demonstrated that the Facebook comments were viewed by all participants as banter between colleagues. Only Sky Eagle viewed them as threats, as all of these allegations were presented to the Harris County District Attorney, who refused to take the charges.

The City of Houston alleges Black violated two rules,

1) Houston Fire Department Conduct and Behavior,
2) The City's Social Media Policy

As the evidence presented at hearing has clearly demonstrated, he committed no such violations and did not deserve his suspension. First of all, the City has no business involving itself in freighters' Union business. It is neither proper, nor legally authorized. The City's rules cited here are

wholly inapplicable to internal Union discussions. Moreover, the results of the OIG investigation into the Sky Eagle complaints were inconsistent at best. Such conclusions reached are sharply disparate and cannot be reconciled with the undisputed facts. With such shoddy investigation, the City was unable to prove the truth of charges listed in Black's suspension letter.

The crux of the City's case is that Black's Facebook comment was a threat of mob violence directed at Sky Eagle is ridiculous, and the facts prove this comment was nothing more than innocent banter among fellow Union firefighters expressing their frustrations about this rogue Union president.

The City presented no evidence that the rules cited in this case were intended to apply to Union speech. All of the witnesses consistently asserted that they did not interpret the policies to apply to off duty Union discussions.

There is simply no proof of the alleged threat by Black was being directed at Sky Eagle. His comment was not a threat or a bullying remark directed at Sky Eagle. The comment was made in jest, in a closed Facebook that Sky Eagle was not a member of at the time, nor had he ever been a member. Such remarks were nothing but venting, made after

months of frustrations about the Union president's thwarting the will of the membership.

All of the witnesses have consistently denied that they made any plans to go get the Union truck. Black testified that he did not know the others commenting on the post, nor did he communicate with them about the Union truck outside of this Facebook post.

Sky Eagle simply cannot be believed. His perception of Facebook comments as threats is nothing short of paranoia. He flat out lied about why he did not return the truck. He likewise lied about being granted access for a brief time on Elliott's Facebook group.

At least nine firefighters were complained on by Sky Eagle and investigated by OIG. Yet, only five had the complaint sustained against them. Objective comparison can leave no doubt that the rules were not fairly and even handedly applied to all the targets of Sky Eagle's complaints. Firefighters making the same type comments, or worse, were not punished, nor even found guilty of violating the same rules.

The five day suspension imposed on Black was not reasonably related to the seriousness of the comment Black made, particularly when viewed in the proper context. The discipline was not reasonably related to the exemplary record Black has in HFD. To the extent Black is culpable of

anything, this is his first offense. Considering the totality of the circumstances, this five day suspension was disproportionately harsh and otherwise inconstant with progressive discipline.

After considering all the facts and circumstances, Black believes that that this hearing examiner must find that the City did not prove the truth of the charges in the suspension letter, nor did just cause existed for the five day suspension imposed on him by Chief Garrison. Accordingly, Black prays this hearing examiner reverse the suspension in its entirety and make him whole for any loss of pay, seniority, or benefits he may have suffered as a result of this improper discipline.

Discussion and Conclusions

The City of Houston issued its policy on use of social media effective January 4, 2011. Such policy states in part,

> 4. Scope
>
> 4.1 This directive applies to all City employees... and applies to the extent specified herein with regard to personal social media sites.
>
> 10. Appropriate Employee Use of Social Media
>
> 10.9 The following guidelines apply to personal Communications using various forms of social media,

> 10.9.1 Use common sense when using social media sites. Remember that what you write is public, maybe public for a long time, and may spread to large audiences. Refrain from posting information that you would not want your supervisor or other employees to read or that you would be embarrassed to see in the newspaper or on television.
>
> 10.9.2 The City expects its employees to be truthful, courteous and respectful toward supervisors, co-workers...

Black testified that he was aware of the policy, but maintained that he felt his posting did not violate the policy.

His specific comments which resulted in his temporary suspension states,

I say we get a large group together, with a spare key, and go get it.

Black was referring to the Union's truck, then in possession of Union president Sky Eagle. Union counsel points out that Sky Eagle did not have the authority or permission to possess the Union truck when the Facebook post and comments occurred.

Black's comments were not isolated. A total of 18 members made comments over a period of three days. Five sustained complaints resulted from the postings, one of which was made against Black.

On October 22, 2014, Black made his statement concerning this matter to Jeffrey Lubrity of the City's Offices of Inspector General. In his statement, Black stated that he did not know Sky Eagle, and had no

relationship with him. Some additional comments by Black,

> ...I just read the Facebook posts before mine and learned there was a union truck which Capt. Sky Eagle was using that he had not returned. I made the post as a joke and never intending to do anything regarding the truck...
>
> ...There were no plans to take the truck...
>
> ...There were no conversations about the truck outside of that post... (Co ex 3)

OIG sustained the allegation of a violation by Black of HFD Rules and Regulations and Executive Order 1.18 on February 13, 2015.

The record also establishes a need number of comments made by Sky Eagle to various entities,

> ...So compelling now are the threats that I filed multiple complaints with our internal affairs. I understand that some of these threats are being reviewed by the District Attorney for criminal behavior and others are being sent to the Office of Inspector General. The nature of the threats involve physical violence, premediated attractions, targets against my home, family and vehicle...
>
> ...I no longer feel safe for myself or my family...

Such allegations were presented to the Harris County District Attorney, who refused to take the charges.

At hearing, Sky Eagle testified specially concerning Black's post,

> Q. Your reaction (to Black's post)?
>
> A. Get a mob together and go get the truck.
>
> Q. You feel there was a plan to take the Union truck?

A. Yes

Q. Your interpretation of Black's post

A. There was a mob coming. I felt my safety threatened. I didn't know if there was a spare key. Others were involved.

On cross,

Q. Black threaten your life?

A. I took it at that.

Q. Black never contact you on Facebook, later, home or at the Union hall?

A. It didn't happen.

If grievant Black takes anything away from this experience, it's the fact that, as stated in the City's Policy on Use of Social Media, in part,

> 10.9.1 Use common sense when using social media sites. Remember that what you write in public, maybe public for a long time, and may spread to larger audiences...

Although Chief Elliott never allowed Sky Eagle to his group, nevertheless he received a printout of part of the post and comments from someone else.

While the OIG interview with Black was short, nevertheless it covered the necessary points at issue. Such interview didn't reveal anything that

was arguably already known.

What is readily apparent here is that there was no demonstrated plot or plans on the part of Black to actually go get the truck, nor did he attempt to organize a group to obtain the truck. Further, there is no hint of animosity on Black's part as to Sky Eagle. Black, like other Union members, were seemingly upset that Sky Eagle still had possession of the truck, and they wanted to see it returned to the Union.

That said, certainly Black, by his comments,

> ...I say we get a large group together, with a spare key, and go get it...

That statement didn't call for mob violence, but such comment, as in the case here, certainly could and was interpreted by some as highly improper, and could lead to some sort of confrontation. Perhaps some years ago, Black's comments would have been ignored. Times and events however, could cast another light on such comment. One can hardly pick up a newspaper or turn on television without hearing about some act of violence committed by some individual. Anything stated on Facebook or some other social outlook is certainly on view by many individuals. Black, in his apparent enthusiasm to comment on the wayward Union truck, commented that he suggested getting a large group together to go get the truck. That comment could reasonably alarm some individuals who would conclude

that an altercation would take place.

In sum, Black's choice of words were inappropriate in light of the events before him. He should have been aware of the possible consequences of such comment. Further, the closed Facebook group was no protection for such comments, as Sky Eagle quickly became aware of the postings, even though he was not part of that group. In that respect, there was a violation of the City's Policy.

That said however, although the posting was inappropriate, there was no demonstration of any sort of plot on his part to substantiate his response to a group getting together to get the truck, nor was there any testimony or evidence offered to remotely suggest he was entertaining a threat to Sky Eagle. With that, and based upon the totality of the record as presented, a lesser discipline is in order.

Decision

There was no demonstration of just cause in the City's decision to impose a temporary suspension of five days to grievant E/OE Jaron Black.

Instead, he is to receive a written warning instead of the temporary suspension and is to be reimbursed for all monies and benefits due as a result of the imposition of the written warning.

November 24, 2015
Dallas, Texas

John B. Barnard, Hearing Examiner