



# CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE  
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CITY CIVIL SERVICE COMMISSION

BRITTNEY RICHARDSON,  
CHAIRPERSON  
CLIFTON J. MOORE, JR, VICE-  
CHAIRPERSON  
JOHN KORN  
MARK SURPRENANT  
RUTH WHITE DAVIS

Thursday, May 6, 2021

AMY TREPAGNIER  
DIRECTOR OF PERSONNEL

Mr. Donovan A. Livaccari  
101 W. Robert E. Lee, Suite 402  
New Orleans, LA 70124

Re: **Adam Brickeen VS.  
Office Homeland Security &  
Docket Number: 9179**

Dear Mr. Livaccari:

Attached is the decision of the City Civil Service Commission in the matter of your appeal.

This is to notify you that, in accordance with the rules of the Court of Appeal, Fourth Circuit, State of Louisiana, the decision for the above captioned matter is this date - 5/6/2021 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Amoco Building, New Orleans, Louisiana.

If you choose to appeal this decision, such appeal shall be taken in accordance with Article 2121 et. seq. of the Louisiana Code of Civil Procedure.

For the Commission,

  
Stacie Joseph  
Management Services Division

cc: Collin M. Arnold  
Eraka Williams Delarge  
Jay Ginsberg  
Adam Brickeen

file

**CIVIL SERVICE COMMISSION  
CITY OF NEW ORLEANS**

**ADAM BRICKEEN**

**Appellant**

**v.**

**Docket No. 9179**

**OFFICE OF HOMELAND SECURITY  
AND EMERGENCY PREPAREDNESS**

**Appointing Authority**

**DECISION**

Appellant, Adam Brickeen, brings this appeal pursuant to Article X, § 8(A) of the Louisiana Constitution and this Commission's Rule II, § 4.1 seeking relief from his 15-day suspension beginning June 17, 2020, and his termination effective July 2, 2020. (See Exhibit HE-1, HE-2). At all relevant times, Appellant was employed as a Communications Chief and IT Supervisor for at the Office of Homeland Security and Emergency Preparedness (NOHSEP) and had permanent status as a classified employee. (Tr. at 22, 30). A Hearing Examiner, appointed by the Commission, presided over a hearing on October 16, 2020. At this hearing, both parties had an opportunity to call witnesses and present evidence.

The undersigned Commissioners have reviewed and analyzed the entire record in this matter, including the transcript from the hearing, all exhibits submitted at the hearing, the Hearing Examiner's report dated February 13, 2021, a copy of which is attached, and controlling Louisiana law.

For the reasons set forth below, I adopt the recommendation of the hearing officer, which is advisory in nature. I GRANT the appeal of Brickeen's termination and DENY the appeal of Brickeen's suspension. Vice-Chairperson Moore joins the portion of the decision granting

Brickeen's appeal of his termination. Chairperson Richardson dissents from the portion of the decision granting Brickeen's appeal of his termination.

## I. FACTUAL BACKGROUND

Adam Brickeen was a liaison between Emergency Medical Services and Homeland Security beginning in 2013. (Tr. at 6). Brickeen began working directly for the Homeland Security in 2018. (Tr. at 6). Generally, Brickeen works in IT. As the Communications Chief, Brickeen ensured all radio-related systems and equipment for police, fire, and EMS worked properly. (Tr. at 22). In his role with the Real-Time Crime Center, Brickeen provided security for the crime center camera network and tracked the radios. (Tr. at 23). Brickeen's job was to protect these systems from cyberattack. (Tr. at 24). Brickeen did not monitor the crime cameras and had no role with NOPD. (Tr. at 9, 25). Brickeen's supervisor testified that Brickeen's job duties included maintaining the "cybersecurity footprint" of the crime center camera, and that Brickeen's performance of these job duties prevented disruption when the city computer network suffered a cyberattack. (Tr. at 109-11).

Brickeen reported directly to George Brown, the IT Manager at the Real-Time Crime Center. (Tr. at 104). Brown reports to Ross Bourgeois, the Administrator for Public Safety Support Services. (Tr. at 33, 35). In turn, Bourgeois reports to Collin Arnold, the Director of Homeland Security and Emergency Preparedness. (Tr. at 69, 30). In his role as Communications Chief, Brickeen reported directly to Collin Arnold. (Tr. at 31).

On June 16, 2020, Brickeen liked a meme on his private Facebook page which read as follows: "IF RIOTERS COME TO YOUR AREA, PLEASE REMEMBER, DON'T BE A LITTERBUG. PICK UP YOUR BRASS!" (Ex. NOHSEP-2; Tr. at 9). Brickeen also liked a meme suggesting Bill Gates developed Covid-19 and a meme about patriots and Antifa. (Ex. NOHSEP-

2, Ex. NOHSEP-3, Ex. NOHSEP-4; Tr. at 13). Apparently, “pick up your brass,” means to pick up spent shell casings. (Ex. NOHSEP-5). Brickeen’s Facebook page did not identify Brickeen as a city employee. (Tr. at 16). An online publication, bigeasymagazine.com, published an article on June 16, 2020, with a copy of the memes Brickeen liked, and describing Brickeen’s role in city government as a “high ranking employee with the New Orleans Office of Homeland Security and Emergency Preparedness” who had made a social media post “glorifying violence against protesters.” (Ex. NOHSEP-5). The article described Brickeen’s job duties as requiring “close collaboration with law enforcement and investigation of criminal activity.” (Ex. NOHSEP-5). The article quoted an EMS employee who questioned Brickeen’s ability to “police the City” and “monitor residents in real time.” (Ex. NOHSEP-5). Nola.com then picked up the story, and it was the top story for 12 hours. (Tr. at 88-89).

On the evening of June 16, 2020, the Communications Director in the Mayor’s office contacted NOHSEP’s Public Engagement Manager about the article, and the Public Engagement Manager in turn contacted Collin Arnold. (Tr. at 94). After Arnold read the article, which was texted to him, Arnold instructed Ross Bourgeois to place Brickeen on an emergency suspension and to schedule Brickeen’s pretermination hearing. (Tr. at 76). Arnold also instructed Bourgeois to conduct an investigation. (Tr. at 36).

During his investigation, Ross Bourgeois could not find Brickeen’s Facebook page. (Tr. at 38). Bourgeois conducted a Google search, which confirmed that Brickeen is listed as a city employee online, although not on Facebook. (Tr. at 43). Based on the article in bigeasymagazine.com, Bourgeois determined that the meme about rioters was offensive and threatening, in violation of CAO Policy 83(R). (Tr. at 48, 60-61).



CAO Policy Memorandum 83(R) addresses use of social media, including Facebook, and instructs employees to “Avoid the offensive. Do not post any defamatory, libelous, vulgar, obscene, abusive, profane, threatening, racially and ethnically hateful, or otherwise offensive or illegal information or material.” (Ex. NOHSEP-6). CAO Police Memorandum 83(R) provides that the City of New Orleans “endorses” progressive disciplinary action, and the “suggested progression: is “verbal warning, written warning, suspension, demotion of circumstances warrant, and termination.” (Ex. NOHSEP-6). The discipline is at the discretion of the Appointing Authority. (Ex. NOHSEP-6).

Collin Arnold made the decision to terminate Brickeen’s employment. (Tr. at 87). Arnold testified that Brickeen was advocating violence against protesters, “innocent people exercising their constitutional rights.” (Tr. at 77, 81). Arnold also noted that Brickeen’s post was “accessible, at some point, by the media.” (Tr. at 85).

Brickeen’s immediate supervisor, George Brown, testified the article was inaccurate as to Brickeen’s role at the Real-Time Crime Center. (Tr. at 108-09). In particular, Brown testified Brickeen did not collaborate with law enforcement and investigated no criminal activity. (Tr. at 108). Brickeen also testified that he had conducted no criminal investigations. (Tr. at 115). Throughout the hearing, Brickeen and other witnesses testified about the difference between rioters, who are engaged in illegal activity, and protestors. (Tr. at 18, 61, 122).

Bourgeois testified that Brickeen was a “[g]reat employee, outstanding. (Tr. at 62). Arnold testified that Brickeen’s job performance “exceeds expectations in most respects.” (Tr. at 93). Brown also testified that Brickeen is not a violent person. (Tr. at 111).

## II. ANALYSIS

It is well-settled that, in an appeal before the Commission pursuant to Article X, § 8(A) of the Louisiana Constitution, the appointing authority has the burden of proving by a preponderance of the evidence: 1) the occurrence of the complained of activity, and 2) that the conduct complained of impaired the efficiency of the public service in which the appointing authority is engaged. *Gast v. Dep't of Police*, 2013-0781 (La. App. 4 Cir. 3/13/14), 137 So. 3d 731, 733 (quoting *Cure v. Dep't of Police*, 2007-0166 (La. App. 4 Cir. 8/1/07), 964 So. 2d 1093, 1094). The Commission has a duty to decide independently from the facts presented in the record whether the appointing authority carried its legally imposed burden of proving by a preponderance of evidence that it had good or lawful cause for suspending and terminating the classified employee and, if so, whether such discipline was commensurate with the dereliction. *Abbott v. New Orleans Police Dep't*, 2014-0993 (La. App. 4 Cir. 2/11/15); 165 So.3d 191, 197; *Walters v. Dept. of Police of the City of New Orleans*, 454 So. 2d 106 (La. 1984).

NOHSEP has carried its burden of showing that the complained-of activity occurred and that the activity resulted in unfavorable media coverage, impairing the efficient operation of NOHSEP. Brickeen's statements advocated violence in violation of CAO Policy Memorandum 83(R) and potentially caused discord with Brickeen's approximately 18 co-workers in the Real-Time Crime Center, which is staffed 24/7, (Tr. at 83 89). *Graziosi v. City of Greenville Miss.*, 775 F.3d 731, 738 (5th Cir. 2015) (describing governmental interest in harmony among co-workers and holding that governmental interest may be met by showing reasonable prediction of disruption), However, NOHSEP has failed to show that the penalty of termination was commensurate with the violation. Brickeen's Facebook page was private and did not identify Brickeen as a city employee. The media description of Brickeen's role with law enforcement (and

by extension, with policing the protests) was inaccurate. In short, Brickeen works in IT, not law enforcement. Therefore, the Commission grants Brickeen's appeal of his termination. NOHSEP shall reinstate Brickeen to his position, and shall reimburse Brickeen's back pay from July 2, 2020, to present, along with all emoluments of employment.

Brickeen's appeal of his suspension is DENIED.

This the 16 day of May, 2021

WRITER:

J H Korn  
J H Korn (May 6, 2021 13:29 EDT)

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JOHN KORN, COMMISSIONER

#### **CONCURRENCE BY VICE-CHAIRPERSON MOORE**

I concur with Commissioners Korn that Brickeen's appeal of his termination should be granted because the penalty is not commensurate with the claimed violation. I would also grant Brickeen's appeal of his emergency suspension and termination for the reasons that follow.

NOHSEP has not met its burden of showing that Brickeen's "like" of a meme on Facebook impaired its efficient operation. In particular, other than NOHSEP management testimony about their displeasure with the "like" of the meme, no co-worker of Brickeen's testified about the disruption to the working relationships among the employees. Therefore, I would grant Brickeen's appeals of his suspension and his termination on this basis.

In addition, NOHSEP's suspension and termination of Brickeen implicate First Amendment issues. If Brickeen was speaking on a matter of public concern as a private citizen, then his First Amendment rights are at issue. *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S. Ct.

1951, 1958, 164 L. Ed. 2d 689 (2006) (“The first [inquiry] requires determining whether the employee spoke as a citizen on a matter of public concern.”). Speech involves matters of public concern “when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’ ” *Lane v. Franks*, 573 U.S. 228, 241, 134 S. Ct. 2369, 2380, 189 L. Ed. 2d 312 (2014) (quoting *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S.Ct. 1207, 1216, 179 L.Ed.2d 172 (2011)). “Speech involves a matter of public concern if it can be ‘fairly considered as relating to any matter of political, social, or other concern to the community.’” *Graziosi v. City of Greenville Miss.*, 775 F.3d 731, 738 (5th Cir. 2015) (quoting *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)). A meme about the protests following the murder of George Floyd is political speech, as are the memes about the origins of Covid-19 and Antifa. Brickeen’s post was on June 16, 2020, after Floyd was murdered on May 25, 2020, and protestors took to the streets throughout the country, including New Orleans. For context, the confrontation between protestors and New Orleans police officers on the I-10 bridge occurred on June 3, 2020. The political nature of these posts is supported by the article in *bigeasymagazine.com*. The news article noted that President Trump had stated that Antifa had contributed to violence at protests, and that the idea that Covid was created by Bill Gates is “popular in fringe right wing circles.” (Ex. NOHSEP-5). Collin Arnold testified that at this time, protests and riots were matters of public interest. (Tr. at 97). Also, Brickeen was speaking as a private citizen. Brickeen’s Facebook page was private, and his “like” of a meme was made off-duty. Further, Brickeen’s Facebook page did not identify him as a City employee.

We must balance the interests of Brickeen, as a citizen, in commenting upon matters of public concern and the interest of the City, as an employer, in promoting the efficiency of the



public services it performs through its employees. *Burkart v. New Orleans Police Dep't*, 2003-1699 (La. App. 4 Cir. 3/31/04), 871 So. 2d 1229, 1234; *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., Illinois*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734–35, 20 L. Ed. 2d 811 (1968). “When performing this balancing test, courts consider ‘whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary[.]’ *Graziosi*, 775 F.3d at 740 (quoting *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)). The Supreme Court addressed this balancing in *Lane*:

As discussed previously, we have recognized that government employers often have legitimate “interest[s] in the effective and efficient fulfillment of [their] responsibilities to the public,” including “ ‘promot[ing] efficiency and integrity in the discharge of official duties,’ ” and “ ‘maintain[ing] proper discipline in public service.’ ” *Connick*, 461 U.S., at 150–151, 103 S.Ct. 1684. *We have also cautioned, however, that “a stronger showing [of government interests] may be necessary if the employee's speech more substantially involve[s] matters of public concern.” Id.*, at 152, 103 S.Ct. 1684.

*Lane*, 573 U.S. at 242 (emphasis added). In this case, Brickeen’s speech more substantially involves a matter of public concern – the Black Lives Matter protests following the George Floyd murder and the property damage and violence perpetrated by a small minority of the protesters (and counter-protesters). The testimony in this case indicated that the Mayor’s office contacted the Public Engagement Manager of NOHSEP about the meme after an online news source incorrectly characterized this City IT employee as collaborating with law enforcement, directly monitoring the protests, and conducting criminal investigations. (Tr. at 94, 108-09). The article characterized Brickeen as a “high-ranking government official,” even though the reporting relationships show that Brickeen has two layers of supervision between him and the Director in his IT role, and Brickeen has no policymaking authority. (Tr. at 30-31). Brickeen is not a law enforcement officer,

and, contrary to media reports, Brickeen had no role in the law enforcement response to the protests, other than ensuring that radios and crime cameras were operational.

Without question, Brickeen's memes did not align with the position of City policymakers on the protests, and the news coverage was unflattering to the City. The Director testified as follows:

I believe that that meme propagates violence. It propagates violence against innocent people exercising constitutional rights and that is contrary to what the City stands for, and clearly what the Mayor and the Administration stand for, and certainly what my office stands for.

(Tr. at 81). The Director testified as follows about the Bill Gates/Covid meme: "I have one of my employees liking the fact that he believes that Covid is a bunch of bullshit." (Tr. at 77). The Director decided to terminate Brickeen because Brickeen's like of memes reflecting Trump's rhetoric directly contradicted the policies and positions of the City's Democratic administration. The Director also testified that he might have imposed a lesser penalty if Brickeen would have stated in his pretermination hearing that he would refrain from posting on social media at all in the future. (Tr. at 101). The governmental interest in avoiding negative media coverage does not outweigh Brickeen's interest in engaging in political speech

A closer question is whether Brickeen advocated violence against peaceful protesters, as the Director testified, resulting in disharmony among co-workers or impairing the efficient operation of NOHSEP. (Tr. at 77, 83, 89). Brickeen and other witnesses recognized throughout the hearing the distinction between peaceful protesters and rioters. (Tr. at 18, 61, 122). Brickeen's explanation was that citizens should be able to defend themselves against rioters. (Tr. at 122). NOHSEP's prediction of disagreement among co-workers or even offense to co-workers about

this controversial political issue does not meet the requirement of a stronger showing of government interest.

Because Brickeen's speech was protected by the First Amendment and his interest in commenting on this matter of public concern outweighed the governmental interest of the City, I would rule that NOHSEP did not have cause to discipline Brickeen. *See Burkart*, 871 So. 2d at 1234.

  
CJ Moore (Apr 30, 2021 08:15 CDT)

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CLIFTON J. MOORE, JR., VICE-CHAIRPERSON

#### **DISSENT BY CHAIRPERSON RICHARDSON**

I would deny Brickeen's appeal of his suspension and his termination. I agree with Commissioner Korn that NOHSEP has carried its burden of showing that the complained-of activity occurred and that the activity resulted in unfavorable media coverage, impairing the efficient operation of NOHSEP. Although Brickeen's Facebook page did not identify him as a city employee, his LinkedIn profile did identify him as a city employee. (Tr. at 43). As Collin Arnold testified, the statements on Facebook could be linked to Brickeen as a city employee. (Tr. at 99). Further, Brickeen identified himself as Chief of Communications on his LinkedIn profile, according to the news report, (Ex. NOHSEP-5), leading the public to believe Brickeen is a high-ranking official.

Brickeen's statements advocated violence in violation of CAO Policy Memorandum 83(R) and potentially caused discord with Brickeen's approximately 18 co-workers in the Real-Time Crime Center, which is staffed 24/7. (Tr. at 83, 89). *Graziosi v. City of Greenville Miss.*, 775 F.3d 731, 738 (5th Cir. 2015) (describing governmental interest in harmony among co-workers and

holding that governmental entity's reasonable prediction of disruption satisfies this requirement). The emergency suspension and termination of Brickeen are commensurate with his violation of CAO Policy Memorandum 83(R), especially the advocacy of violence against "rioters," which I find incompatible with employment with the City of New Orleans, especially an employee in the Real-Time Crime Center who reports directly to NOHSEP Director Collin Arnold as Communications Chief.

As for the application of the First Amendment, I find that the Appointing Authority's legitimate interest in harmony among coworkers and internal discipline outweigh Brickeen's interest in commenting on a matter of public concern. In particular, because Brickeen reported directly to Arnold as Communications Chief, I find that Brickeen's inflammatory statements had a detrimental impact on close working relationships for which personal loyalty and confidence are necessary. *Graziosi*, 775 F.3d at 738.

  
Brittney Richardson (Apr 29, 2021 15:58 CDT)

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BRITTNEY RICHARDSON, CHAIRPERSON



**ADAM BRICKEEN**

**CIVIL SERVICE COMMISSION**

**VERSUS**

**CITY OF NEW ORLEANS**

**OFFICE OF HOMELAND SECURITY  
AND EMERGENCY PRPAREDNESS**

**NO. 9179**

**HEARING EXAMINER'S REPORT**

**I. INTRODUCTION**

Adam Brickeen ("Appellant") was employed by the Office of Homeland Security and Emergency Preparedness ("Appointing Authority") as an IT Supervisor with permanent status at the Real-Time Crime Center. The Real-Time Crime Center maintains a network of cameras located throughout the City. The cameras are used by law enforcement to gather video evidence used in the investigation of crimes.

The Appointing Authority terminated the Appellant effective July 2, 2020, after determining that he violated CAO Policy 83(R) – Standards of Behavior for City Employees. (H.E. Exh. 1; NOSEP Exh. 1). As stated in the termination letter, the Appointing Authority determined that the Appellant made social media posts advocating violence ..."

**II. FACTS**

The material facts presented by both the Appointing Authority's and Appellant's witnesses are uncontested. The testimony primarily concerns individuals' reaction to the Appellant's post, the on-line news article reporting the post, and the actions taken as a consequence.

### **A. Appellant's Activity**

The Appellant has a Facebook account on which he posted that he liked a post made by an entity called "Assault Life Apparel", which stated, "If rioters come to your area, please remember, don't be a litterbug, pick up your brass!" (NOSEP Exh. 2). The Appellant shared that he liked the post only to his Facebook friends. (Tr. 27). However, on June 16, 2020, the Appellant's Facebook post became public. An online article published by *bigeasymagazine.com* reported the Appellant's post with the headline, "New Orleans Homeland Security Leader Shared Facebook Posts Glorifying Violence Against Protesters". (NOSEP Exh. 5).

### **B. Content of Article**

The article characterized the Appellant as a high-ranking employee with the New Orleans Office of Homeland Security and Emergency Preparedness (NOSEP) who had recently made social media posts glorifying violence against protestors. The article explained that "Picking up your brass" refers to cleaning up spent casings after firing a gun. In this case, it implies shooting at protestors." The article also criticized the New Orleans Police Department and attempted to link the Appellant's activities to those of the police department by stating that, "although not a member of the NOPD, Brickeen's role at the Real-Time Crime Center involves close collaboration with law enforcement and investigation of criminal activity."<sup>1</sup> (NOSEP Exh. 5).

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<sup>1</sup> The article referenced other posts made by the Appellant, but the Appointing Authority did not rely on those posts when taking disciplinary action.

### **C. Investigation by Ross Bourgeois**

Ross Bourgeois is employed as the Administrator for Public Safety Support Services. Mr. Bourgeois testified that he was assigned to the Appellant's investigation by Colin Arnold, the Director of Homeland Security (Tr. at 37 and 76). Mr. Bourgeois' investigation was limited to a review of the post as reported in the article by *bigeasymagazine.com*. (Tr. at 37). He testified that, while the actual post was private and there was no evidence that the Appellant identified himself as a City employee on any posting, he was easily identified by the media as such. (Tr. at 43).

He reviewed CAO Policy 83(R) and determined that the Appellant violated Section V(c) – Use of Social Media and Social Networking Standards. The policy cautions City employees to "Avoid the offensive: Do not post any ...offensive... information or material". Mr. Bourgeois prepared a report, concluding that the Appellant violated the policy by posting a meme that resulted in a news article that cast the department in a negative light by suggesting to the public that the Appellant was advocating violence. (Tr. at 51-54, 60; NOSEP Exh. 7).

On cross-examination, Mr. Bourgeois acknowledged that the Appellant's post referenced rioters and the news article referenced peaceful protestors. He distinguished rioters from peaceful protestors, stating that he perceived rioters as individuals acting in a manner that threatens individuals and their property

where a need to protect or defend may arise. (Tr. at 61 -62). He also described the Appellant as a "great employee" whose performance was "outstanding". (Tr. at 62 -63).

#### **D. Emergency Suspension, Pre-termination Hearing and Penalty**

Colin Arnold, the Director of Homeland Security and Emergency Preparedness, testified that he received a call from his Public Engagement Manager on June 16, 2020. The Public Engagement Manager informed him that the City's Director of Communications instructed her to relay the Mayor's concern regarding the *bigeasymagazine.com* news article. After reviewing the article, Mr. Arnold instructed Mr. Bourgeois to immediately place the Appellant on emergency suspension pending an investigation and he scheduled a pre-termination hearing for June 19, 2020. The pre-termination hearing was ultimately conducted on June 25, 2020. (Tr. at 75 -76).

Mr. Arnold testified that the article portrayed the Appellant as a high-ranking employee advocating violence against protestors exercising their constitutional right to protest. He stated that, in the current political climate, there is no distinction between protestors and rioters. As such, once the Appellant's post became accessible to the media, "it became an issue of what is best for the Office of Homeland Security and Emergency Preparedness and what is best for the City of New Orleans and its residents, their safety, and security when exercising their constitutional rights." (Tr. at 77 – 85).



Mr. Arnold acknowledged that the Appellant was an excellent employee and not a violent person. He confirmed that his department is not a law enforcement agency and that the Appellant is not a law enforcement officer. He testified that, when conducting the Appellant's pre-termination hearing, the only question he asked the appellant was whether he made the post. He terminated the Appellant, having determined that progressive discipline was not an option and that he could not risk potential future problems in the current political climate. The news article occurred in the wake of the George Floyd demonstrations for social justice. (Tr. at 87 - 100).

**E. Accuracy of Bigeasymagazine.com Article**

George Brown, the IT Manager at the Real-Time Crime Center, was the Appellant's immediate supervisor. He characterized the Appellant as an employee whose job performance exceeded every expectation and not someone who would advocate violence. (Tr. at 104 -106, 111).

Brown testified regarding the Appellant's job responsibilities and how the *bigEasymagazine.com* article misrepresented the Crime Center. The article stated:

Although not a member of NOPD, Mr. Brickeen's role at the Real-Time Crime Center involves close collaboration with law enforcement and investigation of criminal activity.

Mr. Brown testified that the statement was not accurate and that the Appellant's role was to maintain the Center's cybersecurity footprint. According

to Mr. Brown, the Appellant did not collaborate with law enforcement or investigation of criminal activity.

Mr. Brown also addressed the article's statement that:

[The Appellant's] statements raise questions to his ability to unbiasedly police the City and monitor residents in real time.

Mr. Brown testified without challenge that the Appellant was not involved in monitoring residents, that he did not hold a leadership role, and that he was not a policy maker. According to Mr. Brown, the Appellant worked on cybersecurity protocols and was not in a position to influence policing or how the police department monitored criminal activity. (Tr. at 108 - 111).

#### **F. Appellant's Explanation**

The Appellant testified as to his intent in forwarding the post. He stated that he is an advocate of peaceful protest, but against rioters who undermine peaceful protest and may do violence. He did not create the post and thought it was a joke that he could forward to his Facebook friends. He liked the post, not to incite violence, but to comment on the right of individuals to defend themselves if they are attacked. He stated that, once the investigation was brought to his attention, he could see how the post could be seen differently than he intended. (Tr. at 116 -119).

### **III. LEGAL ANALYSIS**

#### **A. Was the Appellant Disciplined for Cause?**

It is well settled that in an appeal before the Commission pursuant to *Article X, § 8(A) of the Louisiana Constitution*, the appointing authority has the

burden of proving, by a preponderance of the evidence: (1) the occurrence of the complained of activity; and (2) that the conduct complained of impaired the efficiency of the public service in which the Appointing Authority is engaged. *Gast v. Dep't of Police*, 2013-0781, pp. 3-4 (La. App 4 Cir. 3/13/14), 137 So.3d 731, 733. If the Commission finds that an Appointing Authority has met its initial burden and had sufficient cause to discipline, it must then determine if that discipline "was commensurate with the infraction." *Abbott v. New Orleans Police Dep't*, 2014-0993, p. 7 (La. App. 4 Cir. 2/11/15), 165 So.3d 191, 197.

The undisputed facts establish that the Appellant shared a private post with his friends on Facebook that resulted in an on-line news article portraying the City in a negative light. The post was offensive to many and was perceived to glorify the use of violence. As evidenced by the on-line news article, the Appellant's expression of opinion was poorly timed and subject to manipulation and embellishment by the news media. Regardless of the Appellant's personal beliefs regarding the use of violence when confronted by rioters as opposed to peaceful protestors, his opinions were easily misconstrued, causing the Appointing Authority embarrassment. As such, the Appointing Authority has established by a preponderance of evidence that it disciplined the Appellant for cause and that the Appellant's misconduct impaired the efficiency of the public service in which the Appointing Authority is engaged.

**B. Was the Discipline Commensurate with the Infraction?**

The Civil Service Commission has a duty to decide independently, from the facts presented, whether the Appointing Authority has good or lawful cause for taking disciplinary action and, if so, whether the punishment imposed is commensurate with the dereliction. *Walters, v. Department of Police of New Orleans*, 454 So. 2d 106 (La. 1984). As recently reaffirmed in *Matusoff v. Department of Fire*, 2020 WL 2562940, No. 2019-CA-0932 (La. App. 4 Cir, 5/20/20; writ denied, 303 So. 3d 313 (La., 10/10/20), "termination from permanent employment is the most extreme form of disciplinary action that can be taken against a classified employee. *Honore' v. Dep't of Public Works*, 2014-0986, p. 16 (La. App. 4 Cir. 10/29/15), 178 So.3d 1120, 1131. This Court has held that [t]ermination or dismissal is the most severe form of disciplinary action that can be taken by the Appointing Authority, and should be reserved for the most serious violation." *Matthew v Dep't of Police*, 98-0467 (La. App. 4 Cir.11/18/98), 723 So.2d 1044, 1049; see also *Barquet v. Dep't of Welfare*, 620 So.2d 501, 507 (La. App. 4 Cir. 1993)... In determining whether discipline is commensurate with the infraction, the Civil Service Commission considers the nature of the offense as well as the employee's work record and previous disciplinary record. *Hills v. New Orleans City Council*, 98-1101, pp. 6-7 (La. App. 4 Cir. 12/9/98), 725 So.2d 55, 58."

Fully cognizant of the legal requirements created pursuant to *Article X, § 8(A) of the Louisiana Constitution* and subsequent case law, CAO Policy



Memorandum No. 83 (R), Section VI explicitly states, "employee violations of a standard of behavior as set forth in this memorandum may subject the employee to disciplinary action and possible termination of employment. The City of New Orleans endorses the use ...of progressive disciplinary action. The suggested progression is verbal warning, written warning, suspension, demotion if circumstances warrant and termination. The implementation of disciplinary measures shall be at the discretion of a supervisor and/or the appointing authority." (NOSEP Exh. 6).

Termination of employment is not commensurate with the infraction. While not condoning the opinions expressed by the Appellant, it is clear that the Appellant did not advocate violence against protestors exercising their constitutional right to protest as Mr. Arnold determined. The Appellant expressed an opinion regarding rioters that is shared by many who coexist in a very divided community. Thus, the Appointing Authority has abused its discretion by taking such severe disciplinary action.

Regardless of the political climate, The Appointing Authority cannot terminate an employee, one it described as an excellent employee with no record of violence or misconduct, because of an inflammatory news article that distorted the Appellant's opinions and his role as a City employee. Further, there is no evidence to suggest that the Appellant had committed such an indiscretion in the past or would repeat his indiscretion in the future, regardless of his personally held opinions. In fact, a progressive disciplinary policy exists for

that very purpose. Initial discipline places an employee on notice of the Appointing Authority's expectations and warns an employee that more severe disciplinary action may occur, including possible termination, if the employee repeats his or her transgression.

The Appellant's termination concerned non-work-related activity which did not reflect upon his ability to perform the functions of his job. He is a mid-level employee with a valuable skill set who has served the City well. To terminate the Appellant because of this single indiscretion is arbitrary and must be corrected.

#### **IV. CONCLUSION**

While the Appointing Authority has established by a preponderance of evidence that the Appellant violated its social media policy, it has failed to establish that termination was an appropriate penalty.

Considering the foregoing, the Appellant's appeal should be GRANTED in part, and DENIED in part. The Appointing Authority should be ordered to immediately reinstate the Appellant. Further, the appeal should be remanded to the Appointing Authority to determine an appropriate and less severe penalty. Once an appropriate penalty is determined, back pay should be calculated based upon that determination.

February 13, 2021

DATE

s/ Jay Ginsberg

HEARING EXAMINER