

**IN ARBITRATION BEFORE THE
FEDERAL MEDIATION AND CONCILIATION SERVICE**

STEVE LECLAIR and PROFESSIONAL
FIREFIGHTERS ASSOCIATION OF
OMAHA, LOCAL 385,

Grievants,

v.

CITY OF OMAHA,

Defendant.

) FMCS Case No. 190419-06346

)

)

)

)

)

)

)

)

)

**GRIEVANTS'
POST HEARING ARGUMENT**

ISSUE STATEMENT

The issue statement submitted by the Union was:

Was the termination of Firefighter LeClair supported by just cause and if not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article. 6 Discharge, Discipline, and Counseling.

Section. Disciplinary Action - - Cause: Any action which reflects discredit upon the service or as a direct hinderance to the effective performance of the city government functions shall be considered good cause for disciplinary action. The following are declared to be good cause for disciplinary action against any employee, though charges may be based upon causes and complaints other than those listed:

(e) offensive conduct or language toward the public or towards city officers or employees;

(j) Commissions of acts or omissions unbecoming and incumbent of the particular office or position held, which render its reprimand, suspension, demotion, or discharge necessary or desirable for the economic or efficient conduct of business of the city or for the best interests of the city government;

Section 3. Disciplinary Actions – Suspensions: Any employee may be suspended without pay for cause for a period or periods not exceeding twenty (20) working days if employee is assigned suppression duties; thirty (30) working days if employee is assigned non- suppression duties in any twelve (12) consecutive months. A written notice for such suspension shall be transmitted to the employee; a copy of this shall be transmitted to the Human Resources Department. Such notice shall include the reasons for and the duration of the suspension. An employee may request that any suspension that is greater than three (3) years old be removed from any city file except as provided in section 13 and such suspension shall be removed. An employee shall have the right to have his/her suspension without pay deducted from his/her annual leave or comp time for the first seventy-two (72) hours of a suspension for suppression employees or for the first forty-eight (48) hours of a suspension for Bureau employee. For any suspension after the first seventy-two (72) hours for suppression employees or for the first forty-eight (48) hours of a suspension for Bureau employees, the Fire Chief shall have discretion to allow an employee to exchange his/her remaining suspension time deducted from his/her leave banks.

Section 5. Disciplinary Actions – Discharge: An employee may be discharged for cause. Prior to the discharge of a non-probationary employee becoming effective a written statement containing the reasons for the discharge shall be transmitted to the employee and to the Human Resources Department. The city may suspend such employee immediately and indefinitely with pay. Prior to the discharge becoming effective such employee shall be entitled to present his side of the facts surrounding the discharge to an impartial city decision-maker.

Section 6. It is understood between the parties that the city may discipline an employee without actually questioning the employee. If the disciplinary action against the employee is greater than a written reprimand, that employee will be questioned by the proper authorities prior

to the discipline being given so that such employee can give his/her side of the story. However, any time an employee is questioned regarding a matter which may, in the reasonable belief of the city, result in the employee being disciplined, the employee shall be entitled to the following rights:

Firefighters Bill of Rights – Paragraphs 1 and 9

1. Prior to any questioning, as above, the employee shall receive written notice of forty-eight (48) hours, regarding the circumstances upon which the proposed discipline may be based. Should the questioning be based upon a formal citizen's complaint, the employee shall be entitled to receive a copy of the citizen's complaint prior to questioning.

9. The name of the employee involved in the interrogation shall be kept confidential and shall not be released to the news media by the city without his/her express consent.

Article 7. Appeal Procedure

Section 1. Any employee who has satisfactorily completed his probationary period of employment with the city of Omaha shall have the right to appeal to the personnel board or arbitration from a suspension, discharge, or reduction in classification or pay (excluding performance appraisals) not later than fifteen (15) working days after receiving notice of such action.

Section 2. The appeal must be in writing setting forth the reasons why such action is improper and submitted to Human Resources Director within fifteen (15) working day time period, who shall call such appeal to be placed on the agenda of the next regular schedule personnel board meeting, provided the appeal is received at least fifteen (15) working days prior to the regularly scheduled personnel Board meeting otherwise it shall be placed on the agenda of the personal board for the following regularly scheduled meeting. Should the employee desire to appeal to arbitration, such appeal shall follow the above requirements and limitations. Such appeal however

shall request arbitration. Upon receipt of an arbitration request the Human resources director shall refer the request to the Labor Relations Director who shall take the steps necessary to arrange for arbitration. The procedures and arbitration rules shall be the same as set forth in Article 8, Section 2, Step 3.

Section 3. The personnel Board or arbitrator shall not have jurisdiction to discharge an employee upon an appeal from a suspension nor have jurisdiction to increase disciplinary action being appealed.

Article 8 - Grievance Procedure

Section 1. GRIEVANCE as defined in this agreement is a claim of an employee arising during the term of this agreement which is not limited to matters of interpretation or application of the express provisions of this agreement but excludes discharge and disciplinary actions.

Section 2 - STEP 3 - If a satisfactory settlement is not reached under step 2 hereof, either the aggrieved employee or the city of Omaha by and through the Fire Chief or his representative shall, within fifteen (15) working days from the expiration of the time limits as set forth in step 2 or any extension thereof as set forth in section 3, by written notice to the other party request arbitration or that the grievance be heard by the personal board.

That city shall furnish the Union with a copy of any such notice sent or received requesting arbitration.

The arbitration proceeding shall be conducted by an arbitrator to be mutually selected by the parties within a reasonable time after the submission of written demand for arbitration, but not to exceed thirty (30) calendar days. Such arbitrator shall be selected by the parties from a list of local arbitrators. Such list shall be compiled and agreed to by the parties on a yearly basis, or as needed. If the parties are unable to mutually agree as to the selection of an arbitrator within such

time limit and either party continues to demand arbitration, the parties shall jointly request the Federal Mediation and Conciliation Service to provide a list of seven (7) arbitrators. Each party shall have the right to strike three (3) names from the list of arbitrators as submitted. The party requesting arbitration shall have the right to strike the first name and the other party shall then strike one name with same process being repeated so that the person remaining on the list shall be the arbitrator.

There shall be no appeal from the arbitrator's decision. It shall be final and binding upon the Union, the city of Omaha, and on all bargaining unit employees. When an employee elects to process a grievance without union representation or assistance, the Union shall have the right after the arbitrator has been selected to intervene and become a party to the proceeding.

Authority of the arbitrator is limited to matters of interpretation or application of the express provisions of this agreement and the arbitrator shall have no power or authority to add to, subtract from, or modify any of the terms or provisions of this agreement. In the event the arbitrator finds that he has no authority or power to rule in the case, the matter shall be referred back to the parties without decision or recommendation on the merits of the case. The arbitrator shall be requested by the parties to issue his decision within thirty (30) calendar days after the conclusion of the hearing.

Parties selecting the arbitrator shall share equally the arbitrator's expenses. Each party shall be responsible for compensating its own representatives and witnesses. If a party desires that a record of the testimony be made at the proceedings it may cause such a record to be made at its expense provided, however, that it supplies the arbitrator and other party or parties with copies of such record at no expense to the other party or parties.

JUST-CAUSE STANDARD IN ARBITRATION

I. JUST CAUSE AND INDUSTRIAL DUE PROCESS COMPEL LECLAIR'S REINSTATEMENT.

The principle that discharge is normally reserved as a last resort is time honored and pervasive in the labor arbitration field. As one panel stated many decades ago:

It is a well-established principle in arbitration and industrial relations that the primary purpose of industrial punishment is not to inflict punishment for wrongdoing but to correct individual faults and behavior and to prevent further infractions. Both the Company and the employee lose when the employee is terminated. It is for this reason that discharge is normally invoked only as a last resort, after it has become abundantly clear that corrective measures will not succeed.

Texaco Inc. and Oil, Chemical & Atomic Workers International Union, Local 1-128, 42 LA 408, 409 (Panel of Arbitrators, Prasow, Sederholm (dissenting) and Braughton, 1963).

The employer bears the burden of establishing that just cause was present in this case and that means both that the employer can demonstrate a work rule violation and that termination was the appropriate remedy given the gravity of the offense and surrounding circumstances. *Ashland Petroleum Co.* 90 LA 681, 685 (Volz, 1988). It is well established that under a negotiated "just cause" standard, the Arbitrator has the authority to fashion a lesser penalty. *Id.* at 688.

Mitigating factors such as the employee's good work record and whether the employer has acted arbitrarily, irrationally or discriminatory in administering discipline can be considered when

considering whether an employee who violated a work rule should nonetheless be reinstated by an Arbitrator. *Chicago Transit Authority*, 80 LA 663, 668 (Myers, 1983).

The Arbitrator may and should consider evidence of disparate treatment when determining the nature and extent of lesser discipline including whether the company imposed greater punishment on the grievant than that meted out to an employee engaged in a similar work rule violation. *Georgia Pacific Corp.*, 118 LA 675,680-681 (Peterson, 2002). A slipshod investigation of an employee demonstrating a rush to judgment “. . . in an attempt to terminate . . .” can be considered as a violation of a contractual just cause provision. *Id.*, at 681. Evidence that the employer misstated evidence in its investigation can lead to the conclusion that the employer was seeking to terminate an employee without properly considering the evidence. *Id.*

It is a well-accepted principle of labor arbitration that in evaluating discipline under a just cause provision, the penalty selected by the employer must be consistent with other penalties imposed for similar offenses under similar circumstances. *Discipline and Discharge in Arbitration, 3rd Edition, p. 85, Brand and Biren (2015)*. Furthermore, parties are free to agree that certain offenses will constitute just cause for discharge, but an employer cannot unilaterally fix a penalty for rule violations that is inconsistent with the contractual just cause standard. *Pinwheeling Enclosure*, 121 LA 1220 (Dean 2005). One arbitrator has concluded that to begin strict enforcement of rules that had not been uniformly enforced previously, the employer must publish its intent to do so: “[T] this publication does not take place by strictly enforcing the rules, in the first instance by punitive action against the employee.” *ITWCIP Stampings*, 117 LA 1777, 1780 (Richman 2002) When a new chief executive decides to punish workplace misconduct with termination when such conduct did not uniformly lead to termination prior to that executive's appointment, the employer is obligated to inform its workers that its former practice of

progressively disciplining employees involved in such conduct or rule violations will not continue and that workers so involved will henceforth be subject to discharge. See *United Auto Aerospace and Agricultural Implement Workers of America, Local 856 and Aircraft Braking Systems*, 25 LAIS, 3325, 1997 WL 34824623 (August 28, 1997).

A discipline may only be considered to be excessive by an arbitrator if it is disproportionate to the degree of the offense, if it is out of step with the principles of progressive discipline, if it is punitive rather than corrective, or if mitigating circumstances were ignored. *Discipline and Discharge in Arbitration*, 103, (Brand and Birren Eds., BNA Books 2nd Edition, 2015).

It is clear that when an employer violates the rights of employee's subject to an investigation for disciplinary proceedings, an Arbitrator may overturn a discharge and order some lesser form of discipline. See *Goshen Rubber, Inc.* 99 LA 770 (Briggs 1992) (Just cause did not exist to discharge employee for alcohol related incident. The employee was not offered Union representation).

In the City's opening statement, Ms. Guttau argued that this case should be somehow influenced by case captioned *Wheeler v. County of Sarpy and the Sarpy County Sheriff's Office Merit Commission*, 2017 WL 902217 (not designated for permanent publication). First, as case not designated for publication, by rule in Nebraska *Wheeler* may be cited as controlling authority ". . . only when such case is related, by identity between the parties or the cause action, to the case then before the Court." Neb. Ct. R. App. Prac., §2-102(e). The present case is a contract dispute regarding whether the employer had "just cause" under a CBA to terminate an employee, not an appeal of case before a Sheriff's Merit Commission. Furthermore, that case involved an actual sexual touching including allegations that the employee grabbed a woman's breast in a bar, grabbed her buttocks and placed his finger near her vagina. That is not remotely comparable to the

allegations in the present case. For these reasons, any request that the Arbitrator ignore the traditional and well-established arbitral law on just cause in an effort to have the matter analyzed as if this were an appeal from a statutory civil service commission should be rejected.

ESTABLISHED FACTS

I. STEVE LECLAIR

A. Life of Service

Steve LeClair has dedicated his life to the service of others. He served his country through multiple military deployments. He served our community as a firefighter. He made a conscious decision to protect the rights of those he works with through his service in organized labor. Where within his lifetime of service is there any trace of bigotry, hatred, intolerance, or closet racism towards others based by race, color, religion, sex, or sexual orientation? The City produced no such evidence because it is nonexistent. A picture of Steve's moral fabric was painted by the numerous witnesses that spoke on his behalf. These witnesses, black and white, female and male, representatives of minority associations, current and former Senators, a County Commissioner, a Pastor, and a seated U.S. Congressman described Steve's character as an advocate for diversity, the polar opposite of racist. Most telling was the willingness of the four (4) witnesses holding political offices to resist the Mayor's witness tampering efforts. The Mayor and her counsel's efforts to intimidate these witnesses in an effort to influence their testimony was uniformly rejected and each still came forward (absent the live testimony of Congressman Bacon) and shared their common experience that Steve is not a racist. Rather, he is a dedicated advocate for all those he serves.

B. Military

Steve fought for this country, side by side with soldiers with diverse ethnic backgrounds.

One of Steve's fellow servicemen, Todd Boyd Sr. Sgt. Major USAR Ret., who is an African American, described Steve's strong work ethic, moral compass, leadership skills, and a complete lack of bigotry or discriminatory animus. (T:590-594)

C. Firefighter

Steve has served the City of Omaha as a Firefighter for seventeen (17) years. He worked in economically disadvantaged areas of Omaha serving primarily minority citizens. Aside from the off-duty incident, which is the focus of this arbitration, there has never been a citizen's complaint made against Steve. Following this incident on November 9, 2018 through the time of his administrative leave on December 21, 2018, Steve remained in service and again there were no citizen complaints tendered. State Senator Justin Wayne, described himself as being of mixed race, including African American. As a representative of the North Omaha/Florence District, he serves the district with the highest concentration of minorities. In that role, he would have been informed by his constituents if Steve engaged in racist conduct or exhibited racist traits. He received no complaint's regarding Steve. (T617:1-9) Rather, he made himself available to the community and actively participated in community events focused on minority groups. Sen Wayne agreed to testify even in light of Steve's negative press coverage. His testimony focused upon his direct experience with Steve. He came forth to testify even in the face of the City's efforts to persuade him otherwise. He had not observed any conduct on the part of LeClair that Wayne would deem to be racist. (T603:1-13). Wayne, a former management side lawyer with the Union Pacific Railroad, concluded Steve was not a racist and termination was not appropriate given the whole picture of Mr. LeClair. (T607:18-25, 609:1-8).

Within the fire department, firefighters live with one another for twenty-four (24) hour shifts. They not only work together, they also eat, sleep, and socialize with one another over

extended periods of time. The personality and character of each firefighter is well known to their peers. Here, fellow firefighters, male and female, including multiple African Americans, all shared their support for Steve. His nephew, an African American Firefighter, described Steve's encouragement and support for his pursuit of a career with the Omaha Fire Department. The City stipulated that the additional seven (7) witnesses who were not called, would have similarly testified that Steve has never engaged in any racist conduct and they would allow Steve to serve their family, friends, and community without reservation. (T619-621) Steve LeClair is not a racist and has never subscribed to those views.

D. Legislative Advocacy

Steve has been active in collective bargaining on behalf of the women and men composing the Omaha Fire Department. This has, in part, brought him into direct conflict with the opposing political agenda of Jean Stothert both in her role with the City Council and as Mayor. He pushed for healthcare changes within the CBA that **afforded health care coverage to same sex partners assisting the LGBT community** before the same became federally mandated.

He has also engaged in legislative advocacy to protect and promote the diverse rights of Local 385 members. **He helped to pass the mental-mental bill benefiting those with mental health injuries.** The bill provides workers compensation coverage for first responders who suffered mental health injuries without the need of an accompanying physical injury. In doing so, Steve opened up the minds of Senators to the disabling impact of depression, anxiety, and PTSD on first responders.

Steve helped Congressman Bacon pass into federal law the Firefighter Cancer Registry program to track firefighter cancer development secondary to occupational exposures, **assisting firefighters who develop physical injury or disease secondary to that occupational exposure.**

(Ex 80, pg. 4).

He fought for diversity within what he perceived as Omaha's Lilly White department. He spearheaded efforts to obtain grants from the International Association of Firefighters "IAFF" to introduce school children to vocations such as firefighting. This effort was confirmed through the testimony of Jim Ridley, of the IAFF, who is an African American. He had been approached months before this incident by Steve to discuss programs gaining traction to achieve diversity within departments including a program in place in Nashville. (Ex 88) While yet to secure the grant, LeClair has worked hard and succeeded in introducing a pilot program in the Ralston School District (a suburban community adjacent to Omaha). (TR957:319). LeClair's goal is that the program be adopted within the Omaha Public School system. *Id.* These extensive efforts to secure diversity and equality in the workforce negates the City casting LeClair as a closet racist.

II. THE INCIDENT

On the night of November 9, 2018, LeClair made a mistake, which he readily acknowledges. He was speaking of social issues throughout the evening. He intended on making a positive statement reflective of welcomed diversity, "What White Power?" That statement, even with the best intentions to someone who did not know the context of his statements, is likely to be misunderstood and in this instance, upsetting. Impaired communications in this setting was a mistake. He was drinking and made what he believed was a positive statement at the wrong time, under the wrong conditions, to the wrong person, and the message he intended to express was not clearly relayed, nor received, by Miss Jackson.

A. Context Matters

The day in question was a day of celebration for Steve. He had been able to reach closure on issues surrounding the Union and its Health Care Trust. He was also invited to attend a

retirement party at Tiger Tom's. That evening, he was accompanied by persons close to him in the labor movement, including John Corrigan, the union's attorney, and Darren Garrean, a fellow firefighter who is President of the Nebraska Professional Firefighter's Association. Topic matters discussed that evening dealt with social issues including bigotry in this country, mass shootings, the white supremacy movement, and legislative efforts to respond to these growing threats.

The video depicts Steve bouncing from one person to another engaging in hugging, handshakes, and lively conversations consistent with his welcoming personality. He knew many of the patrons within the bar but was unfamiliar with Ms. Jackson and her friend and was unaware as to whether they were attending the same retirement gathering. Steve was described by the patrons that evening, including Jackson, as being intoxicated. That evening, he had five (5) to six (6) beers and a couple of shots at Tiger Tom's and had drank prior to his arrival at retirement party.

In the video Steve is seen advocating for "D," an African American patron, to gain for him a new pitcher of beer. Steve had purchased drinks for many of the patrons that night including the Jackson party. As the exchange between Steve and the bartender drags on, "D" attempts to hug Steve as Steve is being ushered away. Why would Steve advocate for an African American and then whisper a racist statement to Jackson and maliciously assault her? It simply does not make sense.

His actions thereafter were the product of impaired judgement and communication but carried no ill intent. His global commentary of "what white power?" and the context of that comment was lost on Jackson and she was offended. It should be noted though that Jackson described LeClair speaking to her like a person talking to ". . . some buddies. . ." when she heard him use the words "white power" which is further evidence of a lack of malicious intent consistent with LeClair's statement about his intent. (Ex. R-5, 16). LeClair readily acknowledged that

Jackson was not part of his earlier dialog that evening and clearly did not understand why he would make that statement. LeClair defending himself in the press does not equate to an unwillingness to acknowledge his poor judgment that evening.

On December 7th, 2018, Ms. Jackson's first and only written statement, that Steve LeClair "shoved/elbowed" her was delivered to the Fire Department. (Ex. R-25, p.2, Ex. 78 p. 3). That unwanted touching then morphed into a punch fifty-six (56) days after the initial incident when she called the police on January 8, 2019 to report an assault. It was difficult for LeClair to accurately judge his own level of intoxication. LeClair's confused look when confronted by Lynch that evening demonstrated his lack of self-awareness that he forearmed Jackson harder than he thought. His lack of understanding supports his lack of intent. LeClair has been remorseful for any harm caused by his actions, but that does not negate his right to defend himself against the false accusation that he punched a woman, which allegation was plastered in the press following the Omaha Police Department forwarding LeClair's supplemental police report to Mayor Stothert. LeClair found himself being tried in the press, and his truthful response does not equate to a lack of accountability. His self-defense with respect to responding to a false public allegation against him does not negate his remorse.

LeClair's testimony regarding the context of his actions and statements was not rebutted by the City. The City did not call the alleged victim or any witnesses to his actions or words to rebut that explanation.

LeClair acknowledges it was inappropriate for him to reach out to Remus following his placement on administrative leave. He advised Remus that she, "might have something come across your desk in regards to I me. I'm sorry about that. I hope, it doesn't change your opinion of me." (T24:15-20) LeClair had not been interviewed regarding the incident he self-reported five (5)

weeks earlier (T27:23-28:7) but was suddenly being removed from work. He was distraught and acknowledged he made a mistake reaching out to those he knew, Kim Remus, Tim Young, and Bernard in den Bosch to question his removal. Is this insubordination? Yes. The question is the application of appropriate discipline. His actions based upon the historical practice of this department would not reach close to it being a terminable offense.

Yet, the City never intended upon having this matter fairly investigated. The City never intended upon applying discipline commensurate with the infraction. The City never intended on considering mitigating factors supporting retention over termination. This was a directed investigation with a directed outcome.

III. UNFAIR INVESTIGATION AND DISCIPLINARY PROCESS

- 11/13/2019 Jackson signed the **only** recorded complaint in her own writing which wasn't delivered to the Fire Department until December 7th, 2019, wherein she stated, "Put his arm around me stating white/power and then he shoved/elbowed me into the bar." (E47, 78)

A. Internal Affairs investigation deviated from the norm

- Internal Affairs - Remus described a message on an answering machine from Jackson. (T25:12-19) Her notes fail to reflect that not only did LeClair self-report to Tim Young and Chief Olsen, but he also advised her that a matter may be coming across her desk. (T27:23-28:12; 51:13-52:7) She further failed to keep notes regarding the joint meeting between herself, Chief Olsen, Assistant Chief Bossman, and Tim Young where LeClair's investigation was discussed. (T67:1-16; 68:3-24) The Internal investigation was commenced at the encouragement of the department. **Contrary to past practice Remus admitted calling back Jackson and helping with the complaint.**

Q: Okay. Is it typical if someone calls that you would return their call and see if they need assistance finding the form?

A: No.
Q: Okay. Why did you do that?
A: I'm not sure. (T28:20-25)

- Investigative process was overseen by the Mayor from the very beginning. Young described meeting with the Mayor wherein it was decided in that meeting outside the presence of Chief Olsen, that Grauman, the City's Labor Relations Director, would act as the investigator.
- Remus had to admit that LeClair promoted diversity within the workforce, and she personally benefited from his efforts when he arranged for her and a fellow female Firefighter's attendance at a leadership conference where she attended courses discussing emerging issues of woman in the fire service, promoting women, challenging racism, and discrimination. (T69:4-71:7)
- Between November 14th and 19th, 2018, Grauman and Remus had a couple of discussions about whether the complaint had been received. (T29:15-21, 31:22-32:4) LeClair's Attorney in the criminal matter, Patrick Dunn, testified he did due diligence and checked on Jackson's criminal background, which revealed shoplifting charges, which background check would eventually also be done by the City Prosecutor, Kuhse. (T409:18-411:6) A criminal background is a relevant consideration when considering a party's credibility. (T434:24-435:5) By November 19, 2018 Remus asked Grauman what he wanted to do given the lack of response. (T29:22-25). That is not something that she would normally do. (T61:10-15) During this same time Young is calling Jackson and speaking with her attorney to in his words, see that the process was "preserved". (T571:17-21, 518:13)

B. Jackson Finally Files Complaint with Fire Department

- Finally, on December 6, 2018, Remus received a message from Jackson that she would be moving forward with a complaint. (T32:15-33:1) The next day she speaks with her attorney,

Collins, who suggested that Jackson had been leaving unreturned messages, which Remus disclaimed. (T33:2-9; 62:2-10) After Jackson's complaint was filed, Grauman acted as the investigator not Remus. (T33:10-20) **Inconsistent with normal practice, Remus did not lead the investigation and Grauman dictated what questions she was to ask witnesses.** (E43, T42:18-43:1; 75:12-15) **This was the only case that she had turned over to HR.** (T58:6-9; 59:8-11)

- Initiation of an Investigation, "2. The Investigator sets up an appointment with Citizen to formalize the complaint. The Investigator tapes the interview with the citizen. (E78, pg5; T56:7-57:12) Jackson never agreed, at any point, to give a recorded statement. The Chief of Police and his investigator, Lt. Ott, and prosecutor, Kuhse, all acknowledged they have never personally seen a victim refuse to give a recorded statement. (T92:17-93:1) The purpose of a taped interview is to protect the officer. (T56:7-57:3) A recorded interview compels a witness to consider the truthfulness of their statement. Jackson's written statement is in many ways inconsistent with her police report and interviews:

**Shove v. Punch knocking her onto the top of the bar;
Whisper v. Talking to Guys;
Smell good v. Your fucking sexy, I would take you into the bathroom.
Identified LeClair the next day from video clip v. Being told by a Friend
who in turn was told by Spanky the KENO writer as to LeClair's
identiy. (T73:19-22; 74:9-22)**

- December 18, 2018 – LeClair, during an unrelated IA meeting with Remus, apologized for the complaint having been filed. He was beside himself, and the allegations were not reflective of LeClair's character as who she knew him to be. (T71:8-20) He further explained that his statements were being taken out of context, mentioned she had a criminal history, and asked who she had as an attorney. (E24 pg3, T35:25-38:3) **Remus questioned the credibility and motive of Jackson.** (T47:3-20) LeClair has held to his position that he did not punch Jackson

and that his comments were taken out of context. (T142:3-143:24) **Remus did not believe Jackson's suggestion that she was hit with such force that she fell on top of the bar.** (T47:3-20) **Her review of the video confirmed her allegations set forth in the police report did not occur as described.** (T49:13-18; 71:21-72:3) Chief Schmaderer also confirmed that LeClair did not punch Jackson as reported. (T120:22-25)

C. LeClair Placed on Administrative Leave Before he was Even Interviewed

- December 21, 2018 - Chief Olsen placed Steve on paid administrative leave before he even interviewed LeClair regarding an incident he had self-reported five (5) weeks earlier. Olsen suggested he had no ill will against Steve or the Union but had to acknowledge the Union filed two (2) legal proceedings, which directly impacted his employment. The first legal action taken against him involved his improper assignment to work as an Assistant Chief. That arbitration lead to his removal and corresponding economic harm. The second action concerned an allegation that his appointment to Fire Chief by the Mayor was in contradiction to the existing promotional ordinance and as such, was improper. That lead to an ordinance change and compensation of two (2) candidate firefighters allegedly harmed by the Mayor's variance in the appointment process. (TR767:3-11).
- December 21, 2018 - Remus was told by Assistant Chief Bossman that she delivered the administrative leave letter to LeClair and described his response. (E25) LeClair distraught, calls Remus venting and she indicates the suspension was not due to the meeting on December 18, 2018 but based on a different meeting that she failed to keep notes on. (E24) The Chief himself did not articulate any conduct on LeClair's part that actually interfered with the investigation, rather it was his conjecture on the impact LeClair's contact with Remus may have had. (TR737:9-14) (Oslen cited as a basis for the discipline the ". . . attempt to intervene

or persuade, or whatever contact was made with Kim Remus, the effect that would either have on her in terms of pressure maybe and/or whatever influence that might have had on her investigation, or her portion of the investigation.”).

D. Police Report Filed and Released to the Press

- January 8, 2019 - Grauman interviewed Jackson’s friend Leandra Toney. (E78, pg20) That same day the police are called to the First National Bank building in downtown Omaha to respond to an assault. (E78, pg12-13) The City failed to call Grauman who would have been questioned as to whether he encouraged Jackson to call the police that same day. Jackson reports the alleged assault occurred on November 9, 2018. (E78, pg12-13)
 - **She was punched in the back**
 - **Force of the punch caused her to fall forward out of her seat onto the bar.**
 - **Whispered in her ear, White Power, then punched her in the back.”** (E78, pg12-13)
- January 8, 2019 Assistant Chief Scott Gray emails himself LeClair’s police reports. (E78, pg16) The Chief engaged in no formal investigation of how the police reports were released to the Omaha World Herald, “OWH.” He simply raised the issue in a staff meeting and did not question Deputy Chief Gray as to why he was sending those reports to himself the night before they were released to the press. (T96:1-4) Supplemental reports are not public record and should not be released to the press. (T87:1-3; E78 pg15; T98 pg2-4)
- January 9, 2019 Transmission of preliminary police reports:
 - 9:33am - Jackie Williams to Cerveny, with attachments
 - 10:45am - Steve Cerveny to Chief Todd Schmaderer and DC Ken Kanger
 - 11:00am - Gray to Chief Schmaderer

- 12:30pm** - **Police Chief Todd Schmaderer to Stothert (E78 pg18)**
- 1:25pm - Tim Young to David Grauman
- 2:03pm - Grauman to Police Chief Schmaderer, Young, and Kanger (E78 pg20)
- 2:38pm** - **Stothert to Marty Bilek and Kimberly Hord (E78 pg21)**
- 4:09 pm** - **Stothert to City Council member Ben Gray (E78 pg 22)**
- 5:58pm** - **Chief Olsen to Stothert, and Carrie Murphy (E78 pg24)**

The Police reports are sent to the Mayor versus Chief Olsen. (T90:18-23) The Mayor was provided with the supplemental reports, which were not public record and should not have been released to the press and the release of those supplemental reports constitutes a violation of policy. (T93:6-95:1; 411:11-22) As a former prosecutor for Douglas County, Nebraska, Dunn never heard of a situation where the police Chief sent preliminary reports to the Mayor. (T412:5-12) The OWH was sent the confidential police reports and it published in a story “...**Steve LeClair, a firefighter and president of the Omaha Firefighters Union, punched her, used lewd language and whispered ‘white power’ in her ear.**” (E81) The OWH cited Jackson’s allegations contained within her police report.

E. Chief Olsen and Mayor Stothert violated LeClair’s Rights under the CBA

Not only are the police reports to be kept confidential but so are the City’s interrogation of its employees. Mayor Stothert and Chief Olsen violated LeClair’s rights under the parties Collective Bargaining Agreement, “CBA.”

Chief Olsen originally proposed the following press release:

“On December 21, 2018, firefighter LeClair was placed on paid administrative leave pending the outcome of both internal and Police investigations.”

- 6:09pm** - **Mayor’s office Carrie Murphy to Michelle Bandur hearst.com (E78. pg23)**

Chief Olsen's press release was amended. Tim Young, the HR Director, pointed out to Mayor Stothert the need to edit Olsen's press release because LeClair was not under police investigation on December 21, 2018. (E78, pg 25) He was not under police investigation until January 8, 2019, the day Grauman spoke to Jackson's friend, Leandra Toney, and police were first called to respond to an assault at the First National Bank. The contrived nature of the City's approach can be seen within the following email exchange:

"We had no idea that the police were involved when we put him out administrative leave so that part needs to be removed. The statement needs to be as close to identical as the one from your office that Carrie is putting out." (E78, pg25)

Mayor Stothert then issued a statement to the press naming LeClair.

"When the City became aware of accusations made against Mr. LeClair, an internal investigation was started by the Omaha Fire Department. Mr. LeClair was placed on paid administrative leave December 21, which is his current status. Mayor Jean Stothert." (E78 pg23)

Chief Olsen acknowledged this statement violated LeClair's rights under the parties CBA, Article 6 (6)(9). **"The name of the employee involved in the interrogation shall be kept confidential and shall not be released to the news media by the City without his/her express consent.**

- January 10, 2019 - LeClair issues Press Release responding to the false allegation that he punched Jackson and points out the substantial delay in her filing the complaints. (E78 pg26)

F. Chief Schmaderer Directs That the Investigation/Charges be Completed Within the Week

- January 9, 2019 - Chief Schmaderer alleges he handed off the investigation to Deputy Chief Kanger, he did not read the email, and had no further involvement in LeClair's investigation. (T989-25; 100:4-24) That statement is inconsistent with the testimony of Kuhse that he meets

with the Chief and his command staff to review the matter, the video, and jointly decided how the investigation should be handled. (T343:25-345:6)

- January 24, 2019 - Kanger to Cerneny, “On Tuesday I spoke with Chip and asked that this investigation be completed by this week for the most part. **The Chief had a similar request and he had to advise the Mayor when it would be wrapping up. Make sure they brief Kuhse and I can get the Chief an update on what Kuhse is planning on doing with LeClair by tomorrow...Kuhse can make a decision.” Chief Schmaderer was reporting to Mayor Stothert, not Chief Olsen nor prosecutor Kuhse. (T113:11-25)**

G. Ott Criminal Investigation was Outside the Norm

- Lt. Ott agreed that it was abnormal for a sergeant and lieutenant to investigate an incident of this nature. (T174:10-12; 176:2-7; 178:7-19; 224:18-225:13) Further, directing Kuhse to make a filing decision for a minor charge was out of the ordinary. (T226:8-24) The scope of the investigation was abnormal. (T178:7-179:6) Dunn has never seen an investigation of this magnitude for a petty offense let alone a felony. (T404:11- 405:18) Kuhse agreed it was outside the norm. (T345:7-21) Ott had never received a thank you from Kuhse prior to this investigation. (T228:7-12) He never saw the only handwritten statement in Jackson’s own words. (T180:1-181:3) He was never involved in a case where the victim refused to have their statement recorded. (T185:9-13) Looking at the original police report, he agrees Jackson was not punched nor thrown onto the bar as claimed. (T159:17-25; 186:21-187:6) Even Defense counsel had to ultimately concede that Jackson was not punched, “I’ll concede he didn’t punch her with his fist.” (T428:12-13) Jackson said she dropped her phone, but her phone was not knocked out of her hand as alleged. (T157:2-3; 215:19-216:13; 217:8-13) He never had an opportunity to look at the inconsistencies between the only statement signed by Jackson as

compared to her later interview. (T181:4-25;) Jackson's delay in reporting the "assault" is not the norm. (T182:5-24) He reported that LeClair believed his statements were taken out of context, denied punching Jackson but acknowledged he nudged Jackson with more force than he recalled that evening upon review of the video, and denied making physical contact with her based upon rejected advancements. (T142:3-143:24; 145:25-146:14; 151:16-152:23; 153:4-154:1) He acknowledged that Daren Garrean reported discussing political legislative issues with LeClair and his legal counsel was present that evening also but Ott never asked any witnesses what the continuing topics of conversation were with LeClair after Darren left that night. (T212:21-215:10; see also 438:6-439:5; 440:9-441:1) The last interaction with Jackson followed LeClair advocating on behalf of "D," an African American patron, moments earlier to be provided with a new pitcher of beer. (T155:22-156:13; 167:14-168:15; 209:23-210:11) There was nothing in the investigation that revealed that LeClair was an overt racist. (T212:5-19) He agreed it seemed possible that LeClair was confused as to why Lynch wished him to leave the bar. (T220:8-221:13) He agreed that a level of intoxication could impact one's perception and LeClair admitted he had five (5) to six (6) beers and a few shots. (T222:1-223:6) Jackson, her friend, and other witnesses described LeClair as drunk while LeClair did not appear intoxicated to Ryan Lynch, the bar owner. (T232:7-233:21)

- January 30, 2019 - Pamela Volk to Cervney, "The case has been delivered to Kuhse's office." (E78, pg28) Kuhse was provided a massive investigative file involving two petty offenses. The offenses were based upon city ordinance violations and did not statutorily rise in Kuhse's mind to the level of a misdemeanor or felony, thereby denying LeClair the right to trial by jury. Chief Schmaderer agreed that the investigation of LeClair's alleged petty offense rivaled that of an officer involved shooting investigation. (T115:2-12)

H. Kuhse files Charges

Kuhse was originally contacted by John Corrigan, Legal Counsel for the Professional Firefighter's Association of Omaha, who asked whether charges had been filed, but he could find no record of charges being filed at that time. (T315:9-316:19) He was next contacted by the media to question him regarding an incident involving LeClair at a bar. (T317:2-13) He tried to access the reports the next day, but they had been locked down. (T317:14-318:5) He next meet with Chief Schmaderer and his command staff and watched the video and discussed what steps need to be done for the investigation. (T318:14-22). He initially identified that meeting as occurring in December, but the police report had not even been filed by that time. (T342:8-19) Upon returning back to his office he reported the information to Bernard in de Bosch and Paul Kratz, the City Attorney's, who is a direct report to the Mayor. (T320:14-16) He acknowledged this was not the typical follow-up done by the Omaha Police Department. (T321:5-10) He assigned the case to an Assistant City Prosecutor, Marcus Sladek. (T322:19-24) Kuhse spent one (1) or two (2) hours reviewing the investigative file. (T357:3-13)

- February 1, 2019 **As per Chief Schmaderer's described directive on January 24, 2019, charges were filed by Kuhse.** (T111:10-17; E78 pg29)

8:45am - Kuhse to Chief Schmaderer, CC Kanger, Cerveny and Ott

The City Prosecutor's office handles a hundred thousand cases on a yearly basis. (T341:11-24) The charging decision in Steve LeClair's case was the basis for Matt Kuhse's first press release. (T359:3-360:1; 412:13-22) He forwarded the press release to each media outlet identified by the Mayor's office. (T360:10-361:7) Kuhse could not recall a case where he had written the Chief to thank him for investigation of petty offenses.

9:20am - Mayor's office Carrie Murphy to Kuhse

- 10:24 am - Cerveny to Kanger ,, . do you want this release (when it becomes public) to be handled any particular way from our PIO?“ (CITE).
- 10:48 am - Kanger reply to Cerveny, “I don’t think it is a good look for us to release a misd. arrest to the public ref this case. We normally wouldn’t but I know its high profile. Please let them know so if questions come they can take them to the Chief.” (CITE).
- 11:41am - Kuhse press release was sent to media outlets the Mayor’s Press secretary provided him. (E78, pg35)
- 11:42am - Kuhse press release was sent to OWH. (E78, pg36)
- 12:09pm - Carrie Murphy to Olsen and Young. (E78, pg45)
- 12:14pm - WOWT to Mayor’s office Carrie Murphy. (E78, pg46)
- 12:19pm - Mayor’s office Carrie Murphy sends to news media and Schmaderer, Mayors statement. (E78, pg48)

Mayor Stothert, contrary to Article 6(6)(9), releases a second press statement naming Steve LeClair. Chief Olsen again acknowledged this constituted a violation of LeClair’s rights under the CBA.

- 12:21pm - KPTM to Mayor’s office Murphy. (E78, pg49)
- 12:23pm - Mayor’s office Murphy to KPTM. (E78, pg50)
- 12:35pm - LeClair self-reports charges to Olsen. (E78, pg52)
- 1:02pm - Olsen to Young and Grauman. (E78, pg52)

Kuhse is given the opportunity to reframe the public’s understanding of the unwanted touching of Jackson constituting the assault was not a punch but declined to do so. (E78, pg59)

- 2:58pm - OWH to Kuhse. (E78, pg53-58)

3:02pm - Kuhse to OWH. (E78, pg59)

- February 4, 2019 Young to Kanger request for reports and interviews. (E78, pg64)
- February 5, 2019 Ott to Young, dropped off reports and interviews. (E78, pg65)
- February 12, 2019 Notification to LeClair of Internal Affairs Interview, and alleged violations (E78, pg66-67)
- February 12, 2019 Dowd to Paul Kratz request for review of video. (E78, pg68)
- February 13, 2019 Dowd to City Attorneys' office requesting video per historical practice. (E78, pg69)
- February 13, 2019 Grauman to Dowd denying request. (E78, pg70)
- February 14, 2019 Bernard in den Bosch to Grauman, Young, Olsen, Kratz (E78, pg71)
- February 15, 2019 Bernard in den Bosch to Dowd denying access to video. (E78, pg72)
- February 18, 2019 Dowd to Bernard requesting explanation as to the City's deviation from past practice in denying access to review any video prior to IA interview and requesting *Garrity* protection. (E78, pg 73-75)
- February 18, 2019 Young to Kuhse, requesting prosecutor not to release evidence.

➤ **Young states,**

“Did you release the video to Steve’s attorney? We are in the middle of a fight to not give it to them prior to our labor relations interview.”

➤ **Kuhse responds,**

“I can understand that. There is no deadline, but it is my ethical responsibility to turn over discovery even when the case isn’t actually filed. We are operating on two separate tracks and I don’t want them to intersect.”
(E78 pg76-77)

I. LeClair Termination

- February 19, 2019 IA interview - LeClair was denied a fair and impartial interview. Grauman opened the interview by stating that he had no questions about the event, he simply wanted to discuss LeClair's contact with Kim Remus. (E82) LeClair readily acknowledged and explained that contact. There were no questions from Grauman to LeClair regarding his intent on the evening in question or mitigating factors. It was a directed interview performed and to be followed by a directed outcome. The same day LeClair is interviewed, his termination letter was written by Grauman not Olsen. (E78, pg78, 84-87)
- February 20, 2019 - Young to Grauman, suggested revisions to first draft. (E78, pg79,88-91)
- February 20, 2019 - Letter of termination drafted by Young and Grauman is signed by Chief Olsen. (E78, pg80-83)

Olsen suggested that he did not review the investigation until February 20, 2019. He further did not follow the historical norm of asking the IA investigator to review the department's past practice for discipline for employees engaging in similar conduct. (T53:1-6) Remus acknowledged that LeClair was intoxicated and did not hold himself out as an Omaha Fire Fighter at the time of the event, which are mitigating factors when it comes to discipline. (T75:23-76:9;78:2-14) The interview of LeClair was not even transcribed by the time his letter of termination was written. Chief Olsen alleged it was solely his decision to terminate. Yet, he neither drafted the letter nor made any changes thereto and met with Mayor Stothert that same day to review the investigation. He then allegedly locked himself away to read the entire criminal and Human Resources investigative files. Chief Olsen was unable to even interpret a portion of the charges set forth within the letter of termination. He was asked but did not know what Nebraska Public Policy was violated as alleged in the termination letter. Finally, the termination letter appears on HR letter head not Fire Department letterhead. (E78 pg80)

Chief Schmaderer, as a long term department head, is familiar with issues surrounding racial insensitivity and the City's response to those issues when it comes to disciplinary decisions. One cited example included conduct of an Omaha Police sergeant. Harold Scott was acting as a field training officer for a new female African American officer and referred to his billy club as a "nigger knocker." (T116:18-119:8) Scott was not terminated. Rather, he was demoted and received a ten (10) day suspension. (T118:4-119:8)

- February 22, 2019 Assistant Chief Timothy McCaw to Mayor's office Carrie Murphy, Murphy to Stothert, recommendation for termination. (E78, pg92)
- February 22, 2019 Mayor's office to the press, **"Following the conclusion of the internal investigation by the Human Resources Department and Omaha Fire Internal Affairs, Chief Olsen made the decision to terminate Mr. LeClair. I will support that decision."** (E78, pg93-94) This was a decision directed by Mayor Stothert.

J. LeClair was denied an Impartial City Decision Maker Hearing

The decision to terminate LeClair was not effective until he was afforded all rights under the CBA which includes Article 6 (5), **"Prior to the discharge becoming effective such employee shall be entitled to present his side of the facts surrounding the discharge to an impartial City decision maker."** (E78 pg106)

- February 27, 2019 Notice of right to pre-termination conference pursuant to Article 6 (5) of CBA, and Personnel Policy #23-00 was sent directly to LeClair with no CC to his counsel. (E78, pg95)
- March 5, 2019 Dowd to Young, objection to hearing date due to scheduling conflict. (E78 pg
- March 6, 2019 - Young resetting pre-termination conference for March 19, 2019. (E78, pg98)

- March 18, 2019 - Young to Corrigan, outlining refusal to allow for review of IA file prior conclusion of hearing. Young described the conference as **“Steve’s opportunity to present his side to a neutral party unfamiliar with the investigation. Once the hearing is concluded, the hearing officer will be given access to the file to allow him due diligence.”** (E78, pg99)

Fred King was appointed by Tim Young to be an impartial City decision maker. Yet, he was neither a city employee nor impartial, and failed to engage in any substantive decision making. (T309:5-24) King was someone known to Young through the State Patrol legal office. (T289:23-290:8) Young knew King’s attitude towards disciplinary matters. He was not a neutral party. Further, he was first provided with an overview from Young along with LeClair’s letter of termination written by Grauman and Young. (T290:16-291:7; 292:20-293:2) Young indicates he met with King for a half hour and reviewed with King his role as an impartial decision maker. King denied that, and indicated he was given no direction and simply looked at his role as an initial check against a mistaken decision. (T290:4-291:22; 294:14-25) Young acknowledged that the hearing is substantive and not simply an initial check. He confirmed that he overruled the decision of Chief Olsen to terminate a firefighter who had been charged with three (3) felonies. LeClair’s counsel authored a letter to Fred King outlining the open and adversarial nature of the relationship between Stothert and LeClair as President of the Union since 2009. It further outlined the deviation from the established procedure for investigating and imposing discipline. The letter further provided examples of historical discipline demonstrating excessive nature of discipline imposed in this instance. (E78, pg101-117) King engaged in no substantive review of this matter and declined an invitation to consider the historical disciplinary practice of the department and any factors mitigating discipline including LeClair’s personnel file and social media sites. (T301:1-23;

302:6-305:12) The City, by and through Young, refused to provide the Union a complete copy of correspondence received from King by the City because Young, “didn’t want to open a path for Mr. Dowd to communicate with him [King] directly.” (E78, pg140)

K. Kuhse Retracts Plea Offer March 27, 2019

The original charges were assault and battery and disorderly conduct under the municipal code. (T323:15-2; 325:8-17) The original plea offered to LeClair by Marcus Sladek was to plead guilty to the disorderly and in exchange, the City would drop the assault and battery and recommend probation. (T326:17-25; 366:19-25; 415:12-417:9) That agreement was after the Kuhse had reviewed the video of the alleged assault. (T367:1-6) Dunn’s request for a no contest plea is consistent with what happens every day in the courthouse, and represents the norm, especially where there is civil litigation in the offing. (T367:7-25; 402:6-404:10) A no contest plea is not an admission of guilt, only an acceptance of the penalties associated with the charge. (T368:1-10)

- Kuhse never was provided with Jackson’s written complaint. (T346:15-20) He conceded that it is abnormal for a victim to refuse to give a recorded statement. (T346:20-347:6) He agreed that the police report varied from her interviews in that she was not punched and did not say that “white power” was whispered in her ear. (T349:20-350:2; 350:13-351:1; 369:5-17) He agreed that it would be very difficult for anyone to hear LeClair whisper white power in Jackson’s ear. (T363:14-19) The elderly couple to the right of Jackson simply said, “What did he say? Did he say what I thought he said?” (T363:20-25) The basic distinction between LeClair and Jackson positions regarding LeClair’s statement is that he believes he said, “What white power?” and she heard “white power.” (T374:19-375:2) Witnesses, with the exception of the bar owner’s son Lynch, agreed that LeClair was drunk. (T364:6-365:1) Kuhse never

spoke directly with Jackson. (T372:2-4) Yet, Kuhse testified he retracted the initial plea agreement of a guilty plea to disorderly and dismissal of the alleged assault because they had not spoken to Jackson prior to making the original offer. After Kuhse (or Sladek?) spoke with Jackson, Kuhse changed the plea offer to a request for a guilty plea to assault and the disorderly charge would be dropped. (E78, pg118; T334:8-10) Kuhse acknowledged that with respect to sentencing, a jail sentence was “ridiculous” but Sladek was to argue for probation. (T336:4-11)

- Dunn confirmed that the investigation of these petty offenses was well beyond the norm as was the prosecutor’s conduct in engaging in regressive plea bargaining. Kuhse cited new information arising after the initial plea as the basis for the retraction even though the investigation was completed before the initial charges were issued. Dunn testified that given the petty nature of these offenses a defendant is not afforded a right to a jury trial. (T413:1-15) Thereafter, the decision was made to plead no contest, which cannot be used as an admission of guilt in a subsequent civil proceeding as an admission of guilt. (T413:16-415:1; 418:11-419:5)
- April 4, 2019 - LeClair pleads no contest to two City Ordinance violations, sentencing scheduled for June of 2019.

L. Follow up with King

- April 5, 2019 - Dowd letter to Young requesting transmission of letter to King, Young forwarded it to Sarah Lara-Toney. (E78, pg119-120)
- April 5, 2019 - Email exchanges.
- 11:45am Young to Sara Lara-Toney- After Mr. Dowd presented a three-page letter, dated March 19, 2019 Young e-mailed Lara-Toney stating: “Please forward to Fred King. I realize

he has already made a ruling but let's stay consistent with documentation. (E78 pg121). This is important because it demonstrates that there must have been communication between Tim Young and Fred King before Fred King sent the e-mail detailing his decision on the termination recommendation.

LeClair was entitled to a hearing before an impartial City decision maker, which decision should be based upon information provided by LeClair. King never referenced review of the April 5, 2019 letter from Dowd. If the decision maker fails to consider the information sent, how are they acting as an impartial decision maker?

➤ 1:58pm King to Young,

“Mr. Dowd presented a three-page letter, dated March 19, 2019, addressed to me, a copy of which is enclosed. Mr. Dowd argued that this matter is politically motivated; praised Mr. LeClair’s service and qualities and **invited me to receive Mr. LeClair’s personnel file and to receive evidence of other discipline within the department. While investigation and discipline imposed in arguable comparable cases may, at some point, be pertinent to ultimate disposition. I believe the full evidentiary hearing to properly address those concerns exceed the limited scope of my task.** Following the hearing, I read and considered the letter to me from Mr. Dowd; and a binder you provided of Omaha Police Department Reports, Omaha Fire Department Reports, Human Resources Reports. In addition, I watched a video form Tiger Tom’s and listened to a CD of interviews, including an interview of Mr. LeClair.” (E78, pg125-127)

➤ 2:23pm – After Young received King’s e-mail, Young e-mailed Grauman, and Sarah Lara-Toney with the not so subtle direction to initiate the foregone termination by stating, **“It’s go time...”** (E78, pg128)

M. Orchestrated Outcome

The end game for the Chief and Mayor Stothert was to remove a powerful advocate for labor. There was no considerations made with respect to mitigating factors such as LeClair’s years of service, his lack of any serious disciplinary history, his intent that evening, his contribution to

the Fire Department and representation of the interests of the firefighters within the department, his legislative involvement and accomplishments, review of disciplinary history of the department to engage in a consistent and fair application of discipline, the violation of LeClair's right during the investigative process by the Mayor and Chief Olsen, and the application of punitive rather than progressive discipline. There was no consideration as to the tremendous contributions that LeClair has made to his country, city, department, and the men and women he has dedicated his life to represent.

- April 5, 2019 - Inter-Office Communication Young to Olsen. (E78, pg130)
- April 5, 2019 - Olsen letter to LeClair dismissal effective Friday, April 5, 2019. (E78, pg131)
- April 9, 2019 - Notice of Appeal (E78, pg132)
- April 9, 2019 - Confirmation of notice of appeal, Young to Bernard in den Bosch and Mayor's office Lara-Toney (E78, pg133-134)
- April 10, 2019 - Criminal file was bound and taken to Bernard in den Bosch. (E78, pg135)
Bernard has always handled the arbitrations for the City. We were not surprised by his involvement in reviewing the case from the very beginning. What was surprising is the retention by the Mayor of outside counsel, Baird Holm, two (2) weeks before an agreed upon arbitration date. Their retention was followed by a request for continuance citing factors that were not entirely credible.
- May 10, 2019 - Dowd Informational Request to Bernard in den Bosch. (E78, pg137-139)
- June 3, 2019 Young to Bernard in den Bosch, in relationship to a request for King's written opinion, "I believe I have already sent this to you already but here is the original email I got from Mr. King regarding the findings. I don't really have a problem with sharing the header. I

just didn't want to open up a path for Dowd to communicate directly with him.” (E78, pg140)

This simply underscores the City's unwillingness to engage in a fair and impartial analysis of this matter. It was “go time” from day one with the City's plan to terminate LeClair and that is obvious from the release of the supplemental police report, the press releases, Kuhse's unwillingness to admit to the media that in fact LeClair did not punch Jackson, the manipulation of the plea offer, and the violation of procedural protections guaranteed in the CBA.

IV. EVIDENCE ESTABLISHING MOTIVE AND PRETEXT

Mayor Stothert's testimony was most telling. She initially denied that she had a caustic relationship with LeClair. That contradicts 158 pages of press releases documenting a contrary reality. (E77) The fallout first arose when Stothert, then running for City Council, solicited the support of the Union and advised that she would support minimum staffing of fire rigs. She gains the Union's support and is elected to City Council. Thereafter, within a matter of weeks, she votes against minimum staffing. That conduct was met with outrage by the members who understood she broke her promise to maintain staffing, which the Union viewed as essential to protect the safety of Firefighters responding to calls. She received negative feedback due to her renegeing on her promise. She had to refresh her recollection as to her text stream sent to LeClair demonstrating her threatening tone after she received calls and texts following her vote. She was disingenuous when she denied recalling that she alleged LeClair threatened her life. The Union submits that one simply does not forget calling for police patrols at your home because you believe a threat has been made against your life unless of course that in and of itself was a lie. Stothert was simply not credible.

For seventeen (17) years LeClair has had no discipline other than a reprimand. The Mayor

saw an opportunity to rid herself of LeClair due to his mistake made on November 9, 2018. As the Mayor was quoted as saying after promoting Assistant Chief Salcedo (who engaged in racially offensive social media posting while working as Acting Fire Chief and received a two (2) day suspension from Chief Olsen (Ex 76, pg 117)), "With this one exception, Chief Salcedo has had a distinguished career with the Omaha Fire Department." (E77, pg142) Salcedo was suspended and then promoted to Assistant Chief. LeClair was on record in December of 2017 stating on behalf of the Union, "While we do not condone Mr. Salcedo's past actions, an investigation was conducted by the Omaha Fire Department, and Mr. Salcedo served his discipline. He completed a promotional process conducted by the OFD, and we consider this matter closed." (Ex. 77, pg142.)

Why wasn't that same standard applied to LeClair? The simple answer is that as Salcedo was appointed to a management position and not firefighter who had a history of advocacy for the Union and specifically agrees with Stothert's administration.

Stothert's evasion during her testimony with respect to her recollection of these events was also telling. Stothert tried to make an argument that because the media had already received LeClair's name, she was free to do a press release disclosing that he has been the subject of an internal affairs investigation in violation of the clear dictates of the contract. (TR 879:4-19). It is convenient that LeClair's name was already in the media given the fact that the supplemental police reports were leaked to the media and no one within the City government or the Police Department even attempted to investigate this clear violation of policy. Stothert admitted that she was aware that supplemental reports were not to go to the media. (TR871:11-19)

Stothert admitted that she found out who the witnesses were going to be when she received the list of witnesses around the end of July of 2019 and that is all she received. (TR920:18-21). She knew that Steve Lathrop, Brad Ashford, Justin Wayne, Barry Rubin and Don Bacon were

witnesses in the case. (TR 920:22-25, 921:1-17). Despite the uncontroverted evidence from Rubin that Bacon communicated by text message that the mayor wanted him to "pull" his letter of support for LeClair, Stotherts spin was that,

"I was trying to -- -- well, what I did is try to educate him, because what he told me is that he submitted a character reference letter because Steve LeClair called him and asked him to do so. He had no idea, he told me that where it was going to be used or how it was going to be used."

(TR924:12-18).

This statement by Stothert is contradicted by the attached e-mail Bacon sent to Local 385 counsel John Corrigan, dated August 7, 2019 marked as Attachment A hereto, wherein Bacon sent a copy of his initial letter and asked "Will you forward to the arbitration officer?" This as at 7:53 in the morning on August 7th and it was addressed to the Arbitrator, not some random letter of referral. Bacon clearly knew where his letter was going before any subpoena was issued. Stothert testified that she told Bacon that one way he would not have to testify pursuant to subpoena is if he didn't have a character reference letter then he wouldn't be subpoenaed by the City 's lawyers but she ". . . didn't tell him to pull it at all." (TR 926:8-14)

The lengths the City has gone to in order to suggest to witnesses that they have taken a position against the City in agreeing to offer their own assessments of their experience with Steve LeClair and his character even to the point of suggesting on the part of the Mayor to Don Bacon that he could just pull his letter rather than be subject to a subpoena is extraordinary. The argument that the City 's attorneys made during these efforts to harass witnesses with their cover letters to the subpoenas is further laughable given that the only people they sent the subpoenas and the offending letters to, were people involved in politics or political. Character witnesses who testified regarding their experiences with Steve on the list did not receive the same treatment and this is clearly a play on the part of the Mayor and the City to intimidate politicians who stood up for Steve

with the threat of political retribution unless they backed down. Given that these contacts were made by representatives of the City and the Mayor herself in an effort to deprive LeClair of compelling evidence of his character and standing in the community, one cannot ignore the chilling effect this behavior has on other employees engaging in union activity. LeClair did not receive a fair shake from the City because of his union activity over many years. LeClair did not forfeit the right to be treated like other members of the bargaining unit who engaged in off-duty misconduct simply because he served as Union President.

The Union does not contend that LeClair is blameless but the sad reality of this case is that the machinery of city government was placed in motion to grind LeClair into dust when other bargaining union members engaged in similar conduct were not so treated. The HR Director solicited action on the complaint by contacting Ms. Jackson's attorney. On the same day Mr. Grauman interviewed Ms. Jackson's best friend, Ms. Jackson, (nearly two (2) months after the incident) made a police report. The day after the date the police reports were received by the Mayor's office, the supplemental reports were placed into the possession of the Omaha World Herald. Despite knowing that LeClair did not punch Ms. Jackson on January 9, 2019, the City took no action to diffuse this false allegation in the media and took no action to investigate who actually leaked the supplemental reports to the media. Thereafter, the Police Department launched an investigation, which included a photo lineup when LeClair admitted that he was the individual at the bar and that he was the person Ms. Jackson was complaining about. After ninety-eight (98) pages of police reports were generated, a charging decision was reached and LeClair was charged with two (2) city ordinance violations. For the first time in the history of Matt Kuhse's career, he did a press release regarding a charging decision after nearly 300,000 other cases being prosecuted by his office. Tim Young acknowledged that he had a "potential conflict" yet he proceeded to

appoint his former colleague, Fred King, to act as LeClair's impartial decision maker. (T290:2-10). Mr. King, a retired staff lawyer for the Nebraska State Patrol, had no understanding regarding the substantive nature of his role and he was not concerned at all with the work record of Steve LeClair, his actual standing in the community, his character or comparative discipline. As a person who was not employed by the City, he was offered a chance to review information along these lines as long as he would sign a nondisclosure agreement and he declined this offer. (T305:9-13, Ex 78, pg 101-103).

The offer was reiterated on April 5, 2019 but of course by that time it was "go time." (Ex 78, pg 119-120). When Mr. King issued his letter to Mr. Young going along with the recommendation to terminate under the false understanding that his role was not substantive in nature, it was "go time." LeClair appealed this matter to arbitration and when the Union disclosed its witness list to the City through its attorney, witnesses on the list involved in political activity received letters from the City's attorney declaring them an "enemy of the State" to quote Barry Rubin. (TR83:19) The City's attorneys accused those witnesses of backing LeClair, "against the City of Omaha." The Mayor herself advocated that Bacon could pull his letter of character reference for LeClair to avoid having to testify pursuant to a subpoena. All of this because the City wants to win so that they can deprive LeClair of his rights to continued employment despite the "just cause" provisions of the contract. When placed in the context of what LeClair actually did at Tiger Tom's on November 9, 2019, and what he readily admits to and the exhaustive list of other misconduct deemed to be conduct unbecoming within the bargaining unit over the last twenty (20) years as evidenced by Exhibit Number 76, it is outrageous that the City now contends LeClair should be terminated given his work record and how the City has treated other similar situated firefighters who have engaged in off-duty misconduct.

V. HUMAN RESOURCES DIRECTOR TIM YOUNG

While much of Tim Young's conduct has been referenced elsewhere in this brief some specific portions of his testimony are highly relevant to the determination in the case. Young admitted that despite the clear dictates of Article 6, §6, para.11, prohibiting solicitation of complaints against an employee, he contacted Ms. Jackson's attorney "At one point and just inquired as to what was going on, what are the intentions. I certainly don't want to make a decision for your client. I just want to remind you that if we get past the date, we can't look into this matter at all." (TR 457:20-25). In addition to assisting in the drafting of the letter of termination by editing it prior to the Chief ever seeing it (TR 498:17-25, 499-500), Mr. Young participated in drafting of press releases which he admitted were done in conjunction with the mayor that violated the rights of LeClair under the collective bargaining agreement to be free from media exposure by the City as a result of an internal affairs investigation. (TR 537:5-16).

Tim Young also conceded that the collective bargaining agreement in this case provides for a substantive hearing before an employee can be terminated and not simply an initial check against a rash decision. (TR 552:3-8). Young was forced to concede that he himself had reversed a recommendation for termination for an employee in the bargaining unit who had been charged with 3 Class IV felonies. (TR 551:23-25, 552:1-2). Young went so far as to refuse to provide any way of direct contact between LeClair's counsel and the "impartial city decision-maker" Mr. King stating to City Attorney, Bernard in den Bosch that Young "just didn't want to open up a path for Dowd to communicate directly with him." (TR 557:22-23). Young went on to suggest that he did that because he didn't know "if its proper or not that's why I wanted it to go through the City's Law Department." (TR 558:22-25), of course in his email to Bernard in den Bosch there was no question as to whether it was proper or improper but rather a blatant statement of his desire to shield the

"impartial decision-maker" from any contact with LeClair's counsel. The impartial decision-maker rather than consider all the facts surrounding the case as is required by the collective bargaining agreement refused to consider LeClair's performance history or his offer of disclosure of social media platforms and also falsely concluded that comparable discipline wasn't irrelevant at that stage however the contract clearly states that the affected employee is entitled to "present his side of the facts surrounding the discharge to an impartial city decision-maker." (Article 6, §5). Because in this instance the City was not interested in all the facts surrounding the LeClair's employment that being his character, his length of service, his contributions to the department, his outstanding performance, his conduct in being an advocate for inclusivity and diversity in the fire department and the treatment of similarly situated bargaining unit members in regards to discipline, the City clearly ignored the just cause provision of the contract and shot straight to the termination decision which was effectuated when Tim Young communicated to his underlings that it was "go time".

Young further conceded that he was aware that the Fire Department had currently an employee who was under federal indictment involving a wildlife violation and that employee had not been disciplined. (TR 574:22- 25, 575:1-7).

VI. HISTORICAL DISCIPLINARY PRACTICE

The City, through Bernard in den Bosch, provided us with the department's historical application of discipline for persons determined to have violated the same contractual provisions cited in the LeClair termination recommendation. That document request was disfiled by the Union down to the 152 pages of comparative data contained in Exhibit 76. There is not a single entry where a firefighter has been discharged for pleading no contest to two city ordinance violations. We do have the Acting Fire Chief, while in uniform, posting racially offensive material on social media. He was not under the influence of alcohol. He knew the message he was professing when

he shared that material. He was not terminated. He was given two (2) days and then promoted to Assistant Chief within six (6) months. The Firefighters still on the force include individuals that have engaged in domestic violence, assaults, disturbing the peace, drug possession, felonious activities, lying to command, and fraud. The indisputable fact is that many Firefighters maintained their employment after having engaged in conduct that was far more egregious than that engaged in by LeClair. LeClair however, an adversary of the Mayor and the Fire Chief, one of considerable skill and experience, has his record of service and commendable performance disregarded and is instead issued the industrial death penalty of termination without any nod to progressive discipline or remediation.

Chief Olsen suggested that his approach is different than his predecessors. A simple look at the discipline given by Olsen himself suggested otherwise. No. 54 on the comparative list, arrest for DUI and possession of hallucinogenic drugs with several guns in the bed of his truck and one next to the console, seven (7) day suspension. (Ex 76, pg 130) No. 60 on the comparative list, an off-duty arrest leads to incarceration about which a false representation is made to the Department, is given three-day suspension and one year of probation after lying about whereabouts to the chain of command. This while already on probation for a DUI. (Ex 76, pg 148) No. 57 on the comparative list, charged with one count of misdemeanor child abuse, charges diverted, and the employee was given a three (3) day suspension by Olsen and kept the FAE rank. (Ex 76, pg 138) Looking at the rest of the list, it is abundantly clear that LeClair has been over punished given the seriousness of his misconduct and how the City has treated other similarly situated bargaining unit members.

The contents of Exhibit No. 76 are stunning in the breadth of conduct which has not lead to termination in comparison to the actual conduct engaged in by LeClair. Just some of the entries demonstrate this:

6. On-duty alcohol allowed on an unauthorized person in the fire station
8. Purchase of alcohol for a minor and carrying a concealed weapon
10. Derogatory comments to Battalion Chief, threatened coworker, engaged in active aggression and violence
15. Mailed marijuana to himself
21. Cited by Sherriff's office for 3rd degree assault given 3-day suspension for conduct unbecoming and required to write an apology to a female security officer who was the alleged victim in the case. (Ex 76, pg 30-34)

-
22. Resisting arrest and obstructing a peace officer – 2-day suspension
 29. Domestic Violence arrest – 10 duty shift suspension
 30. Domestic Violence arrest – 10 duty shift suspension
 31. Racists comments in the workplace such as “I hate Obama because he is black” and asking a student ride-along if she would be offended to be called “nigger” – 60-day suspension and EAP referral
 33. Off-duty alleged drunken confrontation (Sustained finding of conduct unbecoming where citizen complaint alleged off-duty firefighter while intoxicated threatened him with physical violence while wearing an OFD T-shirt) Referral to EAP and apology letter to citizen. (Ex 76, pg 73-74)

-
37. 2/20/2011 Alleged employee engaged in fraud by getting specialty pay when not entitled to it, he was required to pay the money back
 39. Off-duty open container charge while driving a vehicle in possession of guns and dishonest – given a 10-day suspension
 41. Lying to the Department regarding why an employee did not attend EMT National Registry – 30-day suspension
 43. Use of inappropriate sexual language in the workplace and unwelcomed physical touching – 10-day suspension (Ex 76, pg. 104-105)
 44. Driving under the influence, violating carry and conceal weapons license, possession of marijuana, off-duty 5-day suspension and required to submit to chemical testing.
 45. Charged with federal felony for smuggling alien across US Border – 3-day suspension.
 47. Conduct unbecoming, making false statements to supervisors and internal affairs investigation, 30-day suspension
 49. Charged with assault and battery and disturbing the peace. Plead to disturbing the peace. Received 5-day suspension.
 51. Violation of social media policy while on duty “liked” post denigrating black lives matter and post characterizing Barrack

- Obama as a terrorist. 2-duty shift suspension.
52. Violation of social media policy while on duty “liked” post denigrating black lives matter and post characterizing Barrack Obama as a terrorist. 1-duty shift suspension.
53. Violation of social media policy. Shared multiple pictures that depict women in a negative and demeaning context. 1 duty shift suspension.

As established at the hearing on this matter, LeClair’s actual misconduct did not result in any physical injury to any person and by all accounts including that of the City’s representatives in this case, there is no evidence to conclude that LeClair is an avowed racist. As President of the Union for ten (10) years , LeClair perfectly knew well what conduct would lead to termination and a review of Exhibit 76 in light of the evidence with respect to Steve LeClair’s conduct demonstrates that termination is inappropriate and excessive.

VII. MITIGATING FACTOR

A. Conduct of the Mayor

Mayor Stothert engaged in witness tampering. Her efforts to directly influence witness testimony or to encourage the retraction of evidence meets the elements of a Class Four Felony under Nebraska law. Her conduct has to be considered in deciding the appropriate discipline of LeClair’s conduct. LeClair made a mistake in how he interacted with a person in crowded bar with no malicious intent, which he deeply regrets but the Mayor’s actions were intentional and calculated.

Brad Ashford - He has a history of public service including many years in the Nebraska Legislative and serving two (2) years in Congress. (T237:1-15) His wife, Ann, is currently running for Congress for a seat currently held by Don Bacon. (T237:20-238:13) Ashford came under fire after agreeing to write a character letter supporting LeClair wherein, he describes LeClair as someone who fought for diversity and who is highly ethical. (E80 pg6; T238:14- 240:19; 253:12-

254:4; 255:5-8) He believed LeClair should be entitled to continue his service with the City considering his many contributions to those he has served. (T259:14-17; 261:16-20; 263:8-266:2; 267:11-16) Ashford was obviously offended by the treatment he received at the hands of the City's representatives and at the hearing, Ashford described unethical threats and efforts to intimidate him and his wife if he did not withdraw his letter of support. Ashford described two (2) calls placed by the firm retained by the Mayor, followed by a representative of the firm knocking on his door Sunday morning with a cover letter and subpoena. (T240:23-250:9) His concern was sufficient to cause him to contact the Nebraska State Bar Association's Council for Discipline. (T245:6-246:21)

Steve Lathrop - Senator Lathrop testified regarding an experience similar to that of Brad Ashford. He was both approached by an attorney from Baird Holm and felt he was being subjected to political threats and intimidation suggesting his support would show up in his next election. (T277:24-280:21) He felt they had crossed the ethical line. (T280:16-21) He has worked extensively with LeClair on legislative efforts, which impacted Union members including the CIR and the Mental-Mental workers compensation bill for first responders. At all times, Lathrop found LeClair to be a professional and never heard him make any demeaning comments, even about those who were adamantly against him. (T273:1-277:23) He wrote a letter of support because he believed LeClair is a strong advocate for labor and his work for those who collectively bargain have benefited from his work across the state. (T282:5-13) Lathrop believed his letter of support is accurate and should be considered by the Arbitrator. (T283:21-284:22) The letter Lathrop took offense to was received into evidence as Exhibit 82. (T287:11-21)

Justin Wayne - State Senator Wayne is biracial and in part African American and based upon his life experience he can spot a racist. (T607:7-608:2) He is also an attorney and former

President of the Omaha Public School Board. (T610:2-5) He provided similar testimony of efforts to intimidate similar to that of Ashford and Lathrop. (T606:1-14; 618:11-18) After the Union's witness list contesting Justin Wayne's name was sent to the City in this case, a reporter with the OWH was sent a supplemental police report governing a matter which arose three weeks earlier where the prosecutor Kuhse charged Wayne with reckless driving for rolling through a stop sign and held a press conference regarding the same. (T596:24- 598:19) All of this arose according to the reporter after Baird Holm's subpoenaed Wayne. (T599:14-24) Wayne came forward in support of LeClair based upon their interaction within the North Omaha Community. (T600:2-602:1) Knowing the allegations against LeClair raised in this matter he was still willingly to support LeClair given his character of being supportive of diversity and inclusiveness and he would stand next to LeClair. (T602:14-603:14; 608:12-609:5) He was of the opinion, when asked, that the City did not look at the whole picture when it fired LeClair. (T608:16-609:5) He also noted LeClair's legislative and fundraising efforts. (T603:15-605:12) He disagreed that LeClair was a public figure similar to an elected official (T610:13-25) Finally he dispelled the City's suggestion that LeClair's conduct mirrored that of an elected official, Pat McPhearson with the school board, who referred to Obama as a half breed and engaged in further racist statements five and fifteen years prior. (T611:17-615:4; 618:7-10)

While Stothert can deny knowledge of how the confidential police reports were released to the press that same day, she cannot deny she received those reports the same day they were released to the press, and that she thereafter engaged in an interview and issued her own press release specifically naming LeClair in violation of his rights under the CBA. She engaged in the prohibited conduct not once but twice, with Chief Olsen signing off on the second press release.

The City cannot adhere to extreme penalties for LeClair for impaired judgement and then

engage in the intentional violation of his rights. To allow that to occur is completely inequitable, inconsistent, and should be considered as a mitigating factor.

B. Failure to Provide Hearing before an Impartial City Decision Maker

Prior to disciplinary action becoming effective, LeClair was entitled to but denied an opportunity for a hearing before an impartial City decision maker. King was neither a City employee nor impartial and failed to substantively consider the LeClair's case presentation and mitigating factors.

C. Years of Service

LeClair's seventeen (17) years of service should have been but were not considered in the discipline to be issued.

D. Prior Disciplinary History

LeClair's lack of disciplinary history should have been but was not considered in the discipline to be issued.

E. Military and Community Service

LeClair's military service and his sacrifice for his country including his hearing loss should have been but was not considered. His involvement in community engagement and fundraising including the Muscular Dystrophy drives which have raised hundreds of thousands of dollars over the years should have been, but was not, considered. His participation in Martin Luther King celebrations was another cited example.

F. Unintentional Misconduct

LeClair's actions that night lacked intent or ill motive. His actions in contacting Remus was based upon an emotional impulse. He was in an emotional state following his placement on leave. He reached out to someone who he considered to be a friend. Neither actions constitute

intentional, planned, or premeditated conduct and he made no effort to interfere with any investigation.

G. Off Duty and Under the Influence of Alcohol

LeClair was off duty and not wearing anything that evening that would identify himself as an Omaha Firefighter. He was under the influence of alcohol and that impaired his judgement and ability to clearly communicate his thoughts. He submitted for an alcohol evaluation after this event to make proactive changes in his life.

H. Self-Reported

LeClair's self-reporting demonstrated his willingness to assume accountability. He tried to apologize to Jackson, as did his counsel, Pat Dunn. (T405:19-407:10) He did not engage in an effort to coverup the event and Dunn instructed Jackson on how to file a complaint. (T437:17-438:5; see also 407:11-408:22; 409:2-17)

I. Proactive Measures

LeClair was proactive and underwent an alcohol assessment and followed the assessments recommendations. (T419:6-23)

J. LeClair's Rehabilitative Potential

He is remorseful and there is no evidence that LeClair would engage in similar offensive conduct. He has demonstrated throughout his life that he not only conforms with acceptable standards of behavior but actually advocates to improve the lives of others. His rehabilitative potential was not considered before the City terminated LeClair. Many witnesses in the form of fellow Firefighters came forward in support of LeClair, including Firefighters who are African American. Not one person from the community or from the Fire Department testified that Steve LeClair was bigot or a racist.

Captain Nate Asche - He is a twenty-four (24) year veteran of the force. (T378:20-379:8) He has known LeClair for thirty-three (33) years and worked with him for eight (8) to ten (10) years on the same rig. (T379:12-21) He went on to describe LeClair's outstanding demeanor and efforts to help all members of the force and community regardless of race. (T379:22-381:22) He has never heard a member of the community either before or after the Jackson incident complain about LeClair. (T381:23-382:15) Finally, he was present when Matt Wickham described a conversation with his brother-in-law, Steve Anderson, who works in the Mayor's office. (T383:9-384:14; 385:2-4) He described the Mayor celebrating "**We finally got him,**" after the criminal charges were announced. (T384:5-8)

Battalion Chief Robert McEvoy - He has worked with LeClair for fifteen (15) to sixteen (16) years in North Omaha, which is an economically distressed area of the City where the population is primarily minority. (T390:4-391:13) During that time he has never seen LeClair demonstrate any racial animosity rather he is the moral compass for his crew. (T391:14-392:7) He represents well those he serves and has tried to promote diversity within the department. (T392:8-21) He is seen as an asset to the department. (T392:22-393:3) McEvoy was also present during Wickham's comments that the Mayor stated, "**We got the SOB**". (T393:4-18)

Todd K. Boyd, SR. - He is a retired African American CSM Sergeant Major who served in Desert Storm with LeClair. (T590:18-591:10) He observed LeClair on a daily basis and observed his interaction with others and LeClair is neither a racist nor closet bigot. Rather, he is a supportive member of society who is always there to help. (T592:1-594:2)

James Ridley - He is an African American former President of an International Association of Firefighters Local Union and Assistant to the General President of the International Association of Firefighters. He confirmed that LeClair sought funding to establish a pilot program

to help spur diversity in the Omaha Fire Department long before the incident at Tiger Tom's. (E88; T621:8-23)

Pam Klabunde - She served on the Omaha Fire Department for 20 years, during which time she came to know LeClair. (T622:22-623:16) Her impression of LeClair mirrors the other witnesses; he was a calm leader who treated everyone as a equal. (T623:17-625:24)

John Farmer - He is the president of the Black Fire Fighters Association. (T629:1-18) He came onto the force with LeClair 17 years earlier and has never seen any traits of racism, rather he is someone who promotes the community and positively affects different persons within the department. (T629:23-631:8) LeClair has assisted with the Mental-Mental Bill, PTSD, and Firemen's Cancer Registry, and Martin Luther King Day. (T631:5-21) He would serve next to LeClair even in light of the allegations and feel comfortable having him interact with his family, friends, and community. (T632:4-632:25) He disclaimed the City's efforts to portray the diversity letter as being directed to LeClair. (E67, T636:7-637:15; 639:19-640:10)

Kieron Taylor - He is an African American fire fighter who has known LeClair for almost nineteen years., including work on the PAC committee and e-board, and suicide committee. (T641:16-644:9) he has never seen LeClair engage in bigotry or discriminatory acts towards others. (T644:10-18) The e-board reviewed the matter prior to agreeing to fund LeClair's defense and found it meritorious. (T645:4-648:13) LeClair is not a racist. (T 648:14-649:13) The board reviewed the police reports and video before speaking to LeClair. (T647:10-648:13) The lengthy cross simply focused on LeClair's statement to the e-board. In the end LeClair was described as simply confirming the understanding and intent that LeClair was attempting to relay that evening including discussing white supremacy and stating, "What white power?" (T666:15-667:9; 669:4-671:23) He observed that the physical contact was no different than that experienced in a busy bar

and that neither LeClair nor Jackson looked back after the contact. (T664:16-665:13) Even having listened to all the negative press Taylor believed LeClair was an asset to the department. (T672:10-673:4)

Stipulation - LeClair agreed not to call additional witnesses who would testify as to his character; that they did not find him to be a bigot; and they would allow him to provide services to their family, friends, and community. (T619:18-25) Of the nine witnesses listed thereafter, four were African American firefighters, one was a woman. (T620:15) The current firefighters would continue to work with LeClair and allow him to provide services to their families, friends, and community and they know nothing but what they may have seen in the press. (T620:12-621:7)

VIII. PUBLIC POLICY DOES NOT PRECLUDE LECLAIR'S REINSTATEMENT

LeClair's termination letter, printed on Human Resources Department letterhead rather than Fire Department letterhead and signed by the Fire Chief, stated:

Your behavior on the night of November 9, 2018, which included striking a woman after making racially repugnant comments, is unacceptable and contrary to public policy and the standards the Omaha Fire Department requires of its firefighters. As first responders, we must ensure the public can and will rely on us in emergency situations without fear of discrimination, racial profiling or disparate treatment. (Ex. 78, p. 82).

The Fire Chief could not articulate the public policy that was violated in connection with this matter and he confessed that he did not draft the letter. (TR793:16-25, 794:1-5). The real question is why was the term "public policy" even included in his termination letter. In exhibit 76 we have the termination letters for people in the bargaining unit who have been terminated or recommended for termination for conduct unbecoming offenses over the last 20 years.

Exhibit 76 demonstrates that the following individuals were either recommended for termination or terminated:

1. Felony drug possession, no mention of violation of public policy, later reinstated after completing drug diversion. (Ex 76, pg 5).
2. Felony drug possession, no mention of violation of public policy, later reinstated after completing drug diversion. (Ex 76, pg 6).
25. Theft of funds from the Fire Department Award Ceremony Ball, no reference to violation of public policy. (Ex 76, pg 44).
26. Fire Captain terminated for off-duty prostitution charge and dishonest behavior in investigation and no reference to violation of public policy. (Ex 76, pg 50).
55. Domestic violence charge and terroristic threats including a threat to kill a domestic partner and another family member, no reference to violation of public policy. (Ex 76, pg 132).
56. Charged with 3 felony counts of tax evasion for vehicle sales, not terminated, no reference to public policy. (Ex 76, pg 135).
59. Threatening to shoot up a classroom and harm a specific individual, no reference to violation of public policy, employee terminated.
(Ex 76, pg 143).

The reference to public policy in LeClair's termination letter, while unprecedented, was not by accident but rather a product of the fact this public policy argument was the natural effect of Mr. Tim Young and Dave Grauman being the authors of the termination letter. Particularly of note is a case out of the Nebraska State Patrol which occurred during Tim Young's tenure as in-house counsel to the State Patrol captioned *State v. Henderson*, 277 Neb. 240, 762 N.W. 2d 1 (2009). In *Henderson*, the Nebraska Supreme Court relied on the public policy exception to the deference given by courts to arbitration awards to vacate an Award allowing the reinstatement of a State trooper who while off duty, anonymously joined an online group affiliated with the Ku Klux Klan. The basis for vacating the award in *Henderson* was that the arbitrator's award reinstating that trooper was against the clearly defined public policy that law enforcement officials should be free from racial bias. *Henderson*, 762 N.W.2d at 17. The majority in *Henderson* emphasized that “. . . this policy is only implicated by behavior of the gravest nature,” *Id.* (emphasis

added). The Court cited as essential to the definition of the clear public policy at issue in that case, Nebraska's racial profiling in policing law. *Henderson*, 762 N.W.2d at 16-17.

The Union fully expects the City to propound this argument because they have employed the language in the termination letter, but the reality is that LeClair, by the City's own admission is not an avowed racist and that is not why he was terminated. (TR754, 1-3, 7, 19-22, 210: 22-25) (Where George Martin, Attorney representing the City states ". . .this case isn't about racism. It's never been about racism. There is no allegation that he is a racist."). The City contends that this case is not about race or LeClair being a racist but if that is the case, then why did they claim that citizens must know that Firefighters won't be engaging in "racial profiling." If LeClair is not a racist, then there is no good argument to support a theory that his continued employment would impact the trust of the public by having a fire service tainted by racial bias. The evidence in this case unequivocally proved that LeClair is not a person who has harbored or expressed racial bias so any argument about the public trust is a red herring used by the City to make this unfortunate incident look like the crime of the century. The reality also is that we are not dealing with a police officer who is engaged in policing who voluntarily joined the KKK. Steve LeClair's life history and the evidence of his commitment to service and equality was unrebutted. How a Firefighter would engage in racial profiling in responding to fire and medical emergencies was never explained and that distinction between police work and firefighting demonstrates the absurdity of the City's efforts to shove a round peg into the square hole created by the *Henderson* case.

The Arbitrator heard from more witnesses than the City could stand about Steve LeClair and his commitment to fairness and his lack of racial animosity. The evidence clearly established that his life and body of work have been antithetical to that of an avowed or closeted bigot. From encouraging his own nephew who is African-American to join the Fire Department where he

works today to encouraging the IAFF to assist him in increasing the diversity of its own fire department because he was concerned that the fire department was turning really white long before the incident at Tiger Tom's, Steve LeClair has demonstrated that he has not fostered a belief that citizens of the City of Omaha should not enjoy the same protections from the fire service dependent upon their race. The holding in the *Henderson* case was that public policy precluded an individual from being reinstated to serve as a sworn officer of a law enforcement agency ". . . if that individual's service would severely undermine reasonable public perception that the agency is uniformly committed to the equal enforcement of the law and that each citizen of Nebraska can depend on law enforcement officers to enforce the law without regard to race." *Id.* at 17. The record in this case is completely devoid of any evidence supporting a public policy violation with respect to an order of reinstatement of LeClair through arbitration. This reference by the City in LeClair's termination letter was simply an attempt to piggyback the public policy exception in the *Henderson* case into Steve LeClair's discipline. The City failed to put on any evidence which would support a conclusion that LeClair's continued service in the Fire Department and in particular in the neighborhoods he has long served which are predominantly minority neighborhoods, will create a perception that the City itself does not provide this emergency service in a uniform and unbiased manner. This was a stretch on the part of the City to raise this issue in the termination letter and it is clearly evidence of the bias demonstrated against LeClair by the Stothert Administration since day one of their investigation.

The City certainly was not concerned about public perception when they promoted Chief Salcedo to Assistant Chief but LeClair has now awakened the Administration's commitment even though the uncontroverted evidence is that LeClair does not have any history of displaying racial animosity or holding beliefs inconsistent with his obligation to fairly provide services to all. That

is not to say that Steve LeClair is without fault or that he should not have been disciplined at all, but proportionality must come into play by virtue of the "just cause" standard imposed by the CBA. The City was met here with what can be characterized as inappropriate and alcohol infused misconduct in a bar on a Friday night by Mr. LeClair. LeClair's conduct on a whole, does not implicate "behavior of the gravest nature" when viewed in context of other off-duty misconduct and LeClair's body of work on the Fire Department, the United States Army and in the community where he has made his home.

After the City got wind that a complaint might be made, they contacted Ms. Jackson or her attorney no less than three times to guide her and advise her about the thirty-five day time limit in the CBA. When a police report was made, the City in bad faith allowed a false narrative to permeate the public sphere that LeClair had punched a woman in a bar when he did not. Tim Young acknowledged he had a conflict in acting as an impartial city decision maker so he, conflict and all, selected the hearing officer from his coworkers from his State Patrol days and that person, Fred King, refused to consider evidence of LeClair's life history, past performance and comparative bargaining unit discipline. The City Prosecutor, in a 300,000 to 1 shot, wants us to believe that he issued a press release in LeClair's case in conjunction with the Mayor's office to announce the charging decision simply because he thought it would be a more efficient use of his time. He then engaged in regressive plea bargaining to insist on a guilty plea which he conceded was outside the norm. (TR368:3-8). When LeClair turned over a list of his thirty-three witnesses to the City, the City requested that the Arbitrator issue subpoenas to seven of those witnesses who happened to be folks involved in politics. No subpoenas were requested for those witness not involved in politics or holding office. A legal team of private sector lawyers began an influence campaign aimed at trying to convince some (but not all) of LeClair's character witnesses to back

away from support for LeClair under the guise that these witnesses had taken up sides against the City.

Brad Ashford, a former Sate Senator, Congressman and practicing lawyer for 45 years, stated he was intimidated by one of the City's lawyers, an experience Ashford had not had in his entire career. (TR244:1-5). Ashford's wife's political career was referenced as way to convince him to withdraw his letter of support for LeClair so Ashford could avoid being subpoenaed. (TR242-244). A cover letter with the subpoenas stated:

Given the fact that you have backed Mr. LeClair against the City of Omaha despite behavior that resulted in his discharge, we have decided to subpoena you to testify under oath about your relationship with Mr. LeClair and ongoing support for him.

Ex. 82

The City's attorneys in the case, specially hired to handle this matter, argued with straight faces that it was somehow correct to say support for LeClair was the same as opposition to the City because the Fire Chief wanted LeClair fired and the Mayor supported his decision. (TR257:3-11, 284:14-24). It must be acknowledged that the Chief and the Mayor, while holders of important positions, do not constitute "the City." This case, unfortunate and inappropriate as LeClair's behavior was, has been trumped up to a termination case and a public shaming for an obviously decorated and remorseful employee who is deserving of remediation and redemption. The grievance procedure is the one avenue that can undo this injustice and prevent the chilling effect a termination in this case will have on union activity in the Fire Department and City wide for that matter. The next President of Local 385 needs to know that the assumption of that office is not a surrender of the right to be treated in a manner consistent with other bargaining unit members.

CONCLUSION

In the normal case, that is had we been involved in disciplining a Firefighter not named Steve

LeClair, the facts of this case would have lead to a three to five day suspension as evidenced by the discipline entries 21, 59 and 57 as set forth in Ex. 76. We are not in the normal case as those other instatnces did not involve the public release of supplemental police reports which contained a materailly false allegation that the City did nothing to try to correct, press releases and regressive plea bargaing or clear efforts to tamper with witnesses by trying to get them to withdraw letters of reference submitted to the Arbitrator. Because the City has engaged in such brazen attempts to reach the desired outcome, the City should not now be able to benefit by its conduct. LeClair should be reinstaed with full back pay and all other fringe benefits inuring to him that otherwise would have accrued but for his wrongful termination. The Arbitrator may want to impose some penalty on LeClair and that is understandable but there is a vaild argument to be made that the City, has by the conduct of all the actors in this case, forfeitted any right to discipline LeClair given the violations of the rights of LeClair secured by the CBA. See, *Dana Corp.*, 76 LA 125 (Mittnethal, 1981), *Five Star Hardware*, 44 LA 944 (Wolff, 1965) (cases awarding punitive damages as a result of wilful and flagrant contract violations). LeClair obviously has been chastened by this incident but he should not be deprived of the benefit of his long and valuable service to the Fire Department and to the citizens of the City of Omaha.

Based upon the above and foregoing, the Union on behalf of Steve LeClair requests that he be reinstated with full back pay and for such other and further relief as the arbitrator deems just in the premises.

DATED this 11th day of October, 2019.

STEVE LeCLAIR, Grievant

By:



Michael P. Dowd, #19278
DOWD & CORRIGAN
1411 Harney Street, Suite 100
Omaha, Nebraska 68102
(402) 341-1020
e-mail: mike@dowd-law.com
ATTORNEYS FOR GRIEVANT

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the above and foregoing document was served by electronic mail, on this 11th day of October, 2019, to the following interested parties:

Heidi A. Guttau
George Martin
Baird Holm, LLP
1700 Farnam Street #1500
Omaha, NE 68102-2068
E-mail: hguttau@bairdholm.com
gmartin@bairdholm.com



Michael P. Dowd

John Corrigan

From: Don Bacon <bitsbacon@msn.com>
Sent: Friday, August 09, 2019 6:45 PM
To: John Corrigan
Subject: Re: Character Reference for Steve LeClair

My policy is simple... just tell the truth. It's painful because the Mayor and Steve are both my friends, and I'm sure the partisans will twist things. But, honesty is always best policy. Don

Don Bacon, Brig Gen (Ret)
Congressman, NE-02
Sent from phone

On Aug 9, 2019, at 6:03 PM, John Corrigan <jcorrigan@dowd-law.com> wrote:

Steve is going to give you a ring. The city has asked the arbitrator to issue a subpoena for you and all of the elected officials on our witness list. The union can hardly object to that but it doesn't make any sense to me.

Get [Outlook for Android](#)

From: John Corrigan
Sent: Friday, August 9, 2019 6:00:53 PM
To: Don Bacon <bitsbacon@msn.com>
Subject: Re: Character Reference for Steve LeClair

We did thank you. About 4 pm

Get [Outlook for Android](#)

From: Don Bacon <bitsbacon@msn.com>
Sent: Friday, August 9, 2019 5:50:00 PM
To: John Corrigan <jcorrigan@dowd-law.com>
Subject: Re: Character Reference for Steve LeClair

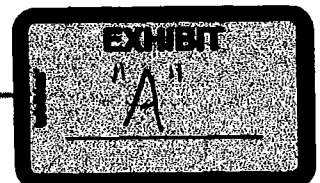
John, Did you submit the second version? Don

Don Bacon, Brig Gen (Ret)
Congressman, NE-02
Sent from phone

On Aug 9, 2019, at 7:53 AM, Don Bacon <bitsbacon@msn.com> wrote:

John, here's my second go on letter and Ms McNeive is now spelled correctly. Don

Congressman, Nebraska's Second District



From: John Corrigan <jcorrigan@dowd-law.com>
Sent: Wednesday, August 7, 2019 10:32:09 AM
To: Don Bacon <bitsbacon@msn.com>
Subject: RE: Character Reference for Steve LeClair

Mr. Bacon,

On behalf of Steve and Local 385, thank you. To put it mildly, your words fit the bill. In reviewing the letter, just one edit: Peggy McNeive is the correct spelling. If you could make that change and forward it to me as a PDF, we will be good.

JEC

John E. Corrigan, Attorney
DOWD & CORRIGAN, LLC
1411 Harney Street, Suite 100
Omaha, NE 68102
(402) 341-1020
(402) 341-0254 fax
jcorrigan@dowd-law.com

WARNING: This e-mail is intended only for the individual(s) or entity(s) named within the message. This e-mail might contain legally privileged and confidential information. If you properly receive this e-mail as a client or a retained expert, please hold in confidence to protect the attorney-client or work product privileges. Should the intended recipient forward or disclose this message to another person or party, that action could constitute a waiver of the attorney-client privilege. If the reader of this message is not the intended recipient, or the agent responsible to deliver it to the intended recipient, you are hereby notified that any review, dissemination, distribution, or copying of this communication is prohibited by the sender and to do so might constitute a violation of the Electronic Communications Privacy Act, 18 U.S.C. Sec. 2510-2521. If this communication was received in error, we apologize for the intrusion. Please notify us by reply e-mail and delete the original message. Nothing in this e-mail message shall, in and of itself, create an attorney-client relationship with the sender.

IRS CIRCULAR 230 NOTICE: To the extent that this message or any attachment concerns tax matters, it is not intended to be used and cannot be used by a taxpayer for the purpose of avoiding penalties that may be imposed by law.

From: Don Bacon <bitsbacon@msn.com>
Sent: Wednesday, August 07, 2019 7:40 AM
To: John Corrigan <jcorrigan@dowd-law.com>
Subject: Character Reference for Steve LeClair

Mr Corrigan,

This is Don Bacon on my personal email account. Can you read this letter and see if it fits the bill? I've enjoyed working with Steve the past three years.

Will you forward to the arbitration officer?

v/r Don

Congressman, Nebraska's Second District

<08091901.PDF>